2013 No. 52-M DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

GUYANA SUPREME COURT
LAW LIBRARY
Georgetown

In the matter of an Application for Writs of Certiorari and Prohibition by **MOHAMED DIN.**

BEFORE

HON. MR. JUSTICE IAN CHANG – CHIEF JUSTICE (ag.)

Mr. Neil Persram for the Applicant.

Mr. Gino Persaud for the named Respondent.

DECISION

On the 3rd July 2013, the applicant, Mohamed Din, by way of Notice of Motion, applied to the court for the following prerogative reliefs:

> ***"(1) An Order or Rule nisi of Certiorari directed to the learned Chief Magistrate PriyaSewnarine-Beharry quashing the December 9 2010, decision of the said learned Chief Magistrate in C.J No. 13458/2010 that MOHAMED DIN by interim order pay to LILOUTIE GOBERDHAN maintenance in the sum of $10,000 (ten thousand dollars) per week commencing on the 9th day of December 2010, on the grounds that the said decision of the said learned Chief Magistrate***

PriyaSewnarine-Beharry was, inter alia, unreasonable, arbitrary, irrational, unlawful, in excess of or without jurisdiction, an improper finding of fact, an error of law, substantially procedurally wrong, a lack of proportionality, and a breach of natural justice and of the legitimate expectation of the Applicant AND an Order directed to the said learned Chief Magistrate PriyaSewnarine-Beharry to show cause why the said Order or Rule nisi of Certiorari should not be made absolute.

2. *An Order or Rule nisi of Certiorari directed to the learned Chief Magistrate PriyaSewnarine-Beharry in C.J No. 13458/2010 that MOHAMED DIN by final order payto LILOUTIE GOBERDHAN maintenance in the sum of $10,000 (ten thousand dollars) per week commencing on the 9th day of December 2010 on the grounds that the said decision of the learned Chief Magistrate PriyaSewnarine-Beharry is inter alia unreasonable, arbitrary, irrational, unlawful, in excess of or without jurisdiction, an improper finding of fact, an error of law, substantially procedurally wrong, a lack of proportionality, and a breach of natural justice and of the legitimate expectation of the Applicant AND an Order directed to the said learned Chief Magistrate PRIYA SEWNARINE-BEHARRY to show*

cause why the said Order or Rule nisi of Certiorari should not be made absolute.

3. *An Order or Rule nisi of Certiorari directed to the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY quashing the December 9, 2010 decision of the learned Chief Magistrate PriyaSewnarine-Beharry in C.J No. 13458/2010 against MOHAMED DIN of an interim Occupational Order removing MOHAMED DIN from the upper flat of the premises situate at 32 James Street, Albouystown, Georgetown, on the grounds that the said decision of the said learned Chief Magistrate PriyaSewnarine-Beharry was, inter alia, unreasonable, arbitrary, irrational, unlawful, in excess of and without jurisdiction, an improper finding of fact, substantially procedurally wrong, a lack of proportionality, and a breach of natural justice and of the legitimate expectation of the Applicant AND an Order directed to the said learned Chief Magistrate PRIYA SEWNARINE-BEHARRY to show cause why the said Order or Rule nisi of Certiorari should not be made absolute.*

4. *An Order or Rule nisi of Certiorari directed to the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY quashing the January 10, 2011 decision of the said learned Chief Magistrate PriyaSewnarine-Beharry in C.J No. 13458/2010 against MOHAMED DIN of final*

Occupational Order *removing MOHAMED DIN from the upper flat of the premises situate at 32 James Street, Albouystown, Georgetown, on the grounds that the said decision of the learned Chief Magistrate PriyaSewnarine-Beharry is, inter alia, unreasonable, arbitrary, irrational, unlawful, in excess of or without jurisdiction, an improper finding of fact, an error of law, substantially procedurally wrong, a lack of proportionality, and a breach of natural justice and of legitmate expectation of the Applicant AND an Order directed to the said learned Chief Magistrate PRIYA SEWNARINE-BEHARRY to show cause why the said Order or Rule nisi of Certiorari should not be made absolute;*

