IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CRI-40-2020

Suraj Subash Tendulkar .... Petitioner

Versus

Mrs. Sangeeta S. Tendulkar & Anr. .... Respondents

Shri M.B. Da Costa, Senior Advocate with Ms K. Betquecar, Advocate for the Petitioner.
Shri A.D. Bhobe, Advocate for the Respondent No.1.
Shri Gaurish Nagvekar, Additional Public Prosecutor for the Respondent No.2.

Coram:- DAMA SESHADRI NAIDU, J.

Reserved on :- 9 OCTOBER 2020
Pronounced on :- 12 OCTOBER 2020

JUDGMENT:

Heard. Rule. Rule returnable forthwith. The learned counsel appearing for the respondents waive service.

Introduction:

A wife complains to statutory authorities of domestic violence by her husband. Then, she applies under section 12 of the Protection of Women From Domestic Violence Act, 2005 ("DV Act") to the Judicial First Class Magistrate's Court. The Magistrate issues notice to the husband. The husband assails the Magistrate's summoning order as cryptic and mechanical—without application of mind. The Revisional Court refuses to interfere. So he files a Criminal Writ Petition.

2. Should the notice or fixing the date of the first hearing be through a speaking order revealing the Court's application of mind?

Facts:

3. The petitioner is the husband, and the first respondent is the wife. They got married in 1899. The petitioner is now 50 years old; the respondent 49 years. In May 2020, the first respondent complained to the

police against the petitioner of cruelty and torture. Incidentally, the petitioner himself is a police officer.

4. Later, on 15 May 2020, the first respondent complained to the Director of Women and Child Development. Eventually, she filed Domestic Violence Complaint No.4/2020 before the Judicial First Class Magistrate, Quepem. Then, on 30 May 2020, the learned Magistrate issued a notice.

5. Contending that the learned Magistrate issued the notice without applying mind, the petitioner filed Criminal Revision Application No.20/2020. But through a very detailed order, on 17 August 2020, the Additional Sessions Judge, South Goa, Margao, dismissed that revision. Aggrieved, the petitioner has now approached this Court under Article 227 of the Constitution of India.

Submissions:

Petitioner:

6. Shri M.B. Da Costa, the learned Senior Counsel for the petitioner, has submitted that the DV Act has sufficient safeguards for both the complainant and the respondent. In other words, the Magistrate must maintain a balance between the competing claims and interests of the parties. To elaborate, the learned Senior Counsel has submitted that before issuing process, the learned Magistrate ought to examine the domestic violence report submitted by the Protection Officer; instead, here, the Magistrate has passed a cryptic order—mechanically.

7. The learned Senior Counsel has also pointed out that though there is a domestic violence report on record, it contains no details, especially dates of cruelty. At any rate, he has also argued that disregarding this fundamental aspect, the Revisional Court has examined irrelevant factors and erroneously concluded that the Magistrate's order of issuing process accords with the statutory safeguards in DV Act. Urging this Court to set aside, what the learned Senior Counsel calls, the Magistrate's non-speaking order, he has relied on these judgments:

Bhupender Singh Mehra v. State NCT of Delhi[1]*; Dr Mahesh Mathur v. State of MP*[2]*;* and *Shyamlal Devda v. Parimala*[3].

Respondent:

8. On the other hand, Shri A.D. Bhobe, the learned counsel for the first respondent, has submitted that the Magistrate has acted on the domestic violence report submitted by the protection officer. According to him, that report contains all the details of the harassment and the mental cruelty meted out to the first respondent. In this context, first, he draws my attention to the definitions in Section 3 of the Act and then to Section 12 to elaborate on the procedure the learned Magistrate is mandated to follow under the Act.

9. Shri A.D. Bhobe draws my attention to section 28 to contend that the Magistrate can adopt his own procedure as the facts and circumstances demand. He stresses that though it is the Magistrate that tries the matter under the Act, the procedure is essentially civil in nature. Referring to the decisions, cited at the Bar by the petitioner's counsel, Shri Bhobe reasons that in all the three judgments the Courts have found fault with the Magistrate's order against relatives rather than the husband. To elaborate, he points out that though there are no prima facie allegations, the Magistrate issued process mechanically. And that has been disapproved.

