

THE HIGH COURT OF TRIPURA
AGARTALA

CRL.PETN. 38 OF 2014

Sri Ratan Sarkar,
S/O. Sri Kangal Sarkar,
Vill.-Dakshin Rangutia, P.O.-Bamutia,
P.S.-Lefunga, District-West Tripura.

..... **Petitioner.**

- V e r s u s -

1. Smti. Uma Sarkar,
W/O. Sri Swapan Sarkar,
Vill.-Dakshin Rangutia (Samaj Sikhya Para),
P.O.-Bamutia, P.S.-Lefunga,
District-West Tripura.
2. Sri Swapan Sarkar,
S/O-Sri Kangal Sarkar,
Vill.-Dakshin Rangutia (Samaj Sikhya Para),
P.O.-Bamutia, P.S.-Lefunga,
District-West Tripura.
3. The State of Tripura.

..... **Respondents.**

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the petitioner : Ms. R. Purkayastha, Advocate.

For the respondent No.1 : Mr. S. Lodh, Advocate.

For the respondent No.2 : Mr. R. Saha, Advocate.

For the respondent No.3 : Mr. R.C. Debnath, Addl. P.P.

Date of hearing and
delivery of judgment
and order. : 27.08.2014.

Whether fit for reporting : **YES.**

JUDGMENT & ORDER(ORAL)

This petition is directed against the order dated 31-01-2014 passed by the learned Additional Sessions Judge, Court No.3, West Tripura, Agartala in case No. Crl. Appeal 28(2) of 2013 whereby the Additional Sessions Judge dismissed the appeal filed by the petitioner and upheld the order dated 15-05-2013 passed by the learned Chief Judicial Magistrate, West Tripura, Agartala in CR 70 of 2013.

2. The undisputed facts are that Smti. Uma Sarkar (respondent No.1 herein) was married to Sri Swapan Sarkar (respondent No.2 herein). The petitioner Ratan Sarkar is the real brother of Swapan Sarkar. It is also not disputed that Ratan Sarkar and Swapan Sarkar had purchased some property jointly. It is, however, claimed by the petitioner that his brother respondent No.2 sold him his share of property vide a registered sale deed executed in the year 2009.

3. The respondent No.1, Smti. Uma Sarkar, had earlier filed one petition being CR 235 of 2011 in the Court of the Judicial Magistrate Ist Class, Court No.5, Agartala, West Tripura in which she had claimed that her hut is in a dilapidated condition and it had become impossible for her to reside in the hut along with her children. According to her, whenever she went to repair the hut, the opposite parties (including the petitioner herein) were obstructing her from doing so. On 04-01-2012, the Judicial

Magistrate Ist Class, Court No.5, Agartala passed an ex parte interim order ordering that in view of the emergent situation the aggrieved person is allowed to repair the room where she has been staying and restrained the respondents, i.e. the petitioner herein and his brother from preventing her from repairing the said hut. Later, on 26-06-2012 the wife withdrew the CR 235 of 2011 on the ground that a report by the CDPO in respect of the matter had been registered in the Court of the learned Additional Chief Judicial Magistrate, West Tripura, Agartala and, therefore, she did not want to press the petition and the same was accordingly dropped.

4. None of the parties have been able to apprise me as to what has happened in the Court of the learned Additional Chief Judicial Magistrate, West Tripura, Agartala.

5. These proceedings arise out of another petition being CR 70 of 2013 filed by the respondent No.1 under the Protection of Women from Domestic Violence Act, 2005 against the present petitioner and respondent No.2. In this petition, she claimed that she in pursuant to the earlier order had repaired the room but in a cyclone which took place on 09-05-2013 again the hut was damaged and she was being prevented by the husband and his brother from repairing the room. She, therefore, again prayed that she be permitted to repair the room. The learned Chief Judicial Magistrate heard the matter and granted ex parte interim relief permitting her to repair the room. The present petitioner brother-in-law filed an appeal which has been rejected by the Additional

Sessions Judge only on the ground that since the order was an interim order the petitioner had a right to contest the order by leading evidence before the trial Court.

6. Though the matter is a small one and can be disposed of by a short order, I am of the view that certain directions need to be issued as to how such cases should be dealt with. The original case being CR 235 of 2011 was pending before the Judicial Magistrate Ist Class, Court No.5, Agartala, West Tripura. If on the report of the CDPO, another dispute between the same parties of identical or similar nature was being raised, that should have been sent to the same Court and should not have been sent to some other Court. The third petition between the same parties out of which the present proceedings arise is being tried by the Chief Judicial Magistrate. When the matter is identical and the parties are the same, there should always be an attempt to avoid conflicting orders being passed by different Courts and it is the duty of the Chief Judicial Magistrate who distributes the cases to ensure that all such cases, as far as possible, are listed before the same Court.

7. Coming to the powers of the Court to grant interim orders under the provisions of the Protection of Women from Domestic Violence Act, 2005. There is no quarrel with the proposition that a Magistrate can pass interim orders as he deems just and proper in terms of section 23 of the Act. However, interim orders have to be passed in relation to application(s) filed under sections 18 to 22 of the Act.

8. Section 18 deals with protection orders and the opening portion of section 18 reads that 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.

9. Section 19 empowers the Magistrate to pass a residence orders but the opening words of section 19 clearly mention that while disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order.

10. Section 12 provides that an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under the Act.

11. Therefore, what is essential is that there should be an application filed under section 12 of the Act. In the present case, the application has been filed under section 12 but it was not at the stage of disposal. Section 19 clearly states that while disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order. Therefore, normally a residence order has to be passed at the time of disposal of the application under section 12 of the Act.