5. *An Order or Rule nisi of Certiorari directed to the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY quashing the December 9, 2010 decision of the said Chief Magistrate PriyaSewnarine-Beharry in C.J No. 13458/2010 granting by interim order sole occupation to LILOUTIE GOBERDHAN of the upper flat of the premises situate at 32 James Street, Albouystown, Georgetown, commencing on the 9th day of December 2010 on the grounds that the said decision of the learned Chief Magistrate PriyaSewnarine-Beharrywas inter alia, unreasonable, arbitrary, irrational,*

unlawful, in excess of or without jurisdiction, an improper finding of fact, an error of law, substantially procedurally wrong, a lack of proportionality, an a breach of natural justice and of the legitimate expectation of the applicant AND an Order directed to the said learned Chief Magistrate PRIYA SEWNARINE-BEHARRY to show cause why the said Order or Rule nisi of Prohibition should not be made absolute.

8. ***An Order or Rule nisi of Prohibition directed to the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY and the CLERK OF COURT prohibiting them from locking up, incarcerating, or detaining or causing the locking up, incarcerating or detaining of MOHAMED DIN as a consequence of matters concerning maintenance monies to be paid by MOHAMED DIN as ordered by the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY in C.J No. 13458/2010 on December 9, 2010 and on January 10, 2011, whether or not the said monies are in arrears, due or becoming due, unless and until cause is shown why the said Order or Rule nisi of Prohibition should not be made absolute AND an Order directed to the learned Chief Magistrate PRIYA SEWNARINE-BEHARRY to show cause why the said Order or Rule nisi of Prohibition should not be made absolute.***

9. Costs.

10. Such further or other Orders that the Court may deem just and appropriate in the circumstances."

In his Affidavit in support of Motion, the applicant, Mohamed Shahabudeen Din deposed that he had filed application Appl 38 of 2013 on April 4, 2013 in the Full Court applying for, *inter alia*, leave to appeal out of time the decisions of the Chief Magistrate but that he withdrew that application on June 3, 2013 and sought the reliefs sought herein because he was advised by his counsel that he would be afforded a more timely hearing.

He further deposed that he and the complainant in C.J No. 13458/2010 were never married but were having two children Junior Din, adult male born on the 14th March 1987 and Aliyah Din born on the 14th March 1987 and Aliyah Din born on the 22nd February 1988. From about 1990, he, the complainant and their children lived at rented premises at the lower flat of 25 James Street, Albouystown. In 1994, he registered and opened a grocery business in the front of that lower flat. Around the late 1990's, the complainant made an arrangement whereby she would look after her mother and bear all the associated expenses and, in exchange, her mother's rice lands, coconut lands and house on 4 house lots at No. 48 Village, Corentyne, would belong to the complainant on her mother's death. The complainant's mother died around the late 1990's and all the properties went to the complainant and still belongs to her.

Around 2004, he broke down the old house at No. 48 Corentyne and built a new building and the property with the new building was in the possession of the complainant. In 2006, he obtained a mortgage and bought two premises at 32A and 32B James Street, and he gave the business at Lot 25 James Street to the complainant. Lot 32B was rented out to help in paying the mortgage which he was still paying. He and his two children moved into Lot 32 A and the complainant remained with her business at 25 Lot James Street. She would sometimes come over and spend a few nights at Lot 32 A James Street.

In 2007, he opened a meatcentre downstairs at 32 James Street and, in 2008, his daughter migrated to Canada.

He and the complainant never really got along and would fight with each other. Around early 2009, after an argument, the complainant picked up a knife to attack him and he grabbed her hand with which she was holding the knife and a scuffle ensued. The complainant reported the matter to the Police who locked up himself and his son for the week-end. He retained a lawyer and applied and obtained a restraining Order restraining the complainant to keep at a distance of 300 yards from him. In early 2010, his son got married and moved over with his wife to Lot 25 James Street as Lot 25 James Street had ample space for everyone.

