

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.2938 OF 2017

Aniket Subhash Tupe

...Petitioner

Versus

1. Mrs. Piyusha Aniket Tupe

...Respondents

2. The State of Maharashtra

.....

Mr. Abhijit Sarawate for the Petitioner.

Mr. Abhijeet Ashok Desai for the Respondent No.1.

Mr. Y.M. Nakhwa, APP for the Respondent No.2-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON: 13/11/2017

JUDGMENT PRONOUNCED ON:22/3/2018

JUDGMENT:-

Rule. Respondents waive service. By consent, Rule is made returnable forthwith and the petition is taken up for hearing and final disposal.

2. A short question raised in this petition is whether in an application filed under Section 12 of the Protection of Women from the Domestic Violence Act, 2005 (hereinafter referred to as 'DV Act'), the Applicant can be permitted to file affidavit in evidence.

3. The brief facts leading to this Petition are as under:-

The Respondent was married to the Petitioner on 15.2.2013. The matrimonial dispute between the parties led to the Petitioner filing a Divorce Petition being P.A. No.1223 of 2015, which is pending before the Family Court. The Respondent-wife has also filed an application under Section 12 of the DV Act being M.A. No.717 of 2015 before the learned J.M.F.C., Cantonment, Pune. The Petitioner filed his reply to the said application under Section 12 of the DV Act and said proceedings were fixed for evidence on 29.11.2016.

4. The Petitioner-husband filed an application dated 7.11.2016 contending that the proceedings under the DV Act are to be dealt with in the manner laid down under Section 125 of the Cr.P.C. The Petitioner therefore, claimed that the Respondent-wife is not entitled to file an affidavit-in-evidence and sought direction to call upon the Respondent-wife to step into the witness box and adduce evidence.

5. The learned Magistrate, upon hearing the respective parties held that Section 28(2) of the DV Act permits the Court to lay down its own procedure for disposal of an application under Section 12 of the

DV Act. The learned Magistrate further held that considering the object of the Act and particularly the time frame within which such applications are required to be disposed of, it is permissible to conduct the examination-in-chief of the Respondent -wife on an affidavit. Based on the aforesaid findings the learned Magistrate dismissed the application filed by the Petitioner. Hence, this Petition.

6. Mr. Abhijeet Saravate, the learned counsel for the Petitioner submitted that in view of Section 28(1) r/w Sub Rule 5 of Rule 6 of the DV Rules, 2006 evidence in application under Section 12 is required to be recorded in presence of the Respondent in a manner prescribed for summons case. He contends that the Act does not contemplate filing of affidavit-in-evidence and hence the learned Magistrate was not justified in permitting the Respondent to file her affidavit-in-evidence. In support of this contention, he has relied upon decisions of this Court in *Anil Ambashankar Joshi Vs. Mrs. Reena Anil Joshi in Writ Petition 4243 of 2015* and *Sachin Vs. Sushma 2015 (0) ALL MR (Cri) 3128*. He has also relied upon the decision of the Madhya Pradesh High Court in *Madhusudan Bhardwaj and Ors. Vs. Mamta Bhardwaj 2009 (2) Crimes 284*.

7. Mr. Abhijeet Desai, the learned Counsel for the Respondent No.1 submits that Sub Section 2 of Section 28 gives wide powers to the Court to lay down its own procedure for disposal of applications under Section 12 of the Domestic Violence Act. He contends that Sub Section 5 of Section 12 of the DV Act, mandates disposal of the application under Section 12 within a time bound frame of 60 days. He therefore, contends that to achieve this object the learned Magistrate can take recourse to Sub Section 2 of Section 28 of the DV Act and thus permit the Petitioner to file affidavit-in-evidence. He further submits that such procedure does not contravene the procedure prescribed either under Sub Section 1 of Section 28 of the DV Act or Sub Rule 5 of Rule 6 thereof. In support of this contention he has relied upon decisions of Madras High Court in *Laxman Vs. Sangeetha (2009) SCC OnLine Mad 1626*, the Karnataka High Court in *M/s. K. Manjunath Reddy Vs. Smt. Latha A.C in Criminal Petition No. 1726 of 2016* and decision of Patna High Court in *Manish Kumar Soni & Ors. Vs. State of Bihar and Anr. II(2016) DMC 207 (pat.)*

8. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties. In order to appreciate the contentions raised on behalf of the respective parties it

is necessary to consider the object of the DV Act and the provisions relevant to decide the issue raised in the Petition.

