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Procedural Conundrum Regarding Powers of Magistrate Under the Protection of Women from Domestic Violence Act, 2005, A Critical Overview

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ABSTRACT

A Judicial Magistrate First Class is a carte blanche authority under the Protection of Women from Domestic Violence, Act (herein for short, 'the Act'). He being vested with greatest discretion for deciding the fate of application of an aggrieved person, is vested with unbridled powers to deal with application of such aggrieved person so that, justice can be manifestly achieved. It is ubiquitously conceded by luminaries of legal fraternity throughout India that, a Magistrate can adopt his own procedure while deciding application under the Act especially the main application on the basis of which reliefs are mainly structured. Similarly, he is empowered to adopt his own procedure in deciding ex parte reliefs. The Act conversely incorporates a mandate which controls the discretion of Magistrate by unfolding that, the powers of Magistrate shall be governed by the procedure contemplated under the Criminal Procedure which is now called as Bhartiya Nagrik Suraksha Sanhita, 2023. Considering the legal departure of one provision by generating conflict with another provision, a conflict is emerged in the Act. The Act is a beneficial and remedial statute. The conflict in the provisions regarding procedure attracts a harmonious construction of statute but the pendulum still swings over the head of Magistrate regarding the nature of powers either civil or criminal or a combination of both i.e quasi civil and quasi criminal procedure. Therefore, there is a legal conundrum of procedure under the Act which requires immediate rectification at the hands of parliament.

Keywords: Procedure, Civil, Criminal, quasi civil and quasi criminal, Magistrate, discretion.

I. INTRODUCTION

There is no gainsaying in extraction of inference from the spirit and essence of the Act that, it is a piece of social welfare legislation and is deeply intertwined in the legal fabric of beneficial and remedial statute. Every statute either beneficial or remedial, has to lay down a standard

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procedure by resorting to which an object sought under it could be achieved without any impediment. So far as the nature of Act is concerned, it is not only a substantive legislation but also a procedural law which lays down a lopsided procedural formality for obtaining remedies. A Magistrate being Judicial Magistrate First Class is enthroned *numero uno* under the Act through whom Judicial ship of justice sails along for the quest of justice for dejected women who are the sufferers of turmoil in the aftermath of domestic violence.

II. VIEWS ON PROCEDURAL CONUNDRUM OF POWERS OF MAGISTRATE UNDER THE ACT

The Act, in the context of procedure, deals with the procedural module with a saving clause as to the procedure otherwise provided under this Act and contemplates that, all the proceedings under this Act and the offence shall be governed by the provisions of criminal procedure.² There is no such otherwise procedure dealt with under the Act barring non obstante clause conferring the Court to lay down its own procedure for deciding main application and for deciding *ex parte* reliefs at the very initial stage of proceeding.³ The case commences before a Court of Magistrate when application being registered and assigned to it for adjudication. The main application in in the form of plaint which is either presented in the Court or is presented at the office of protection officer.⁴ If it is presented at the office of protection officer, he has to investigate the case and shall send it with the domestic incident report to the Court. This main application consists not only of the relief with the cumulative prayer which is in the combination of all reliefs but also, it is mostly appended with the interim reliefs or *ex parte* reliefs as contemplated under section 23 of the Act. The use of word ‘shall’ under section 28(1) of the Act, implies a mandatory nature of provision which leaves no leeway for laying hands in the area of discretion. It must be borne in mind that, the word ‘shall’ more often than not is interpreted to be inclusive of departure from narrow pedantic lines of statute when there is a need to extend benefits under the law to the stakeholders i.e. litigants. It must also not be forgotten that, the word ‘may’ in the spirit of statute would render interpretation as mandatory instead of it being a directory term. It is the duty of Court to ascertain the *Sentencia Legis* by reading the statute as a whole and not in isolation. Undoubtedly, the word ‘shall’ used under the abovesaid section is in the context of procedure. It is not with regard to relief rather it is with regard to procedure. It is a settled exposition of law that, when statute provides something shall be done in a particular manner, it shall be done in that manner only and in no other manner. Other modes of performances are

² Sec. 28(1) of the Act.

³ Sec. 28(2) of the Act.