Around 2010, the complainant came to his meat centre and broke the front window. A scuffle ensued. The complainant went to the Legal

Aid Centre, and obtained legal aid. Around the 6th December 2010, he was served with a Summons wherein the complainant made 17 complaints against him and sought several reliefs against him under the Domestic Violence Act 1996.

On the 9th December 2010, he went to court. He informed the Chief Magistrate that his counsel was on his way. But the matter nevertheless went ahead with the matter by asking him whether he was guilty or not guilty. He pleaded Not Guilty. Thereupon, the Magistrate asked him what about maintenance. He replied that he did not understand and she asked him whether he did not understand what financial maintenance means. He said that he thought so and she asked what about $15,000. Thinking that he could afford $10,000 per month, which he could afford, he said okay. It was only some days later when the Police brought a paper to him that he saw that the sum was weekly and not monthly.

He deposed that the Chief Magistrate took no evidence from him or the complainant. She dismissed some of the complaints made against him and made the following interim orders:

> ***"(a) a protection order restraining the Respondent from physically abusing the applicant.***
>
> ***(b) a protection order restraining the respondent from verbally abusing the Applicant.***
>
> ***(c) A protection order restraining the respondent from psychologically abusing the applicant.***

(d) An occupation order removing the respondent from the upper flat of premises situate at 32 James Street, Albouystown, Georgetown.

(e) The respondent MOHAMED SHAHABUDEEN DIN to pay the sum of $10,000 per week for maintenance of the applicant, LILOUTIE GOBERDHAN to the Collecting Officer commencing on the 9th day of December 2010.

He further deposed that the Chief Magistrate told him to remove from the house. But the lawyer on the other side told the Chief Magistrate that he had nowhere to go. The Chief Magistrate then allowed him to stay in his meat centre (Exhibits AA12 – 13 – Orders of Court).

He stated that the matter again came up on the 3rd January 2011. Both himself and his counsel were absent from court. The matter was then adjourned to the 10th January 2011. **On the 10th January 2011, when he and his counsel were in another Court in another matter involving himself and the complainant and thus could not be before the Chief Magistrate, the Interim orders were made absolute by the Chief Magistrate (Exhibit AA14)**.

On the 14th January 2011, his counsel made an application for a variation/discharge of the Maintenance and Occupation Order. But that application was dismissed for want of prosecution on the 8th March 2011 because his counsel was again absent from court. (Exhibit AH 15 – 16). He

deposed that he then retained another counsel who made another application for a variation/discharge of the Maintenance and Occupation Orders. That application was made before several Magistrates but they were all reluctant to interfere in a matter decided by the Chief Magistrate. He retained yet another counsel who continued the matter before another Magistrate who, after hearing arguments, gave his counsel the option of withdrawing the action or having it dismissed. The lawyer on the other side represented to the Magistrate that she cannot see how a Magistrate can go against an Order made by the Chief Magistrate. The Magistrate advised his counsel that it made no sense refilling another application and that the best thing to do was to bring the matter before the High Court. In March 2013, his then counsel withdrew the application (Exhibits AA20 – 28).

He stated that, at the time of the hearing of the complainant's application by the Chief Magistrate, the complainant had and was still having considerable assets and properties and was not paying any expenses and bills since he was having to pay all the mortgages, loans and bills from 2006 to the current time on 32A and 32B James Street, Albouystown. His son was paying the rent and all bills for Lot 25 James Street. The complainant would travel at least once a year to North America since about 2000.