10. In the end, Shri Bhobe urges this Court not to interfere with the well-reasoned judgment of the Revisional Court, which, according to him, has taken care of all legal aspects.

11. Heard Shri M.B. Da Costa, the learned Senior Counsel for the petitioner; Shri A.D. Bhobe, the learned counsel, for the first respondent; and Shri G. Nagvekar, the learned Additional Public Prosecutor for the second respondent.

Discussion:

---

1 CDJ 2010 DHC 1703

2 2013 SCC Online MP 5934

3 (2020) 3 SCC 14

12. Indeed, the first respondent is the wife. As seen from the domestic incident report, she did make specific allegations against her petitioner-husband. Of course, the report in Form I has not contained the details as to the place and time of domestic violence. That said, when the instances of alleged domestic violence are numerous and occurred continually, it is idle, rather impractical, to expect the victim to keep a logbook of all violations and privations with time and place. Usually, domestic violence involving wife and husband provides a continuous cause of action. At any rate, it is premature for this Court to observe anything on the correctness of the allegations. Allegations are galore, however.

13. As rightly contended by Shri Da Costa, the learned Senior Counsel, the order issuing process by the Magistrate is cryptic and, of course, it does not explicitly spell out any *prima facie* satisfaction. After accepting this contention that the Magistrate's order is cryptic, we will, now, examine its correctness.

Precedents:

14. We will set the tone of our discussion with the precedents the petitioner has cited at the Bar.

15. In *Bhupender Singh Mehra*, father-in-law and brother-in-law have been arrayed as the respondents in a case of domestic violence. In that context, the High Court of Delhi has observed that only those persons can be summoned who have been in a domestic relationship with the aggrieved person. Under the DV Act, an aggrieved person does not have the licence to make every relative of the husband as a respondent. So the Court wanted the learned Metropolitan Magistrate to consider the domestic incident report and the application before he notifies the respondents.

16. Now, we may turn to *Dr Mahesh Mathur*. In that case, too, all the members of the husband's family have been arrayed as parties to the DV proceedings. In that backdrop, Madhya Pradesh High Court has observed that before passing any order on the application, the Magistrate has to

consider the domestic incident report received from Protection Officer or Service Provider.

17. And finally, we may refer to the Apex Court's judgment in *Shyamlal Devda*. The respondent-wife has alleged domestic violence against fourteen appellants. Appellant No.14 is her husband, and appellants No.1 and 2 are her parents-in-law. All other appellants are relatives of the parents-in-law. Some of those appellants live in other States. On facts, the Supreme Court has found allegations only against the husband and the parents-in-law, but none else. There are no specific allegations, the Court noticed, as to how other relatives of appellant No.14 have caused the acts of domestic violence. So the Apex Court has held that as there are no specific allegations against appellants No.3 to 13, the criminal case of domestic violence against them cannot be continued and is liable to be quashed.

The Statutory Scheme:

18. The D.V. Act has been enacted, according to the Apex Court[4], to provide a remedy in Civil Law for the protection of women from being victims of domestic violence and to prevent domestic violence in the society. Presently, when a woman is subjected to cruelty by husband or his relatives, it is an offence punishable under Section 498A, IPC. The Civil Law, it was noticed, did not address this phenomenon in its entirety. Consequently, Parliament enacted the DV Act to effectively protect the rights guaranteed under Articles 14, 15 and 21 of the Constitution to women who are victims of violence of any kind in the family. As defined under section 2(a) of the DV Act, an "aggrieved person" is any woman 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. I may note the DV Act addresses, perhaps, civil tort arising out of matrimonial discord.