⁴ Sec. 12 of the Act/

necessarily forbidden.⁵ Now considering this rule of law so declared in the form of obiter dictum and it being not overturned, the proceedings under the Act necessarily shall be conducted as per the Criminal procedure.⁶ It must be further borne in mind that, this mandate would draw an inference about nature of proceeding which is basically to be understood as criminal proceeding. The statement of object of Act would confer Constitutional benefits which are something more than Constitutional rights guaranteed under Part III of the Constitution of India. The Constitutional rights are basically civil rights. It is beyond an understanding of any ordinary prudent man that a proceeding which is basically for adjudication of civil rights are to be conducted as per criminal legal procedure provided under BNSS.⁷ There are various facets of criminal trial. Which facet of criminal trial shall be applicable for proceeding under the Act is not covered by the statute? So far as discretion part is concerned, section 28(2) of the Act implicitly holds the field but that too do not vest discretion with Magistrate, it is with Court. Another grotesque anomaly emerges under section 28(2) of the Act that, it does not explicitly use the word 'discretion' nor does it use the term 'Magistrate'. It uses the word 'Court'. Ironically, the term 'Court' is not defined under the Act. When the term 'Court' is used by the Act, it leaves a wider amplitude for interpretation. It may cover Civil Court, Criminal Court, Family Court.⁸ Sessions Court, High Court and Supreme Court would also get covered impliedly because they do come under the definition of Court. In absence of any word as 'Magistrate' and without any definition of 'Court' under the Act, whether Magistrate shall consider that the discretion is exquisitely vested in him. On this aspect there is lack of clarity in the Act. Therefore, there is a procedural conundrum.

The Act echoes about the role of Magistrate in the entire statutory setup of the Act. It prominently provides that, an application for any relief shall be made to the Magistrate within the Jurisdiction of the aggrieved person.⁹ Likewise, every mandate would require Magistrate to step in for passing order but it is not dealt with under the Act as to how the discretion has to be exercised. In *Kunapareddy v. Kunapareddy Suwarna Kumari*¹⁰ the hon'ble Supreme Court observed that, the nature of proceeding for the relief of protection order and monetary relief is civil but governed as per the procedure under the Code of Criminal Procedure within the facets of section 28 of the Act. It is a pristine principle of interpretation of statute that, 'a special law

⁵ *Nazir Ahmed v. King Emperor*, 1936 SCC Online PC 41, *Union Of India v. Mahendra Singh*, MANU/SC/0919/2022

⁶ *Bhartiya Nagrik Suraksha Sanhita*, 2023 (for short BNSS)

⁷ *Ibid.*

⁸ Sec. 26 of the Act, Reliefs in other proceedings and proceedings

⁹ *Ibid.* *Supra* Note 04.

¹⁰ (2016) ALLMR (Cri) 3143

overrides general law'. BNSS contains a special saving clause which saves the special statute conferring special jurisdiction on any forum or in respect of proceeding.¹¹ Similar saving clause is provided in the Code of Civil Procedure. (For short, CPC).¹² The Act also contains a provision akin to the saving clause which provides that the Act shall be in addition to, and not in derogation of any other law, for the time being in force.¹³ This simply indicates that, the Act is an intermixture of civil as well as criminal law but there is obvious conundrum of procedure in the context of discretion of Magistrate. It can be assumed that, the Act is quasi civil and quasi criminal statute.

III. AN OVERVIEW ON THE PROCEDURAL ASPECTS UNDER THE ACT

When an application reaches the Magistrate, he has to apply his mind to the facts and documentary material appended with the record of case and shall proceed to issue notice to respondents. The procedure of passing an order of issuance of notice is not enumerated under the Act. It is a promising task albeit it does not require a detailed order akin to the order of issuance of process under BNSS because respondents are not treated at par with accused in the criminal trial. If there is no domestic incident report filed, Magistrate may direct the protection officer within his jurisdiction to submit the domestic incident report for assessing a ground reality of domestic violence. It is primary function of Magistrate to satisfy himself regarding commission of domestic violence at the prima facie stage. The provisions as to issuance of notices or summons to respondents are not dealt with under the Act. Nonetheless, Magistrate may have an option of issuance of summons by adopting the procedure of issuance of summons to defendants as contemplated under CPC.¹⁴ Magistrate must allow electronic mode of service and shall not advert his reluctance for issuance of summons by means of electronic modes viz., WhatsApp, email etc.¹⁵ Proper care shall be taken for preserving hash value of electronically downloaded copy of email or service on WhatsApp. Applicant shall in addition be directed to submit her affidavit for justification regarding her personal service of summons by electronic means with additional certificate of authenticity of such service.¹⁶ The next stage is of the appearance of respondents. On their appearance, they may file their say. They not only file their say but also file say on interim application submitted by aggrieved person for interim relief. If respondents do not appear despite service, Magistrate may pass an order for proceeding *ex parte*