He deposed that he was in severe debt and, *inter alia*, was owning on 3 mortgages to Citizen Bank, New Building Society and IPED. He

attached statements of loans owed to his daughter (Exhibits AA 35) statements of his arrears for rates and taxes for 5 years in the sum of $1,000,000 (Exhibits AA 36 – 37) and a Statement of his arrears for water rates for 5 years in the sum of $400,000 (Exhibits AA 36 – 37). His electricity was recently disconnected and he worked out a payment plan in respect of which he had to borrow money to start paying instalments. He was having medical problems and was medically advised not to exert himself (Exhibit AA40 – Medical Certificate. His vehicle was recently re-possessed for non-payment of the instalments and he has to incur for debts to redeem the vehicle.

He was having to borrow money from his daughter who also would send money to the complainant who runs a business. On the 3rd April 2013, he was called in by the National Building Society who informed him that it would foreclose on the 5th April 2013. The complainant was having several properties to which she was having access and he was made to reside in the bottom flat of the building in the meat centre. He deposed that he was forced into debt and ruination and was unable to pay the maintenance sum to the complainant. On four occasions he was unable to pay the maintenance the complainant took out a warrant causing him suffer incarceration which further restricted his ability to earn.

He further deposed that the complainant was having a relationship with a man whose wife met him and confirmed that relationship which

had begun before the complainant had filed her complaint in the Magistrate's court and was still continuing.

In her Affidavit in Answer, the Chief Magistrate PriyaSewnaraine-Beharry deposed that both parties were charged with Criminal offences and opted not to testify against each other. She deposed that she made a judicial determination of the application of LiloutieGoberdhan which was supported by her sworn Affidavit. In exercising her discretion to grant interim relief, she considered section 5(1), 6, 7(1), 7(2) and 8 of the Domestic Violence Act. She deposed that, on the 9th December 2010, the applicant consented to pay the sum of $10,000 weekly towards her maintenance. The effect of all orders made by the court was explained to the applicant in accordance with section 28 of the Domestic Violence Act. The applicant was granted leave to file an Affidavit in Answer within 14 days and the matter was adjourned to the 3rd January 2011. On the 3rd January, 2011, the applicant did not yet file his Affidavit in Answer and was given further leave for 7 days to do so. On the 10th January 2011, not only did the applicant not file his Affidavit in Answer but neither he nor his counsel appeared in court and she in the exercise of her judicial discretion made the interim orders final in accordance with section 25 of the said Act.

She deposed that LitoutieGoberdhan swore to an Affidavit in support of her application and that Section 23 of the Act provides that evidence on an application for a protection order may be given on affidavit and that it is not necessary to take viva voce evidence.

The applicant's application dated 14th January 2011 for a variation or discharge was subsequently dismissed for want of prosecution because he and his counsel again failed to attend court on the date fixed for hearing while LiloutieGoberdhan and her counsel and/or discharge the Orders but they were always dismissed. The applicant failed to inform the court and that failure amounted to material non-disclosure. The 2nd application was filed by Attorney-at-Law Adrian Thompson on C.J No. 5151/2011 and was dismissed by Magistrate Ramdhani for want of prosecution since the applicant and his counsel again failed to attend court. On the 20th March 2012 made the said 3rd application to vary or discharge the orders on C.J No. 148/2012. That matter came up before Magistrate GeetaChandan-Edmond, put down for hearing on the 24th April 2012 and was again adjourned to the 15th May 2012. It was adjourned yet again to the 25th June 2012 when it was yet again dismissed for want of prosecution for non-appearance of the applicant and his counsel. She deposed that the applicant made a 4th application on the 25th July 2012 to vary or discharge the order – which he fraudulently represented as his 2nd application in his Notice of Motion. That matter was fixed for hearing before Magistrate Judy Latchman. But counsel for the applicant withdrew and discontinued those proceedings on the 7th March 2013.

In her Affidavit in Answer, the Chief Magistrate (ag.) contended that she lawfully exercised her jurisdiction under section 6 of the Domestic Violence Act which specifically provides that a protection order may direct

a respondent to make such contribution to the welfare of a person named in the order as the court thinks fit. She specifically denied that she made a finding that LiloutieGoberdhan was the wife of the applicant and deposed that LiloutieGoberdhan fell within the category of persons mentioned in sections 3 and 4 of the Act as persons associated with a respondent who could apply under the Act for a protection order.