4*Indra Sarma v. V. K. V. Sarma*, AIR 2014 SC 309

19. First, in this case, even the petitioner does not contend that the complaint contains no allegations of domestic violence. It does. So is the protection officer's report in Form I. It has a long list of domestic violence. The list, in fact, covers sexual abuse, emotional abuse, and financial abuse. True, allegations only they are. So we need not labour on the definitional dynamics of the Act.

20. We should also agree that the proceedings under the DV Act are essentially civil. The trying forum—here a criminal court—is no sure indication of the nature of the proceedings. The DV Act combines civil remedies with criminal procedure. But even that assertion is qualified. Section 28, discussed below, lays down the procedure. It requires the Magistrate either to follow the Cr PC as a matter of *lex fori* or to devise its own procedure.

The Reliefs the Victim may Secure:

21. Among the reliefs a victim can get under the DV Act are the relief of protection from violence, relief of residence, relief of monetary support, relief of custody, and other compensatory reliefs. Section 9 enlists the Protection Officer's duties and functions. He should ensure under section 9 (1) (h) of the Act that "the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973". Section 19 covers residence orders. Under subsection (3) the Magistrate may ask the respondent to execute a bond, with or without sureties, not to commit the domestic violence. And that order, as subsection (4) provides, is deemed to be an order under Chapter VIII of the Cr PC.

22. The victim can get, as we have noted above, protection order under section 18, residence order under section 19, monetary relief under section 20, custody orders under section 21, and compensation orders under section 22 of the Act. But the DV Act is in addition to and not in derogation of other enactments. So these reliefs under sections 18 to 22 can be sought from a civil court, family court, or a criminal court. In fact,

the reliefs under this Act are "in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court". As sub-section (3) of section 26 requires, if the victim has approached multiple forums, she has only one obligation: inform the Magistrate under the DV Act about the reliefs she has secured before those other forums.

23. Truly penal are sections 31 and 32 of the Act alone. The former covers the penalties for the respondent's breaching the protection order. Under section 31(1) of the Act, the breach "shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both". As section 32 (1) mandates, the offence under sub-section (1) of section 31 shall be cognisable and non-bailable.

Procedure:

24. Now, let us come to the procedure. Section 28 deals with "procedure". Sub-section (1) declares that the provisions of the Cr PC shall govern all proceedings under sections 12, 18, 19, 20, 21, 22, and 23 and offences under section 31. But, sub-section (2) of section 28 dilutes the procedural rigour of sub-section (1). That is, nothing in sub-section (1) prevents "the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23".

25. Then, how justified are we to import wholesale the procedural parameters and safeguards from Cr PC., though the respondent cannot be treated as an accused under section 12 of the Act? Under the DV Act, when the Magistrate issues the process, there is no question of his taking cognisance of an offence. There is no offence at all—until we reach section 31. That is, only a breach of a protection order converts the proceedings under the DV Act penal.

(a) Instituting a Complaint:

26. Before we proceed further, let us examine section 12 of the DV Act. It reads thus:

12.Application to Magistrate.—

(1)An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking *one or more reliefs* under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2)*The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages* without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree, and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set-off.

(3)Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4)*The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.*

(5)The Magistrate shall endeavour to dispose of every application made under sub-section (1) *within a period of sixty days* from the date of its first hearing.

(italics supplied)

27. Any aggrieved person, a Protection Officer, or any other person on the aggrieved person's behalf, as sub-section (1) of section 12 enables, may apply to the Magistrate seeking reliefs under the DV Act. The sub-section (1) contains a proviso. This proviso requires the Magistrate to consider "any domestic incident report" before his passing "any order on such application".

28. Sub-section (2) of section 12, too, refers to the "the relief sought for (sic) under sub-section (1)". The reliefs the applicant sought may include relief of compensation or damages. Sub-section (3) requires the applicant to apply under sub-section (1) "in such form [with] such particulars as may be prescribed or as nearly as possible thereto." Then, sub-section (4) requires the Magistrate to "fix the first date of hearing, which shall not ordinarily be beyond three days" from the day the Magistrate received the application.

