

**Court No. - 44      Reserved A.F.R.**

**Case :-** CRIMINAL REVISION No. - 635 of 2011

**Petitioner :-** Manoj Anand

**Respondent :-** State Of U.P. And Anr.

**Petitioner Counsel :-** A.M. Tripathi

**Respondent Counsel :-** Govt. Advocate, Nipun Singh

**Connected with**

**Case :-** CRIMINAL MISC. WRIT PETITION No. - 17658 of 2010

**Petitioner :-** Manoj Anand

**Respondent :-** State Of U.P. And Anr.

**Petitioner Counsel :-** A.M. Tripathi

**Respondent Counsel :-** Govt. Advocate, Nipun Singh

**Hon'ble Sudhir Kumar Saxena, J.**

The Criminal Revision as well as the Writ Petition arise out of same proceedings, as such they are being disposed of by this common order.

Heard learned counsel for the parties, learned A.G.A. and perused the record.

**Writ Petition No. 17658 of 2010**

The facts in short are that Smt. Veenu Anand wife filed an application u/s 12 of The Protection of Women from Domestic Violence Act, 2005 (in short the Act). In the aforesaid case she also filed an application u/s 23 of the Act for interim order. The said application was allowed on 20.3.2010 and a sum of Rs. 5,000/- per month was ordered as interim maintenance. This order was challenged in appeal but appellate court dismissed the appeal and confirmed the order of interim maintenance. These orders have been challenged by learned counsel in W.P. 17658 of 2010 on the ground that no evidence was recorded and it is not clear as to what was the violence caused to the applicant.

The argument is fallacious as the court was deciding an application for interim maintenance. Evidence was yet to be adduced. Section 23 enables the Magistrate to pass ex parte order on the basis of affidavit. Moreover court has gone in detail and found that the income of husband is Rs. 28,738/- per month. The applicant was admittedly wedded wife of petitioner Manoj Anand. Petitioner has not denied the fact of marriage or income or the fact of separate living.

In these circumstances learned Magistrate after examining the attending circumstances gave order of interim maintenance. It cannot be said that the order suffers from any error of law. The appellate court has examined the submissions of husband in detail and has confirmed the order of interim maintenance.

This Court is not exercising its appellate jurisdiction. The court below is yet

to decide the application finally after recording the evidence. Even otherwise considering the income of petitioner the amount awarded cannot be said to be excessive as such impugned orders do not suffer from any such error of law which may warrant interference by this Court in its jurisdiction under Article 226 of the Constitution of India, as such writ petition has no force and is liable to be dismissed.

### **Criminal Revision 635 of 2011**

Criminal Revision is directed against the order passed by the Magistrate under section 31 of the Act. It appears that in pursuance of the order passed by this Court in Misc. Application No. 22856 of 2010 whereby lower Court was directed to decide the application u/s 31 of the Act within a month, impugned order has been passed. By impugned order dated 22.1.2011 learned Magistrate has proceeded to punish revisionist husband u/s 31 of the Act for failure to pay the interim maintenance ordered on 20.3.2010, which order has been upheld as above. It may be relevant to mention that in writ petition there was no interim order.

Learned counsel submits that section 31 of the Act is not attracted to the present case. Same is quoted below for ready reference:

**31. Penalty for breach of protection order by respondent -** (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who has passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498-A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

Section 31 of the Act applied to the protection order. Protection order has been defined u/s 2 (10) of the Act as protection order means an order made in terms of section 18. Section 18 gives details of protection orders that may be passed by the Magistrate. Section 18 is reproduced below:

**18. Protection Orders-** The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from -

(a) committing any act of domestic violence,

(b) aiding or abetting in the commission of acts of domestic violence;

- (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
- (f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;
- (g) committing any other act as specified in the protection order.

From the above it is clear that the order passed for the maintenance or interim maintenance is not included or covered by section 18. Thus there is substance in the contention of revisionist that power u/s 31 was not available to the Magistrate to implement the order of interim maintenance passed under section 23 of the Act and proceed to punish him for the breach thereof. Even clause (g) of Section 18 which includes, any other act as specified in Protection order would not include the order of interim maintenance.

Order passed under Section 23 of the Act cannot be implemented under Section 31 of the Act. The Act is punitive in nature and the provisions are to be construed strictly. In my view such act/breach could not be made punishable which legislature did not intend, as such impugned order cannot be sustained.

Learned counsel for the wife, opposite party would submit that Act is a complete Code and it cannot be presumed that any order passed under the Act will be left uncomplied and there will be no provision to implement the same.

Provisions of the Act are to be construed in a manner so as to advance the purpose of the Act and it cannot be presumed that legislature did not intend to ensure compliance of order of interim maintenance. If this argument is accepted, Section 23 would become redundant or inoperable.

For this purpose power has been given in the Act itself. Section 28 of the Act provides for procedure and says that all proceedings under sections 12, 18, 19, 20, 21 and 23 shall be governed by the provisions of Criminal Procedure Code. Sub section (2) of section 28 further enables the Court to lay down its own procedure for disposal of an application under sub section (2) of section 23 of the Act. This gives sufficient indication as to how application u/s 23 will be dealt with and how the orders passed thereon will be enforced. While section 20 (1) (d) contains provision for maintenance. Sub section (4) (5) and (6) of section 20 provide for mechanism to ensure compliance of order for maintenance.

More over in exercise of power conferred by section 37 rules have been

framed for carrying out the provisions of the Act. Rule 6 (5) lays down the procedure as such it cannot be said that section 23 being not capable of enforcement is redundant or in operable.

In view of above this revision is liable to be allowed.

In the result the Writ petition is dismissed with no cost. The criminal revision is allowed. The order dated 22.1.2011 is set aside. Learned Magistrate is directed to pass appropriate order in accordance with law on the application for compliance of order passed under section 23 of the Act.

**Order Date :- 10.2.2012**

GNV