

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Miscellaneous Application No.303 of 2023

Applicant : GhulamShabbirKubar through Mr. Nasrullah Korai, advocate

Respondents No.1 to 3: Through Mr. Siraj Ali Khan Chandio, Additional Prosecutor General Sindh

Respondent No.4 : Mst. Batool through Mr. Imtiaz Ali Shah, advocate

Dates of hearing & Order : **31.05.2023**

ORDER

AMJAD ALI BOHIO, J. The application has been filed to challenge the orders dated 17.4.2023 and 09.05.2023, which were issued by the Civil Judge and Judicial Magistrate-V, Karachi, South, and the Sessions Judge, Karachi, South, respectively. After the notice was served, respondent No.4 appeared through her counsel.

2. In summary, the application in question pertains to a Domestic Violence Petition filed by respondent No.4 before the Court of Civil Judge and Judicial Magistrate-V, Karachi, South. The court has taken cognizance of the petition, which alleges offenses under Section 5(f)(ii), 5(f)(vi), and 5(o) of the Domestic Violence (Prevention and Protection) Act, 2013, commonly referred to as the Act-2013.

3. Learned counsel for the applicant, Ghulam Shabbir, has challenged the impugned orders primarily on the basis that the trial court erroneously took cognizance under the Act-2013. The counsel argues that the learned Magistrate failed to comply with the provision of Section 8, which mandates the direction for the petitioner to undergo mandatory counseling. Furthermore, it is contended that no material was presented on record regarding the alleged violence, yet the learned Magistrate, relying on Section 12, took cognizance without the submission of any proof before the trial court.

4. The counsel emphasizes that the trial court was obligated to record the statement of respondent No.4 and her witnesses, as provided under Chapter-XVI of the Code of Criminal Procedure, 1898, with reference to Section 2(1)(c). It is also highlighted that the applicant has lodged an FIR bearing Crime No.141/2022 against the brothers of respondent No.4, wherein it is stated that respondent No.4's attitude had become harsh. To support these contentions, the counsel has submitted a USB containing voice messages of threats issued by respondent No.4 to the petitioner. Lastly, it is argued that both the impugned order dated

17.04.2023, wherein the learned Magistrate took cognizance, and the order dated 09.05.2023 passed in Criminal Revision Application No.42/2023 by the Sessions Judge Karachi South, who upheld the learned Magistrate's order, are being challenged.

5. Learned Additional Prosecutor General Sindh has expressed support for the contentions put forth by the learned counsel for the applicant. The Additional Prosecutor General has argued that the learned Magistrate, without following the appropriate procedure, took cognizance of the case through the impugned order. As a result, the Additional Prosecutor General contends that the said order should be set aside.

6. Learned counsel for respondent No.4 has presented their arguments, stating that in the Domestic Violence Petition filed before the learned Judicial Magistrate-V Karachi South, the wife of the petitioner, Mst. Batool, mentioned that after their marriage on 14.11.2009, they adopted a minor child named Haya Batool, and the petitioner was obligated to provide maintenance, which he neglected to do so. It was further mentioned in the Domestic Violence Petition that the petitioner's brothers used to provide the maintenance. Additionally, voice messages of Ghulam Shabbir were cited, wherein he instructed respondent No.4 not to come to his house.

7. The counsel contends that the learned Magistrate correctly took cognizance of the petition filed by respondent No.4. Therefore, the current application is deemed to be dismissed, according to the arguments presented by the counsel for respondent No.4.

8. The learned counsel for the applicant, Ghulam Shabbir, has primarily raised concerns about the maintainability of the Domestic Violence Petition and the procedure followed prior to the court's decision to take cognizance. The counsel argues that the petition may not be legally valid and questions whether the proper provisions of the Act-2013 were followed in the process.

9. After careful consideration of the arguments presented by the learned counsel for both parties, a thorough examination of the impugned orders, and a review of the material submitted on record, I have come to a conclusion that respondent No. 4, as the petitioner, has filed the petition under the Act-2013 as an aggrieved person, as defined in Section 2(1)(a) of the Act-2013, as under.

“(a) “aggrieved person” means any woman, child or any vulnerable person who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;”

10. The Act-2013 specifies that the court before which such a petition is to be filed is the court of Judicial Magistrate of first class, as defined in Section 2(1)(d) of the Act-2013, as under:

“(d) “court” means the court of Judicial Magistrate of first class;”

11. Furthermore, the Act-2013 defines domestic relationships and includes individuals living together in a household who are related by consanguinity, marriage, kinship, adoption, or are family members living together. Both parties admit to falling within the definition of domestic relationship as defined under Section 2(1)(e) of the Act-2013.

12. Regarding the procedural aspect adopted by the learned Magistrate, it is noted that the impugned order dated 17.4.2023 mentions the issuance of a show cause notice to the applicant Ghulam Shabbir and others, followed by affording an opportunity of hearing to the counsel for both parties before passing the order. The contention raised by the learned counsel for the applicant regarding the failure of the trial court to conduct counseling proceedings under Section 8(1) of the Act-2013 is addressed. The provision empowers the court to conduct counseling proceedings with the appropriate service provider at any stage of the proceedings, and it is left to the discretion of the court as the word "may" is used to issue such directions. Therefore, the trial court, even after taking cognizance, may issue such directions as provided under Section 8(1) of the Act-2013.

13. Regarding the contention raised by the counsel for the applicant that respondent No. 4 filed the Domestic Violence Petition without substance and evidence, it is observed that both parties have submitted voice recording messages allegedly issuing threats to each other by presenting respective USBs. The learned Magistrate, after hearing both parties, found that respondent No. 4 has prima facie established the allegations for the offenses under Sections 5(f)(ii), 5(f)(vi), and 5(o) of the Act-2013. The truth of these allegations can be proved or disproved after providing an opportunity for evidence, during which the applicant Ghulam Shabbir will have the opportunity to cross-examine respondent No. 4 and her witnesses.

14. As for the application of Chapter-XVI of the Code of Criminal Procedure, 1898, in the complaint, it is observed that the Domestic Violence (Prevention and Protection) Act, 2013 is a special law that governs primarily under its provisions. Where a general law as well as a special law applied to a particular case then to the extent of application of special law in that case provision of general law stand this place. Only when the provisions of the Act-2013 are silent, the Code of Criminal Procedure, 1898, as defined in Section 2(1)(c), would prevail.

15. Importance of the Act-2013 recently emphasized in a case of Mst. Hina v. Province of Sindh through Secretary Home Department Sindh at Karachi and 04 others (PLD 2019 Sindh 363), wherein pivotal role of the Magistrate is highlighted with a hope that the Magisterial Court(s), shall feel courageous in dealing with such situation(s) by passing interim order(s) but on being satisfied of prima facie substance and the trial Court in above case in hand while passing the impugned order prima facie found the aforementioned offences have been made out. While deciding the case of Mst. Hina (ibid), directions issued to the Magistrates relevant to this case are reproduced as under:

“The Magistrates shall ensure what the object of the Act demands of them i.e. not only wiping tears of the cheeks of *aggrieved* but restoring what is snatched or attempted to be snatched of them while making them a victim of ‘**domestic violence**’.”

16. Based on my understanding, I have concluded that the impugned orders passed by the Civil Judge and Judicial Magistrate-V, Karachi, South, and the Sessions Judge, Karachi, South, do not require any intervention, and as a result, the current Criminal Miscellaneous Application is dismissed.

JUDGE