¹¹ Sec. 5 of BNSS, Saving.

¹² Sec. 4 of CPC, Savings.

¹³ Sec. 36 of the Act, Act not in derogation of any other law.

¹⁴ Order 5 of CPC.

¹⁵ Order 5(9) CPC.

¹⁶ Sec. 63 of Bhartiya Sakshya Adhiniyam, 2023. (BSA)

against them. The crucial stage at the proceeding is the stage of order on interim application.¹⁷ The provision for granting temporary injunction is dealt with under the CPC.¹⁸ But it is related to the protection of suit property from damage, invasion or wastage. So far as interim relief under the Act is concerned it is not in relation to the property in dispute. It has direct nexus with the human conduct of dos and don'ts. It is a settled exposition of law at civil jurisprudence that, the plaintiff has to satisfy tripod test in order to get the relief of temporary injunction. The tripod test is amenable to the three principles of equity i.e. *prima facie* case, balance of convenience and the aspect of irreparable injury. If plaintiff successfully makes out his case under these three principles which are celebrated principles called as tripod test, he will be entitled for temporary injunction restraining obstruction, alienation or otherwise as directed by the Court. But the Act meekly deals with the interim relief. The drafting of section 23 of the Act is so clumsy that, it has completely left the burden on Magistrate for passing order as he deems just and proper. At least this mandate would have carved out some scope for orders based on prima facie proof of domestic violence. Absolutely discretion must be engrafted in the law, but always it must come at the cost of checks and balances meaning thereby it must be a controlled discretion. If discretion is uncontrolled by any legislative wisdom, any order passed without resorting to the due principles of law would be addressed to as absurd order. It would entail revisions and would be amenable to the challenge by way of writ. It is a matter of concern that, the unbridled discretion vested in the authority of Magistrate for passing order without satisfaction as to prima facie case, balance of convenience and irreparable injury aspects entail ramifications in the outcome of travesty. The provision of affording interim relief needs a clever and wise drafting as it has become amorphous shaped mandate. There is another misconception of thought i.e. to have an application for interim relief on record for necessary orders. The provision does not specify any prerequisite of having application for interim relief. Nevertheless, the application with affidavit is needed when the relief is sought at *ex parte* stage.¹⁹

Another anomaly in the Act is that it lacks any provision for framing of issues. The proceeding under the Act is civil nature proceeding. When any special law is accepted to be of the nature of any general law. Such a special law must be in symmetry with the broader principles of the rules governing the conduct of cases. Now when the Act is acquiesced to be a branch of civil law, it must at least contain bare minimum provisions in conformity with the civil jurisprudence. Expectation about an Act to be civil nature legislation without having any provision in

¹⁷ Sec. 23 of the Act. Power to grant Interim and *ex parte* order.

¹⁸ Order XXXIX Rule 1 of CPC, Temporary injunctions and Interlocutory orders.

¹⁹ Sec 23(2) of the Act. *ibid*

conformity of civil law would make the Act prone to insipidity. There are hardly any court which frame issues in a case under the Act because of one or many reasons. One of the reasons is that, there is lack of provision and another is not all courts are well versed with case laws. But then, to know the law is the duty of Magistrate and to cope up with the difficulties is his wisdom. The need of having issues on record is to make the parties aware of the burden of proof which they are going to face at the trial and the sense in which they are supposed to discharge their burden of proof. The Hon'ble Bombay High Court in *Jovita Olga Ignesia v. Rajan Maria*,²⁰ observed, "it would be desirable that the court after hearing both the parties frame issues on the basis of the relief sought by the petitioner so that each can meet the case of the other and avoid such orders of remand. If this procedure is followed there would be no question of any of the relief unnoticed and undecided".

