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A Critical Study of the Role of Magistrate under the Protection of Women from Domestic Violence Act, 2005

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ABSTRACT

A woman in the contemporary world is susceptible to discrimination and violence. Discrimination coupled with violence are behavioural pattern which albeit is unavoidable but can be controlled by stringent and deterrent measures. Though half of the world's population comprises of women, still they suffer, inter alia the turmoil of domestic violence. Merciless beatings, shoving, battering, hurling of abuses and other physical as well as sexual violence against women transmogrified into ubiquitous regular behavioural pattern in the society which hardly leave any remorseful impact on the society. In Kundula Bala Subrahmanayam v. State of Andhra Pradesh, the Supreme Court adverted its very concern about the women harassment and torture. It is held that, of late there had been an alarming increase in case relating to harassment, torture, abetment of suicide and dowry deaths of young innocent brides. Considering furore for protection of women and amid judicial activism, The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act) has been enacted. The ambit of the Act is very wide and the Courts of Magistracy are conferred with the pivotal task for safeguarding the interests of women victims of Domestic Violence. A very wide discretion is vested with the Magistrate to decide the cases under the Act. There are procedural lacunae under the Act which impedes the quick remedies under the Act.

Keywords: *Discrimination, Women, domestic violence, reliefs, Magistrate, discretion.*

I. INTRODUCTION

The Act aims to provide more effective protection of rights of women guaranteed under the Constitution of India especially for women who are victims of domestic violence of any kind occurring within the family and for the matter connected therewith and incidental thereto. The Act has been enacted to assure constitutional guarantees for women who are victims of domestic violence, more effectively. On the basis of mere glimpse of the objective of enactment, it can be unequivocally gathered that, the Act is a laudable piece of legislation. It is not a class

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legislation. It is well within the facet of Article 14, 15 and 21 of the Constitution of India. Before the advent of this Act, remedies available for women were scanty. Women either had to approach a Civil Court for a decree of divorce or initiate a criminal prosecution in a regular Criminal Court for the offence punishable under section 498A of IPC. In both these proceedings, aggrieved woman could not get immediate reliefs. In absence of legislation, for redressal of grievance and for spinning fulcrum of civil as well as domestic rights of women, they remain sufferers of injustice.

II. LEGAL FRAMEWORK OF THE ACT

The Act is divided into five chapters. Chapter one covers preliminary aspect. It takes into its sweep short title extent and commencement, the definition of various terms which have direct nexus with the kind of relief and the powers of Magistrate to intervene the application of victim for granting reliefs under the Act. Chapter second is for the definition of domestic violence. Chapter three deals with the powers and duties of protection officers, service providers and Magistrates. Chapter four deals with the procedure for obtaining order of reliefs. It is obviously the procedure which requires Magistrates to apply their mind for granting reliefs to the victims. Chapter five covers miscellaneous aspects. Section 28 of the Act vests wide discretion with Magistrate for adopting his own procedure to decide the case under the Act. One must not lose sight of the legal implication of the vestiture of discretion in the authority of Magistrate. The discretion is a tool in the hands of Court to implement the law effectively and speedily. If the situation demands the Court can initiate a strict measure provided under the BNSS and if needed it can resort to the procedure provided in Civil Procedure. There is no prohibition for the Court to adopt any of the procedure for implementing the scheme of the Act. In *Kamatchi v. Laxmi Narayan*,² it was observed the Hon'ble Supreme Court that the proceedings under the Act are essentially in the nature of civil proceedings. But the Hon'ble Bombay High Court differs its opinion in *Dhananjay Mohan Zombade v. Prachi*,³ on the pedestal that, the question of law before the Supreme Court was question of limitation and not the question of quashing the proceedings under section 482 of the Code. It held that, discretion is vested with the Court to lay down its own procedure but it does not affect application of general provisions of the Criminal procedure to the proceedings under the Act.

In this backdrop it is very necessary to have a glimpse of section 36 of the Act for drawing the import of the Act. It is provided in section 36 of the Act that; provisions of this Act are in

² AIR 2022 SC 2932.

³ 2023 SCC Online Bom 1607, (2023) 3 Bom CR(CrI) 954.

addition to and not in derogation of the provisions of any other law for the time being in force. The import of this section simply adds authority on the Court to adopt its own procedure as the situation demands. It is a manifestation of clear intention of legislature that, the Court can treat the provisions of this Act in addition to the other law and not in derogation to it. But in addition, it adds a slur to the drafting of this mandate on the aspect of ambiguity so crept in. It speaks of any other law. Any other law means which law? It is obviously not mentioned that, it means *Bhartiya Nagrik Suraksha Sanhita, 2023* or *Code of Civil Procedure, 1908* etc. When there is no clarity in the provision itself, can a Court *Suo moto* construe any other law means any law. This is a clear ambiguity in the drafting of section 36 of the Act. Nonetheless, in what manner discretion has to be exercised, is obscured in the Act. In the Indian legal parlance, the discretion has to be based on equity, justice and good conscience which must have a sound nexus with the due process of law. It must not be arbitrary and unjust discretion to unsettle the settled exposition of law of fairness, justice and equitable principles.

