

**IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL**  
**Criminal Misc. Application No. 423 of 2011**  
(Under Section 482 Cr.P.C.)

Smt. Gulishta

... Applicant

Vs

State of Uttarakhand & another

... Respondents

Mr. Dharmendra Barthwal, Advocate for the applicant.

Mr. Saurabh Pande, learned Brief Holder for the State of Uttarakhand.

Mr. M.K. Goyal, learned counsel for respondent No. 2.

**Hon'ble Manoj K. Tiwari, J. (Oral)**

1. Applicant – Smt. Gulishta is the wife of respondent No. 2 – Mohammad Akbar Jalaluddin. Since the relation had become strained between them and they were living separately, therefore, husband filed a suit for restitution of conjugal rights before Civil Judge (J.D.), Saharanpur, which was registered as Original Suit No. 322 of 2008. The said suit was subsequently, transferred to Principal Judge, Family Court, Dehradun and was renumbered as Original Suit No. 431 of 2009. Applicant – wife moved an application in the said suit claiming litigation expenses as well as maintenance from respondent No. 2 and learned Principal Judge, Family Court, Dehradun vide order dated 13.07.2010 granted ₹3,000/- as litigation expenses and ₹1,500/- per month as interim maintenance.

2. Thereafter, applicant moved an application under Section 125 Cr.P.C. claiming maintenance before learned Principal Judge, Family Court, Dehradun, which was registered as Criminal Case No. 311 of 2008. However, no order for grant of maintenance was passed by learned Family Court in the said proceedings.

3. Thereafter, applicant moved another application, under Sections 17, 18, 19, 20, 22 & 23 of the Protection of Women from Domestic Violence Act, 2005 (*from hereinafter referred to as "DV Act"*) before 3<sup>rd</sup> Additional Chief Judicial Magistrate, Dehradun, which was registered as Case No. 2124 of 2010. Learned 3<sup>rd</sup> Additional Chief Judicial Magistrate,

Dehradun granted ₹3,000/- per month from date the order, as interim relief to the applicant vide order dated 09.04.2010. Since husband did not comply with the said order, therefore, learned 3<sup>rd</sup> Additional Chief Judicial Magistrate, Dehradun vide order dated 20.07.2010 issued recovery warrant against him. Respondent/husband filed an appeal under Section 29 of the DV Act before learned Sessions Judge, Dehradun against the order dated 20.07.2010, whereby recovery warrant was issued against him. Learned Sessions Judge, Dehradun passed interim order in the said appeal on 06.08.2010 providing that if the husband deposits half of the amount in terms of the order dated 09.04.2010 and continuous to pay monthly interim maintenance on or before 5<sup>th</sup> day of each month, recovery warrant issued against him shall remain stayed. The said appeal was ultimately allowed by learned Additional Sessions Judge, Dehradun on 10.01.2011 and the order passed by learned 3<sup>rd</sup> Additional Chief Judicial Magistrate vide order dated 20.07.2010 was set aside on the ground that when the wife was granted interim maintenance by Family Court in the suit of restitution of conjugal rights, she was not entitled to get maintenance under provisions of DV Act.

4. Mr. M.K. Goyal, learned counsel for the respondent submits that respondent's appeal was allowed because in the application filed by the wife under DV Act, husband's address was not mentioned at all, therefore, there is no question of service of notice upon husband. He further submits that in the grounds of appeal, respondent had challenged the principal order dated 09.04.2010 passed by learned 3<sup>rd</sup> Additional Chief Judicial Magistrate, therefore, merely because, no relief was sought against the said order in the relief clause, cannot be a ground for disturbing the order passed by learned Additional Sessions Judge in appeal.

5. Mr. Dharmendra Barthwal, learned counsel for the applicant submits that the reasoning given by learned Additional Sessions Judge for setting aside the order passed by learned 3<sup>rd</sup> Additional Chief Judicial Magistrate, Dehradun is erroneous. In support of this contention, learned counsel for the petitioner has relied upon a decision of Kerala High Court in the case of **Vijesh P.K. Vs Divya** reported in **2014 SCC Online Ker 3252**. In the said judgment it was held that wife can bring proceedings for maintenance under provisions of Criminal Procedure Code and DV Act by filing separate proceedings, however, the court has to consider the orders passed on wife's application in earlier proceedings. Relevant portion of the said judgment is extracted below:-

*“2. On a perusal of the provisions contained in Section 26 of the Protection of Women from Domestic Violence Act this Court finds that parallel proceedings for maintenance under the said Act and under Section 125 of the Code of Criminal Procedure are permissible. Pendency of a claim for maintenance before the Family Court will not preclude the petitioners therein from seeking relief including maintenance under the Protection of Women from Domestic Violence Act. Section 26 of the said Act provides that any relief available under Sections 18 to 22 of the Act may also be sought in any legal proceedings, before a Civil Court, Family Court or a Criminal Court, and Sub Section 2 provides that any relief referred in sub-section(1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a Civil or Criminal Court. Sub-section(3) further provides that in case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief. Thus we find that*

*parallel proceedings for maintenance are possible, and one proceeding cannot be set aside or quashed on the ground that there is another proceeding before a different forum. The 1st respondent herein has the right to claim maintenance under the Protection of Women from Domestic Violence Act or under Section 125 of the Code of Criminal Procedure. Of course, when a decision is taken in one proceeding, the other court will have to consider such decision while granting the relief in the second proceeding. The court also will have to follow the decision of this Court in Preceline George (Dr.) v. State of Kerala reported in (2011 (4) KHC 502). In view of the clear provisions contained in Section 26 of the Protection of Women from Domestic Violence Act and also the decision of this Court does not find any merit in this application, and it is liable to be dismissed.”*

6. Thus, according to him, the reason given by learned Additional Sessions Judge for setting aside the order passed by learned 3<sup>rd</sup> Additional Chief Judicial Magistrate, Dehradun cannot be sustained.

7. Section 26 of the DV Act provides that any relief available under Sections 18 to 22 of the Act may also be sought in any legal proceeding, before a civil court, family court or a criminal court and Sub-Section (2) of Section 26 of the Act provides that any relief in Sub-Section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. Sub-Section (3) of the said Act further provides that in case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief. Thus, it can be safely

inferred that law permits parallel proceedings for maintenance. However, when decision is taken in one proceeding, the other court will have to consider such decision, while moulding the relief in the second proceeding.

8. In such view of the matter, the impugned order passed by Additional Sessions Judge, Dehradun is unsustainable. Moreover, the husband (*respondent herein*) had challenged the order dated 20.07.2010, whereby recovery warrant was issued against him and he had not challenged the principal order passed on 09.04.2010. This aspect was overlooked by 3<sup>rd</sup> Additional Sessions Judge, while passing the impugned order.

9. Accordingly, the judgment and order dated 10.01.2011 passed by learned Additional Sessions Judge in Criminal Appeal No. 777 of 2010 is set aside. The order dated 09.04.2010 of learned 3<sup>rd</sup> Additional Chief Judicial Magistrate, Dehradun in Case No. 2124 of 2010 is also set aside, as it was passed without notice to the respondent. The matter is remanded back to learned Magistrate to decide the application filed under DV Act by the applicant afresh, in accordance with law. Parties are directed to appear before learned Magistrate on 26.07.2019.

**(Manoj K. Tiwari, J.)**

28.06.2019

Aswal