The manner in which evidence has to be conducted under the Act is not contemplated in it. If the evidence is desired to be conducted as per the criminal procedure, there is no provision incorporated to permit evidence by way of affidavit yet affidavit in lieu of evidence is taken on record almost in every *lis*. The BNSS deals with the provision regarding formal character evidence by way of affidavit.²¹ Such formal character evidence may be considered to be the evidence of medical officer or investigation officer in a pure criminal case. The evidence of aggrieved person under the Act cannot be regarded as a pure criminal case requiring formal character evidence. The evidence under the Act is always a typical evidence based on merits of case. Taking evidence on affidavit cannot be denied but it must not be forgotten that, such an affidavit of evidence would be always in the form of replication of entire pleadings or a cut paste of pleadings rendering it to be a stereotype formality. There is nothing wrong to suggest that, a Magistrate in his wisdom shall with consent of parties pass an order on the order sheet and thereby shall navigate the channel of approach i.e. to conduct a case either as per the procedure under the facet of quasi civil or quasi criminal procedure. This would curtail the time of court as well as litigants.

The time frame or limitation in which the application shall be filed and condonation of delay based on sufficient cause in appropriate cases is not dealt with under the Act. It has been observed that due to lack of provision as to limitation in filing of application a very stale and ineffective claims would be set up by generating cause of action. In *Kamatchi v. Laxmi Narayan*,²² it was observed the Hon'ble Supreme Court that the aspect of limitation in not

²⁰ 2011 Cri.L.J. 754 (Bom)

²¹ Sec. 332 of BNSS. Evidence of formal character on affidavit.

²² AIR 2022 SC 2932.

covered but the Magistrate shall consider the question of limitation with facts and circumstance of the case and can consider whether the wrong is continuing one. On this pedestal of the rule, if any claim say for example of the domestic violence of ten years ago is brought before the Court, Magistrate has to consider it as a mixed question of law and fact and shall see whether it tantamount to a continuing wrong. Peak of angst surfaces whether the application can be rejected like rejection of plaint if it is outside the periphery of limitation?²³ The answer is but obvious 'No' because, there is absolutely no provision for limitation in the entire Act. If an aggrieved person comes to a court with her grievance that, she faced domestic violence fifty years ago, the court cannot say no to her grievance, perhaps the court will have to consider retrospective application of the Act with all facts and circumstances and shall consider whether the wrong is continuing. This legal quagmire is an exemplar of jejune drafting. It greatly requires an overhaul or at least a rejig to cope up legal glitches.

The standard of proof at the trial of civil case is based on preponderance of probable evidence. The standard of expectation of proof at civil side is in complete contrast with the standard of proof at the criminal trial where the strict proof i.e. evidence beyond the shadow of reasonable doubts is expected. These two laws hold field in two different sides. But since the Act is a special law overrides the general laws. The provision as to standard of proof is completely obscured under the Act. The act of domestic violence is akin to offence and is amenable to attract penal consequences. Such an offending act requires a proof in *stricto sensu*. Any act of beating, shoving and battering requires exact manner in which the events happened. It is not a mere word game of mouth. These desultory aspects in the Act must be cured by proper drafting.

IV. CONCLUSION

Every order passed by Magistrate attract ramifications and repercussion for other side. Order of Magistrate restraining domestic violence and its execution by protection officer and police officer would assure that there is a law and order in the society. To keep the baton of justice high in the society, there is a need to have proper legislations to avoid 'Sisyphean' trials. There is a celebrated legal maxim *lex injusta non est lex* which means an unjust law is no law at all. It cannot be said that, the Act is unjust law but it can be well inferred that, the Act is dressed unjustly without paving proper way out for justice. In legal parlance, the term 'justice' is what is just according to law and not according to whims and caprices of Judges. Parliament is a trend setter. It shall make suitable amendments defining discretion of Magistrate at various situations and shall define procedure because due process and procedure established by law is the only

²³ Order VII Rule 11(d) CPC rejection of plaint for the want of jurisdiction.

aspect by which behavioural patterns of subjects can be regulated to bring laurels for all and sundry.