9. It may be mentioned that the DV Act came into force w.e.f. 26th October, 2006. As can be seen from clause 3 of the statements of the objects and reasons, this Act was enacted keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which intended to protect the woman from being victim of domestic violence and to prevent the occurrence of domestic violence in the society. The preamble of the Act states that this Act has been enacted to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith and incidental thereto. The provisions of the Act came up for consideration before the Supreme Court in *Hiral P. Harsora and others vs. Kusum Narottamdas Harsora and Others* , (2016) 10 SCC 165. In the said judgment, while discussing the provisions of the Act, the Apex Court held as under:-

"14. A cursory reading of the Statement of Objects and Reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal,

civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence.

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16. *What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The Preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious. ..."*

10. Now coming to the relevant provisions of the statute, Chapter IV of the DV Act prescribes procedure for obtaining orders of reliefs which are in the form of :-

- 1) Protection order under Section 18,
- 2) Residence order under Section 19
- 3) Monetary relief under Section 20,
- 4) Custody order under Section 21
- 5) Compensation order under Section 22
- 6) Interim and ex parte order under Section 23

11. Section 12 of the Act stipulates filing of an application for seeking one or more reliefs under the DV Act either by the aggrieved

person or by the protection officer or any person on behalf of the aggrieved person. Sub section 4 of Section 12 of the DV Act mandates the Magistrate to fix the first date of hearing, ordinarily not beyond three days from the receipt of the application by the Court. Whereas Sub Section 5 of Section 12 states that the Magistrate shall endeavour to dispose of every such application within a period of sixty days from the date of its first hearing.

12. Section 13 of the DV Act also casts a duty on the protection officer to serve the notice on the Respondent or any other person, as directed, within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

13. Section 28 of the DV Act prescribes the procedure to be followed by the Magistrate. Sub Section 1 of Section 28 provides that all proceedings under Sections 12,18,19,20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure. Sub Section (2) of Section 28 of the DV Act provides that nothing in Sub Section (1) shall prevent the Court from laying down its own procedure for disposal of an application

under Section 12 or under Sub Section 2 of Section 23 of the DV Act.

14. Sub Rule (5) of Rule 6 of Domestic Violence Rules, 2006 provides that the application under Section 12 shall be dealt with and the orders enforced in the same manner as laid down under Section 125 of the Code of Criminal Procedure, 1973.

15. At this stage, it would also be advantageous to refer to Sub Section (2) of Section 126 Cr.P.C. which prescribes procedure for dealing with applications under Section 125. This provision states that all evidence in proceedings under Section 125 of Cr.P.C. shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed in summons case.

16. A plain reading of these provisions clearly indicates that the DV Act provides effective protection to women, who are victims of domestic violence. The Act prescribes mandatory time limit for fixing the date of hearing, service of notice and disposal of the application with an intent and object of providing expeditious and speedy relief to

the aggrieved women.

17. It is to be noted that though the reliefs which can be granted under Section 17 to 22 are civil in nature, Sub Section (1) of Section 28 mandates that such proceedings shall be governed by the provisions of the Criminal Procedure Code. The Act or the Rules do not contain any specific provision as regards mode of receiving or recording evidence. Nevertheless, Rule 6(5) stipulates that the application under Section shall be dealt with and the orders enforced in the same manner laid down under Section 125 of Cr.P.C., 1973. In *Anil Ambashankar Joshi* (supra) this Court has held that in an application under Section 125 of Cr.P.C. the provisions of order XVIII Rule 4 of CPC are not applicable. It is further held that in terms of Section 126 of Cr.P.C. the evidence in proceeding under Section 125 of Cr.P.C. has to be recorded in the manner prescribed for a summons case.

