

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2009

CORAM:

THE HONOURABLE MR.JUSTICE R.REGUPATHI

Crl.O.P.Nos.18107 and 18108 of 2009 &  
M.P.Nos.1 & 1 of 2009

M.Sripriya

... Petitioner in both Crl.O.Ps

Versus

P.V.Kamakshidsan

... Respondent in both Crl.O.Ps

Prayer in Crl.O.P.Nos.18107 of 2009: Petition filed under Section 482 Cr.P.C seeking for a direction to set aside the order of the learned Magistrate in Crl.M.P.No.3149/2009 dated 21<sup>st</sup> August 2009 and direct the learned Magistrate of XXIII Metropolitan Magistrate Court, Saidapet to recall and reexamine the petitioner as a witness.

Prayer in Crl.O.P.Nos.18108 of 2009: Petition filed under Section 482 Cr.P.C seeking for a direction to set aside the order passed by the XXIII Metropolitan Magistrate, Saidapet, Chennai in Crl.M.P.No.3023/2009 in C.C.No.3457/2008 dated 21<sup>st</sup> August 2009 and to direct the learned Magistrate to call for Form-16 pertaining to the year 2007-08 and 2008-09 issued by the HCL Technologies Ltd. To the respondent and filed before the Income Tax Department.

For Petitioner : Mr.Ramasubramanian

For respondent : Mr.K.Chandrasekar

COMMON ORDER

The petitioner herein lodged a complaint under the provisions of the Protection of Women From Domestic Violence Act 2005 as against her husband and ultimately trial was taken up in C.C.No.3457 of 2005 by the XXIII Metropolitan Magistrate Court, Saidapet, Chennai. The petitioner and the only respondent, namely, the husband of the petitioner have been examined in chief and cross and the case was posted for arguments and at that stage, two petitions were filed, one under section 311 Cr.P.C., and another under section 91 Cr.P.C. to recall the witnesses and to mark certain documents. The respondent/husband objected to the same on the ground that the purpose behind filing of those petitions was to prolong the proceedings and by the orders impugned, the plea of the petitioner came to be dismissed and, aggrieved thereby, the present petitions have been filed before this court.

2. The learned counsel for the petitioner/complainant points out that the petitioner is mother of two children, aged about 14 and 9 respectively and they are in her custody and that the proceedings have been initiated by her on 14.3.2008. He submits that the respondent produced the pay slips issued by his employer upto July 2009 and disputing the same, the petitioner has produced Form 16 issued by the employer to substantiate her claim regarding actual income derived during 2006-07 and to establish the fact that subsequently the respondent/husband drew more salary during 2007-08 and 2008-09. Initially, Form 16 could not be produced by the petitioner because there was refusal by the husband; therefore, production of the same through the employer had become necessary. The respondent produced a letter alleged to have been written by the father of the petitioner to substantiate the good conduct of the respondent. Under such circumstances, the petitioner wanted to produce certain diary notings of her father to disprove the claim of the husband. The learned Magistrate, without properly considering the plea for recalling of witnesses and marking of certain relevant documents, erroneously passed the orders impugned. According to the learned counsel, unless those documents are allowed to be marked and the respondent is recalled for cross examination, great prejudice will be caused and the same may not be rectified at a later stage.

3. Learned counsel for the petitioner relied on a case reported in 1999 SCC (Cri) 1062 (Rajendra Prasad v. The Narcotic Cell through its Officer in charge, Delhi), wherein it is held as follows:

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

According to him, granting permission to produce Form 16, which is maintained by the employer, will not cause any further delay and the order impugned may be set aside.