III. VIEWS ON THE ROLE OF MAGISTRATE UNDER THE ACT

Recently the Hon'ble Supreme Court in *We the Women of India v. Union of India and Ors.*,⁴ expressed its anguish due to slow pace of progress of the cases under the Act and observed that, the cases are moving like a regular criminal Court. It further observed that, the remedies under the Act were supposed to be quick remedy but the cases filed under the Act are dragged on. Considering this observation there is a consistent furore in the legal fraternity regarding lethargic conduct of cases under the Act. The Magistrate is supposed to give his verdict in the case registered under the Act within the period of sixty days.⁵ Hardly there is any case in the entire legal strata which has been promptly disposed of within the span of sixty days. There is a celebrated legal principle in the legal setup which says that, "*justice must not only be done but it must be seen to have been done*", equally it must not be forgotten that, in the legal arena, the Courts have to resort to the principle of due process of law which rests on the pedestal of fullest of opportunity of hearing to other side i.e., respondent. Conversely, there is another principle of law which too is celebrated in the legal fraternity i.e., "*justice hurried is justice buried*". Undoubtedly, it is too unexpectedly quick to expect the judgment within the span of sixty days. The Act unflinchingly contemplates of split reliefs at a stepwise interval. The reliefs engrafted under the Act are so intertwined that at the very first hearing an aggrieved person or victim prefers an interim relief for one or as many as all reliefs.⁶ While deciding application

⁴ W. P. (C) No. 1156 of 2021, order dated Nov. 4, 2024.

⁵ Sec. 12(5) of the Act.

⁶ Sec. 23 of the Act.

for any relief under the Act, the Magistrate has to apply his mind to over all facts and circumstance of the Case. Any cursory order overlooking the legal and precedential facets of the law would attract absurdity in the order. Therefore, Magistrate is obliged to pass a well-reasoned order in respect of any relief. His order shall match the spirit and essence of the Act which is deeply rooted to ensure assurance of preserving her constitutional rights of dejected women. Considering the depth of substantive reliefs and the claims under the Act, the parliament shall think to confer authority with the Magistrate to decide the claim within a reasonable period instead of sixty days so that, the matter would not be dragged for so many days and equally it would not be decided in undue haste.

IV. CARE AND CAUTION TO BE EXERCISED BY MAGISTRATE IN GRANTING RELIEFS AND PASSING ORDERS

A plethora of reliefs can be granted to the victim of domestic violence under the one umbrella under the schematic outline of the Act. The Hon'ble Supreme Court in *V. D. Bhanot v. Savita Bhanot*,⁷ observed that, the Magistrate shall adopt proactive approach by taking into consideration overall conduct of the parties. The Act contemplates that, in order to assess the domestic violence of the parties, Magistrate shall consider act, omission, commission or conduct of the parties.⁸ It further contemplates that, in order to constitute domestic violence, overall facts and circumstances shall be taken into consideration.⁹ One of the crucial aspects which a Magistrate has to consider is to protect an aggrieved woman who was subjected to domestic violence. In order to seek relief of protection inter alia other reliefs, an aggrieved woman or any person on her behalf shall file an application before the Court of Magistrate. Such an application may be filed by protection officer appointed under the Act. An application may be clamped with the domestic incident report at the behest of protection officer.¹⁰ Albeit it is not mandatory, having the domestic report from protection officer may add a documentary proof showing prima facie facts of domestic violence. The application is expected to be in a format as provided in the rules but there are no hard and fast binding rules to expect a rigid application akin to rule. An applicant may tender her application in the form of plaint in the civil suit.

There is a scope of departure from the rigidity of pedantic formality of pleading in formats. But at the same time, it is noticed that, pleadings run into pages making it a verbose and loquacious

⁷ (2012) 3 SCC 183.

⁸ Sec. 3 of the Act.

⁹ Explanation II of Sec. 3 of the Act.