In his Affidavit in Reply, the applicant deposed that the interim orders ought not to have been granted without affording him a hearing since he was present in court and had denied the respondent's allegations. He contended that recourse should have been taken to section 23 (2) of the Domestic Violence Act and, moreso, since no evidence was given or proferred against him as admitted by the respondent in paragraph 6 of her Affidavit in Answer. He further contended that neither sections 5 (1), 6, 7(1), or 8 of the Act allows for the granting of maintenance to the applicant since the Act provides for maintenance only in respect of children. Such a assumption of jurisdiction by the Chief Magistrate was in conflict with section 5(2) and 5(3) of the Act since such an assumed jurisdiction would imply that maintenance can be awarded *ex parte* without any hearing as to means and that failure to pay such an unsubstantiated award can result in incarceration. He further contented that section 7(c), (d), (e) and (f) of the Act should have been complied with before any of the challenged orders was made. He stated that had he consented to the alleged payment of maintenance as alleged in the Affidavit in Answer, he would not, on the 14th January 2011, have filed an

application for a variation of the Order. He further pointed out that the interim order was dated the 3rd January 2011 for a hearing on the said 3rd January 2011.

He deposed that he was in court on the 25th June 2012 and this fact is supported by the respondent's Affidavit in Answer and that he appeared at least 13 times before Magistrate Ramdhani, Magistrate GeetaChandan-Edmond, the Chief Magistrate and Magistrate Judy Latchman with at least 4 of those 13 times before Magistrate Ramdhani as evidenced by the Respondent's Exhibit A.

Section 8 (1) of the Domestic Violence Act 1996 provides:

> ***"The court, when making a protection order or an interim protection order may also make an occupation order or an interim occupation order, as the case may be, granting the person named in the order for such period or periods and on such terms and subject to such conditions as the court thinks fit the right to live in the household residence or any other premises forming part of the household residence."***

Section 8 (2) provides:

> ***"The court may make such an order under subsection (1) only if the court is satisfied that such an order –***
>
> > ***isnecessary for the protection of the applicant or the person for whose benefit the order is made."***

Section 8 (1) deals with the making an occupation order and interim occupation orders as part of protection orders or interim protection orders. But it is clear from section 8 (2) that the court cannot make an occupation order or interim occupation order unless the court becomes satisfied that such an order is **necessary** for the protection of the applicant or the person in whose favour the order is made. Moreover, an occupation order which confers a right to live in the household residence to the applicant or the person for whose benefit the order is made must **specify** therein a period or periods of time for the duration of that right of occupation. Further, the right conferred by an occupation order is not an absolute or unconditional right but a right on **"such terms and subject to such conditions as the court thinks fit."** The discretionary power of the court which arises from the words **"on such terms and subject to such conditions as the court thinks fit"** is not a power to determine **whether** to impose terms and conditions but rather is a power to determine what terms and conditions should be imposed in the circumstances of the making of an occupation order as a matter of necessity and the circumstances of the case.

It is significant to note that while section 9 (1) provides:

> ***"Where an occupation order or interim occupation order is made, the person to whom it relates shall be entitled to the exclusion of the respondent to occupy the household residence to which that order relates."***

Section 10 provides:

"The court may, <u>if it thinks fit</u>, on the application of either party, make an order –

(a) extending or reducing any period <u>specified by thecourt</u> pursuant to section 8 (1)

(b) varying or discharging any terms and conditions <u>imposed by the court</u> pursuant to that subsection."