4. Per contra, learned counsel for the respondent/husband submits that sufficient time and opportunity have been given pending trial of the case and though the petitioner marked pay slips of the husband and letters written by her father, steps were not taken by the petitioner at the relevant time and she allowed the proceedings to be closed and having slept over till the stage, when the case is posted for argument, only with a view to protract the proceedings and to fill up the lacuna, she filed the two petitions for recalling of witnesses and many of documents. The litigation started on 14.03.2008 and pay slips possessed by the respondent upto July 2009 have been furnished under such circumstances, the

documents said to have been procured from the Employer, may not be necessary. Even otherwise, with the available materials, the assessment of the income for the year 2008 can be arrived at and the claim can be examined and under such circumstances, necessity to mark some more documents as claimed does not arise. At the time when the letter said to have been written by the father of the petitioner was marked by the respondent, the petitioner could have very well produced the diary notings and cross examined the witnesses or examined herself in that regard. Moreover if the petitioner was in fact aggrieved, she would have preferred an appeal against the orders impugned under section 29 of the Act instead of directly preferring a petition under section 482 Cr.P.C., to the High Court, therefore, both the petitions are not maintainable. Learned counsel also points out that on an earlier occasion, this court has passed a specific direction to complete the trial within a period of two months, as per order dated 17.3.2009, in a petition preferred by the respondent and it is only the petitioner who is dragging on the proceedings.

5. Learned counsel for the respondent relied on a case reported in 2008(1) SCC 474 (Hamida v. Rashid @ Rasheed and others) wherein, it has been held as follows:

"7.It is well-established principle that inherent power conferred on the High courts under Section 482 CrPc has to be exercised sparingly with circumspection and in rare cases and that too to correct patent illegalities or when some miscarriage of justice is done. The content and scope of power under section 482 CrPC were examined in considerable detail in Madur Limaya v. State of Maharashtra and it was held as under:

The following principles may be stated in relation to the exercise of the inherent power of the High Court.

(1) that the power is not to be resorted to if there is a specific provision in the code for the redress of the grievance of the aggrieved party;

(2) that it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice;

(3) that it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

6. Heard the submissions made on either side and perused the materials available on record.

7. The applications have been preferred by the wife under the provisions of the Protection of Women From Domestic Violence Act 2005 to get relief for herself as well as for her minor children. Admittedly, the children are living with the petitioner and an interim order of maintenance was passed by the learned Magistrate awarding Rs.30,000/- per month and the same was reduced to Rs.20,000/-. It has also been observed by the High Court that in view of the facts and circumstances of the case, the petitioner is entitled to 50% of the salary of the respondent/husband. When the



proceedings were pending to substantiate the salary drawn, materials were produced and under such circumstances, Form-16 for 2006-07 has been marked. To controvert this, pay slips have been marked on the side of the respondent/husband. When Form-16 for 2006-07 is available with the employer and when the respondent is relying on the pay slips for the subsequent period namely, 2007-08 and 2008-09, I am of the considered opinion that there is nothing wrong in securing Form 16 from the employer for the subsequent two years. Though the applications were initiated on 14.3.2008, the learned Magistrate may adjudicate the dispute and arrive at a quantum based on the income of the husband as on the date of adjudication in one way or other.

8. Learned counsel for the respondent contended that there may be fluctuations in the income for subsequent period and claim for enhancement in proportionate to the hike may have to be agitated only in subsequent application and not in the present one. Further, the respondent has already marked documents to prove the good conduct of the respondent, by producing the letter written by the father of the petitioner; while so, the petitioner/wife has every right to repudiate the same by producing contrary materials and that is the reason why she is seeking for marking of diary notings made by the father.

9. On a careful perusal of the orders impugned, I find that both the petitions were dismissed since a direction has been issued by this court to complete the trial within a period of two months. Admittedly, the period fixed by the High Court had already expired. Under such circumstances, the production of document sought for by the petitioner and recalling of the respondent for cross examination may not cause prejudice. In that view of the matter, the orders passed by the learned Magistrate are set aside with a direction to call for the document mentioned in the petitions and also to recall the respondent for cross examination soon after receipt of those documents. Consequently, connected miscellaneous petitions are closed.

rj

Sd/-

Asst. Registrar

//True Copy//

Sub Asst. Registrar

To

The XXIII Metropolitan Magistrate Court,  
Saidapet, Chennai.

+ 2 ccs to Mr. Ram & Ram, Advocate SR No.43343, 43342  
+ 2 ccs to M/s.K.Chandrasekaran, Advocate SR No.43608, 43609

CKN (CO)

SR/18.9.2009

Cr1.O.P.Nos.18107 and 18108 of 2009