¹⁰ Sec. 12 (1) of the Act.

pleadings containing blabbering contents. In such a situation it is very difficult to cull out a perfect relief. The draft of pleading more often than not is prepared by advocates which leaves a greater chance for embellishment in the pleadings. It is noticed at the trials that, when an aggrieved person enters in a witness box for deposition does not withstand her pleadings in the cross examination and gets fumbled by feigning ignorance as to what had she pleaded. This is a confounding and tricky stage at the trial wherein the Magistrate has to step in for controlling the irrelevant questions in the cross examination when an aggrieved person herself becomes averse to her own case. Obviously, a Magistrate is not a mute spectator, he has to play an active role to extract truth. But the need of an hour is that, there is a need to have specific mandate regarding rules of pleading in the context of what shall it contain and what shall be desisted from being enumerated. When Magistrate propels to pass a protection order, it has to wade into explicit details to assess pleadings in the application, documents and affidavits. If it is satisfied that, there is sufficient material to pass an order restraining domestic violence against respondent, it can pass such an order like an injunctive order.¹¹ A note of caution is needed to be exercised by Magistrate in this context because the repercussion of order is so vast that, protection officer reaches the residence of respondent to convey such order with the help of police officer. Therefore, a greater caution is needed to be exercised because respondent does mean husband and his relatives.

So far as other reliefs are concerned, prominently reliefs of residence order,¹² monetary reliefs,¹³ custody orders,¹⁴ compensation orders¹⁵ are sought under the Act. In *Satish Chandar Ahuja vs. Sneha Ahuja*¹⁶ the hon'ble Supreme Court has observed that, "the definition of shared household given in section 2(s) of the Act cannot be read to mean that, shared household which is household of the joint family of which husband is a member or in which husband of the aggrieved person has a share". Even if the right to residence is granted, in such a situation there is always a threat to the life and dignity of the woman. In this context Magistrate has to adopt a very practical approach and shall pass orders in the best interest of aggrieved women. An order for restricting alienation of property of parents of husband shall not be passed without going into details of ownership and rights of husband in such property. Parents right are protected under the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007*, the Magistrate while granting residence order or order in parity of granting accommodation in the shared

¹¹ Sec. 18 of the Act.

¹² Sec. 19 of the Act.

¹³ Sec. 20 of the Act.

¹⁴ Sec. 21 of the Act.

¹⁵ Sec. 22 of the Act.

¹⁶ (2021) 1 SCC 414.

household, shall consider rights of parents of husband of aggrieved person. Magistrate shall not evict parents because they are protected under the abovesaid Act.

It is need of an hour that; these offshoots shall be addressed by parliament in the Act by way of amendment. It is common practice of advocacy that, while drafting the petition of reliefs under the Act, the quantum of monetary reliefs is exorbitantly drafted without any reference to any proof of earning capacity. Magistrate is compelled to pass order for heavy interim monetary reliefs or maintenance. Once the maintenance is ordered, the matter gets dragged on for several years for recovery of interim maintenance. The best option is to grant lumpsum maintenance for time being and direct the parties to lead the evidence. Magistrate can alter, revoke or modify the relief if the situation demands.¹⁷ But advocates approach the appellate court and obtain stay order. Again, the matter gets dragged on for years in the name of stayed matter.¹⁸ Similarly, while deciding the application for custody of children, it must be borne in mind that it is always a temporary custody or visitation rights. In what manner such an application has to be decided is not dealt with under the Act. The compensation claim in the application has to be decided with utmost fairness and must be based on actual loss, injuries, distress, torture, damages etc. It is needless to say that, the claims of compensation are also very exorbitant. Magistrate has to be very proactive and equally careful in passing orders and granting reliefs and shall always introspect with circumspection that, the order is not being misused.

V. CONCLUSION

In *Chinnamarkathian alias Muthu Gounder v. Ayyavoo alias Periana Counder*¹⁹ “it was observed by the Hon’ble Supreme Court that, it is a well settled canon of construction of statute that, in construing the provisions of such enactments, the Court should adopt that construction which advances, fulfils and furthers the objects of the Act rather than the one which would defeat the same and render the protection illusory”. The progress of the case before gets thwarted mainly due to lack of proper procedural module under the Act. Section 28(1) of the Act at once provide that, the reliefs under the Act shall be governed through the procedure under the criminal procedure. But under section 28(2) of the Act, it says that Magistrate can adopt his own procedure to dispose of the application under section 12 of the Act. There is obviously a procedural quagmire under the Act. It is limpid from the precedents that, the Act is quasi civil and quasi criminal. But this terminology is not mentioned under the Act. Therefore, Magistrate has to be at his peril while passing orders so that, the object and essence of the Act is not

¹⁷ Se. 25(2) of the Act.

¹⁸ Sec. 29 of the Act.

¹⁹ (1982) 1 SCC 159

defeated. It is high time to have a simplified standard operating procedure for Magistrates for disposing of case by granting reliefs suitably to the need of situation. Equally, High Courts may establish special court in every district as fast track court for speedy disposal of cases.