12. This Court is not concerned with sections 20 and 21 because they relate to monetary matters and custody of children which are not in issue before this Court. Before passing an order under section 19, the Magistrate has to be satisfied that domestic violence has taken place. The provisions of the Domestic Violence Act are applicable only if domestic violence takes place.

13. Domestic violence has a very wide connotation and section 3 defines what is domestic violence. Before passing an order under section 19, the Magistrate has to pass an order that he is satisfied that domestic violence has taken place.

14. No doubt, section 23 empowers the Magistrate to grant interim and ex parte orders in any proceedings under the Act, especially proceedings relating to sections 18 to 22 of the Act. This, however, does not mean that what are the basic ingredients mentioned in sections 18 to 22 have not even to be looked into, at the time when an interim order is passed. It is made clear that this Court is not indicating that an ex parte order cannot be passed. In certain circumstances, to protect the aggrieved women, it would be necessary for the Magistrate to pass interim orders for protection or even for residence. However, before passing such interim order, the Magistrate on the basis of some material before him either on the basis of the affidavit filed or on the basis of the averments made in the applications supported by an affidavit will have to first come to the conclusion that from the facts stated in the

application, there is prima facie evidence of domestic violence having been committed on the aggrieved person. Without coming to this finding, no order whether an interim order or a final order can be passed.

15. This Court is constrained to observe that neither the Judicial Magistrate Ist Class, Court No.5, Agartala nor the Chief Judicial Magistrate nor even the Additional Sessions Judge have in their orders given any prima facie finding that there was any allegation or proof of domestic violence. This is the basic ingredient and without the Court coming to this finding that this ingredient is made out, no order under the various sections can be passed.

16. Though section 23 empowers the Court to grant interim and ex parte orders, such jurisdiction should not be exercised in a very casual fashion. In a case, like the present one, where a house has been damaged and the petitioner, even according to her own allegation, was living outside the hut for more than six days, heavens would not have fallen if the learned trial Court had directed that notice of the petition be served upon the aggrieved parties within a couple of days. When we deal with the powers to pass ex parte ad-interim orders, such orders should be passed where it is absolutely essential to do so. The very basis of our jurisprudence is that no order should normally be passed without hearing the aggrieved party. In this case, the interim orders which have been passed are virtually in the nature of final orders. Once the hut has been repaired under the garb of the interim order, can

that repair be undone in the final order? Obviously, it cannot be. Interim orders of mandatory nature should normally not be passed. Ex parte protective orders can be passed and may be passed liberally also but when something positive has to be done which cannot be undone after it has been done, the Court should tread carefully and examine all the circumstances before passing such an order. If such ex parte interim order has to be passed, then the Court must give very cogent and valid reasons for passing such order. Even such reasons are totally missing from both the orders. In the first order which was passed by the learned Judicial Magistrate Ist Class, all that is stated is that in view of the emergent situation, the aggrieved person is allowed to repair the room where she has been staying. That is no reasoning. That is only a copy of the statement made by the aggrieved person or her counsel. There is no reasoning given by the Court. As far as the second order dated 15-05-2013 passed by the learned Chief Judicial Magistrate is concerned, he has only relied upon the earlier order while passing the second order. Coming to the order passed by the learned Additional Sessions Judge. He has rejected the application only on the ground that it is an interlocutory order but he did not appreciate the fact that by the interlocutory order it was not that the petitioner was permitted to stay on in the house but she was allowed to repair a house which had become totally unusable according to her, and she was permitted to reenter a house which, according to her, she could not reside in for the last

six days. Though the order may be interlocutory in nature, it has the ramifications of a final order.

17. Ms. Purkayastha, learned counsel for the petitioner, submits that copy of the interim order dated 15-05-2013 was received by her client only through the Lefunga Police Station but from Court she has not even received the summons till date. She does not even have a copy of the petition. On the other hand, Mr. S. Lodh, learned counsel for the respondent No.1, submits that this may have happened because immediately after passing of the order, the petitioner filed an appeal and the record was called for.

18. At this stage, I may mention that the learned Chief Judicial Magistrate passed an interim order on 15-05-2013 and fixed the next date on 04-07-2013, i.e. almost after two months. It is directed that in future, any Magistrate granting an ex parte interim order shall ensure that the next date fixed is not more than 15 days later. He shall also ensure that the respondent is served either by the aggrieved party or the Protection Officer or through the police. The whole purpose of granting interim orders and then giving long dates is counterproductive to each other. According to Ms. Purkayastha, the appeal was filed on 07-06-2013. If the order was passed on 15-05-2013 and the appeal was filed on 07-06-2013, then before filing of the appeal notice should definitely have gone to the husband.

19. I have purposely not gone into the facts of the present case in detail because I do not want to prejudice the case of either. According to the petitioner/brother-in-law, the lady/aggrieved party is not residing in the house. This is a matter for the learned trial Court to decide. Keeping in view the fact that the interim order was passed almost more than a year back, the clock cannot be set back at this stage. The repairs which have been done cannot be undone at this stage.

20. Therefore, this petition is disposed of with the following directions:-

(i) The parties are directed to appear before the learned Chief Judicial Magistrate, West Tripura, Agartala on 11-09-2014;

(ii) The learned Chief Judicial Magistrate is directed to ensure that the entire proceedings are completed and disposed of by 30-11-2014.

(iii) The learned trial Court will obviously decide all issues raised before it.

21. The Registrar General is directed to circulate a copy of the judgment to all the Judicial Officers of the State.

CHIEF JUSTICE