18. It is pertinent to note that the procedure to deal with applications under Section 125 is prescribed in Section 126 of Cr.P.C. Sub Section (2) of Section 126 provides that evidence in proceedings under Section 125 shall be taken in presence of the person against

whom the order of payment of maintenance is proposed to be made. The evidence in such matters is to be recorded in a manner prescribed for summons case. There is no dispute about the proposition that in the absence of any other enabling provision akin to Section 28(2) of the D.V. Act, the Magistrate cannot give a go by to the procedure contemplated in Section 126(2) of Cr.P.C. and permit filing of affidavit-in-evidence.

19. The question in the instant case is whether section 28(2) of the D.V. Act enables the court to permit the parties to file affidavit-in-evidence in the proceedings filed under Sec. 12 of Domestic Violence Act. A cumulative reading of Sub Section (1) of Section 28 r/w. Sub Rule (5) of Rule 6 indicates that in deciding the application under Section 12, the Court has to follow the procedure prescribed under Section 126 of the Cr.P.C. and thus, record evidence in presence of the parties. It is however to be noted that Sub Section (2) of Section 28 clearly provides that-*"Nothing in Sub Section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under Sub Section (2) of Section 23"*. The opening words of Sub Section (2) of Section 28 viz.-*"Nothing in Sub Section (1) shall prevent the Court"* clearly indicate that notwithstanding the procedure

prescribed in 28(1) r/w. Rule 6(5) the Court is empowered to lay down its own procedure in deciding the application under Section 12 or 23(2) of the D.V.Act.

20. Now coming to the decisions relied upon by the learned counsel for the Petitioner, in *Sachin V/s. Sushma 2014(4) Mh.L.J. Cri. 290*, the learned Magistrate taking recourse to Section 28(2) of the DV Act had issued NBW for recovery of the amount towards interim maintenance. While setting aside the said order this Court had observed that the Magistrate had to follow the procedure laid down in Cr.P.C. for recovery of maintenance. In this context it was held that Sub Section 2 of Section 28 can be pressed into service only when there is no provision available for implementing a particular order passed under the Domestic Violence Act. The issue of filing of affidavit-in-evidence by invoking provisions of Section 28(2) of the D.V. Act did not fall for consideration in the case of *Sachin* (supra) This decision would therefore not be applicable to decide the controversy involved in this petition.

21. Relying upon the decision of the Madhya Pradesh High Court in *Madhusudan Bhardwaj* (supra) the learned counsel for the

Petitioner submits that the recording of evidence in application under Section 12 has to be in conformity with the procedure prescribed in Rule 6(5) of Domestic Violence Rules, 2006. It may be mentioned that the facts in case of **Madhusudan Bhardwaj** (supra) are distinguishable. In the said case no opportunity was given to the parties to lead evidence and the application under Section 12 was allowed mainly on the basis of allegations stated in the application and upon hearing the oral arguments. In this circumstance, it was held that the Magistrate was required to comply with the provisions of Section 28(1) and Sub Rule (5) of Rule 6 and follow the procedure under Section 126 of Cr.P.C. in disposing of the application under Section 12 of the Act.

22. Referring to the observations in paragraph 9(A) in **Madhusudan Bhardwaj** (supra) the learned counsel for the Petitioner submits that the procedure adopted by the learned Magistrate is contrary to the provisions under Section 28(1) r/w Rule 6(5) of the DV Act. Paragraph 9(A) of the decision supra reads thus:-

"It is also true, that sub-section (2) of section 28 provides, that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under section 12 of the Act. By cumulative

reading of section 28 sub-sections (1) and (2) of the Act and Rule 6(5) of the Rules, it appears that sub-section (2) of section 28 of the Act appears to have been enacted looking to the peculiar nature of the Act and also the existence of aforementioned ambiguity with regard to the provision of section 28(1) of the Act, but now that ambiguity has been removed by the Central Government under its powers given by section 37 of the Act."