Since under section 9 (1), an occupation order confers upon the person for whose benefit it is made an entitlement or right to occupy the household residence to the exclusion of the respondent (who also retains his interest in the household residence), section 8 (1) cannot be interpreted to have conferred on the court the power to make an order granting to the person in whose favour the order is made an occupation right for an indefinite period or without terms and conditions i.e. indefinitely and unconditionally.Such an right would leave the respondent's interest in the household residence unprotected if not defeated. The court has no power to do so. Necessity cannot justify the deprivation of the respondent's interest in the household residence. Indeed, by failing to specify a definite period of time for the subsistence of the occupation right granted and/or to impose suitable terms and conditions in protection of the respondent's interest, the court would be negativing the procedural right of the respondent under section 10 (a) and (b).

It would be an absurd and ridiculous state of affairs if an applicant, who is granted a right to occupy the household residence to the exclusion of the respondent, is allowed by the court making such a grant to occupy

that household residence for an indefinite period of time and without terms and conditions attaching to such right. Necessity does not justify the negation of the respondent's interest and therefore the court is under duty to impose not only a period of time but also terms and conditions which suit the circumstances in protection of the respondent's interest in the household residence.

In the instant case, it does appear that the Chief Magistrate (ag.) made the occupation orders without first satisfying herself that such orders were necessary for the protection of the applicant in those proceedings – a jurisdictional requirement under section 8 (2). In paragraph 7 of her Affidavit in Answer, the Chief Magistrate (ag.) deposed:

> ***"Upon examining her affidavit in support of application, I held that the application merited the grant of interim relief in terms of the orders sought and I granted the interim orders which are the subject matter of the challenge herein."***

With regard to an occupation order in particular, the issue was not whether the application merited the grant of an occupation order but rather was whether the application merited such an order **as a matter of necessity** for the protection of the applicant therein. An essential requirement for the making of an occupation order is necessity. Section 8 (1) and (2) clearly distinguished an occupation order from other kinds of protection orders by mandating necessity as the jurisdictional basis for its issue.

After all, an occupation order which has the effect of depriving a respondent of his right to occupy his household residence is a serious denial of his right to the enjoyment of his household residence and must be based on a requirement of necessity – and Parliament has so ordained in section 8 (2). It does appear to this court that the Chief Magistrate overlooked the jurisdictional requirement of a finding of **necessity** for the grant of the occupational orders made against the respondent. She therefore fell into legal error by failing to consider not whether occupational orders were merited but rather whether such occupational orders were necessary for the protection of the applicant.

An examination of the occupation orders made by the Chief Magistrate (ag.) reveals that the right of the applicant to occupy the household residence to the exclusion of the respondent was granted by the court to the applicant without any limitation as to period of time specified or any term or condition imposed. The grant of such a right unlimited in terms of duration of time and not subject to any term or condition was ultra vires section 8 (1) read in conjunction with section 10. The occupation orders made by the Magistrate must be quashed for this reason also.

Section 6 (1) of the Domestic Violence Act 1996 provides:

"Subject to this Act, a protection order may

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.....

.....

(g) direct the respondent to make such contribution to the welfare of the person named in the order as the court thinks fit."

While under section 2 (p) of the Act,

"protection order" means an order made under section 5 and includes an interim order made under that section",

a protection order made under section 5 (1) must be distinguished from a protection order made under section 5 (3). This distinction must be made because a protection order made under section 5 (1) is premised on the court's satisfaction on a balance of probabilities that the respondent is guilty of conduct specified in section 5 (1) (a) to (d) while an interim protection order made under section 5 (3) is premised on the court's satisfaction that it is **necessary** to ensure the **safety** of the applicant or the person for whose benefit the order would be made. Thus, an interim protection order is premised on **necessity**for the purpose of ensuring safety. All interim protection orders must be based on a finding of necessity and relates to the **safety** of the applicant. Therefore, a protection order which, under section 6 (1) (g), directs the respondent to make such contribution to the **welfare** (in contradistinction to the **safety**) of the person named in the order cannot be made as part of an interim protection order made under section 5(3). However, it can be made as part of a final protection order.