23. As stated earlier, Sub Rule 2 of Section 28 enables the Court to lay down its own procedure in deciding the applications under Section 12 or 23 of the DV Act. The rules framed in exercise of powers under Section 37 of the Act cannot override this substantive provision under the Act. As regards interpretation of the statute or any provision, in *Visitor & Ors vs K.S. Misra [2007(8) SCC 593 the Apex Court has held that:-*

" It is well-settled principle of interpretation of the statute that it is incumbent upon the court to avoid a construction, if reasonably permissible on the language, which will render a part of the statute devoid of any meaning or application. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intent is that every part of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if

they can have appropriate application in circumstances conceivably within the contemplation of the statute. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., p. 68.)"

24. Reference can also be made to the decision in ***Balwant Singh (Dead) Vs. Jagdish Singh and Ors. (2010) 8 SCC 685***, wherein the Apex Court has elucidated the approach to be adopted by a Court in such cases and held as under:

"It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious."

25. It is thus well settled that when the language of the provision is plain, clear and unambiguous the Courts should not extend or limit the scope of Section but read the Section as it is and interpret in a manner which makes the provision workable and not redundant or otiose. The interpretation, which renders the operation of the provision otiose, must be eschewed and endeavour should be to give an interpretation which would be consistent with the provisions of the Act

and would effectuate the intention of the legislature in inserting the said provision.

26. These principles have to be borne in mind while interpreting the provision under section 28 (2) D.V.Act. As stated earlier the D.V.Act is a beneficial piece of social welfare legislation aimed at providing to the victims of domestic violence speedy reliefs, which are civil in nature. Though, unlike Negotiable Instrument Act, there is no specific provision in the D.V. Act to give evidence on affidavit, section 28(2) with words plain, simple and unambiguous gives flexibility to the Court to depart from the procedure prescribed under Section (1) of Section 28 and to devise its own procedure in deciding application under Section 12 or 23(2) of the Act. This enabling provision, which intends to achieve the object of the Act, would over-ride sub section (1) of section 28 the Act as well as Rule 6(5) of D.V. Rules. Having regard to the object and scope of the Act, this provision cannot be given a narrow interpretation which will have an effect of rendering it redundant, surplus or otiose. In my considered view, such approach will defeat the very object of the Act.

27. Similar view has been taken by Karnataka High Court in **K. Manjunath Reddy** (supra). It has been held that :

“3. Having regard to the object of and the scope of the legislation, the prescription of such enabling provision is obviously not to cramp the style of the court which requires to address issues with some expedition. Therefore, the section providing that the court can form its own procedure, would also over-ride sub-section (1) of Section 28 to rule 6(5) of the Rules as well.

4. There is no illegality, as the court in exercise of its inherent power while prescribing the procedure for disposal of the application, would even permit evidence by way of an affidavit in such cases. And where the deponent would be available for cross-examination to test the veracity of the evidence, there is no miscarriage of justice or other illegality in such a procedure being adopted.”

28. Similarly, in **Manish Kumar Soni** (supra) it has been held as under :-

“27. Hence, though the provision under Section 28(1) of the Act stipulates that the proceeding under Section 12 of the Act shall be governed by the provisions of the Code of Criminal Procedure, but the same is directory in nature and any departure from the provisions of Code of Criminal Procedure will not vitiate the proceeding initiated under Section 12 of the Act.”

29. Thus, keeping in mind the aim and object of the Act and

scope of Section 28(2), in my considered view the Court can deviate from procedure prescribed under Sub Section (1) of Section 28 r/w Rule 6(5) and devise its own procedure, which would include permitting evidence by way of an affidavit. In other words, the court in its discretion can allow evidence on affidavit and permit cross examination to test veracity of the evidence.

30. Under the circumstances and in view of discussion supra, there is no merit in the petition. The petition is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)