Under section 5(2) of the Act:

> ***"The court, when making a protection order may impose one or more of the prohibitions or conditions specified in section 6.***

Section 5(3) provides:

> ***"Where the court is satisfied that it is necessary to ensure the safety of the applicant or the person for whose benefit the order would be made pending the hearing and determination of the application to make an interim protection order the court may make such an order whether or not the application has been served on the respondent."***

Even if is conceded that, on the definition of protection order as prescribed by section 2 (p), the court can impose one or more of the prohibition or conditions specified in section 6 in making an **interim** protection order, a direction that the respondent make contribution to the **welfare** of the person named in that order is not a prohibition or condition. Therefore, such a direction cannot form part of an interim protection order and can form part of only a final protection order under section 6 (1) (g).

This Court therefore holds the Chief Magistrate (ag.) acted ultra vires the provisions of the Domestic Violence Act 1996 when, on the 9th December 2010, she directed the respondent in those proceedings to pay to the applicant therein the weekly sum of $10,000 per week as contribution to the applicant's welfare. At that juncture of the

proceedings, the Chief Magistrate had made no finding of guilt of conduct, as mentioned in section 5 (1) (a) to (d), in the respondent therein. At that juncture, the Chief Magistrate was not making final protection order but was making an interim protective order.

For the purpose of clarity, it must be stated that the court's power to direct contribution to be made by the respondent to the **welfare** of the person mentioned in the protection order relates only to a final protective order and is made under section 6(1) (g) which stands unaffected by section 5 (2) and 5 (3) of the Act.

It cannot be doubted that the Chief Magistrate did have discretionary power under section 6 (1) (g) to direct the respondent in the proceedings (the applicant herein) to make such contribution to the welfare of the applicant. The word "may" relates to the court's discretion to make direction for the respondent to make contribution to the welfare of the person mentioned in the final protective order while the words "as the court thinks fit" relate to the nature and quantum of the contribution.

But a perusal of the Affidavit in support of the application for protective orders in those proceedings does not reveal any evidence at all on which the Chief Magistrate (ag.) could have exercised her statutory discretion to make such a direction. The burden was on the applicant in those proceedings to provide some evidential basis to enable a finding that the applicant was in need of such contribution from the respondent to her

welfare. There was no such evidence. The Chief Magistrate could not have exercised her statutory discretionary power *in vacuo*.

It is rather perplexing that the Magistrate did ask the respondent in those proceedings if he could make a weekly financial contribution of $15,000 to the applicant's welfare. The clear implication is that the Chief Magistrate (ag.) had come to the conclusion that the applicant was in need of contribution to her welfare without any evidence whatsoever to support such conclusion. The applicant in those proceedings had merely prayed for:

> ***"A Protection Order compelling the respondent to contribute toward my upkeep."***

without deposing to any facts or circumstances showing her needs and/or the respondent's means to make a contribution. The question of the applicant's needs had to be first determined before she could have come to the conclusion that the respondent should make a contribution to her welfare and such a determination had to be made on her affidavit evidence which did not speak to any such need. The exercise of the statutory discretionary power under section 6(1) (g) by the Chief Magistrate (ag.) was arbitrary and irrational. It was therefore ultra vires section 6 (1) (g) of the Act. That direction must therefore be quashed by Certiorari.

For the above reasons, the Orders or Rules nisi of Certiorari and Prohibition made on the 9th July 2013 are made absolute. The court so orders. There will be no order as to costs.

This court wishes to state that, despite the fact that these proceedings were belatedly instituted, the court allowed them to be proceeded with because of the **continuing** operation of orders of questionable legality to the **continuing** detriment of the applicant. The court also felt that it was salutary and in the public interest to analyse certain provisions of the Domestic Violence Act for future application since the manner of their application has been the subject of critical comments by members of the public and even by members of the legal profession.

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Ian N. Chang, C.C.H, S.C
Hon. Chief Justice (ag.)

Dated this 19th day of March, 2014