29. Evidently, until we reach sub-section (4), section 12 deals with only the reliefs sought and the orders that may be passed granting those reliefs. The question is, does the proviso appended to sub-section (1) affect sub-section (4)?

30. The DV Act has always been interpreted in the backdrop of the Code of Criminal Procedure as if we were dealing with penal provisions. Cr PC gets mentioned in the DV Act because the adjudicating authority is a Judicial First Class Magistrate. And the court trying the matter is, under traditional classification, a criminal court. So unless excluded, *lex fori*—the law of the forum—governs the procedure. It is by default. But the legislature can always limit the *lex fori.* Precisely, that is the case here. Section 28 (1) of the DV Act requires the court to follow Cr PC to adjudicate under sections 12, 18, 19, 20, 21, 22, 23, and 31. But for the proceedings under sections 12 and 23, the Act enables the court to have a procedural alternative: following the Code of Criminal Procedure or laying down its own procedure. Once, the court decides to follow its own procedure under section 12, any discussion on the procedural limitations under Cr PC becomes otiose. All that the trial Court required to do is to follow, procedurally, the principles of natural justice, besides keeping in mind justice, equity, and good conscience.

31. Yet, let us discuss section 12 of the DV Act in the backdrop of Cr PC. So we will analyse section 12 comparing or contrasting that with, say, section 204 of Cr PC. Chapter VI of Cr PC deals with "process to

compel appearance". Sections 61 to 90 of Cr PC deal with how a person's presence can be secured before the court. "Issuing Process", perhaps, is not a word of art; it simply signifies summoning a person. As is evident, section 204 Cr PC deals with "issue of process". This issuing of the process requires the Magistrate to find "sufficient grounds" for his taking "cognisance of an offence". Under section 204 of Cr PC, once the process is issued, the Magistrate cannot recall that process. He can only discharge or acquit the accused. Section 12 of the DV Act, on the contrary, does not even speak of summoning a party; it plainly provides for "fixing the first date hearing". Nothing more. Sub-section (5) requires the Magistrate to endeavour to dispose of every application within sixty days from the date of its first hearing.

32. That said, as we have already noted, how should we interpret the proviso under sub-section (1) of section 12 of the DV Act. Sub-section (1) has two limbs: the principle provision and its proviso. How do they interact or influence each other? In other words, how does a proviso affect a provision: does it affect the whole provision or the part the proviso has been attached to?

Proviso:

33. Chapter 8 of *Craies on Legislation*[5] deals with drafting of legislation. Under the sub-heading "exceptions, provisos, savings &c." it says the draftsman is frequently required to give effect to a policy by applying a proposition to some but not all cases within a natural class. There is a variety of ways of achieving this. "An exception can be provided", according to Craies, "for either by stating a proposition in general terms and then disqualifying it or by expressing the proposition only in limited terms. Which is appropriate will depend on the circumstances of the case".

---

5 *Craies on Legislation*, 350 (Sweet & Maxwell, 8th ed. 2008)

34. According to Bennion[6], the proviso is an ancient verbal formula. It enables a general statement to be made as a clear proposition, any necessary qualifications being kept out of it and relegated to a proviso at the end. As to the interpretation of the proviso, Bennion reckons that it is usually construed as operating to qualify that "which precedes it".

35. Even though the primary purpose of the proviso is to limit or retrain the general language of a statute, the legislature, unfortunately, does not always use it with technical correctness. So holds Crawford in his *Statutory Construction*[7]. But the learned author further opines that "as a general rule, however, the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it in the statute".

36. Finally, we may refer to our own erudite M. P. Singh, who, in his treatise, *Principles of Statutory Interpretation*[8], has observed that "the language of a proviso even if general is normally to be construed in relation to the subject-matter covered by the section to which the proviso is appended". That is, "a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."[9] To put this principle in perspective, the learned author takes up a constitutional provision. As judicially interpreted, "the proviso appended to Article 286(2) of the Constitution authorising the President to lift the ban imposed by the said provision was not available to lift the ban imposed by Article 286(1)."[10]

37. Now, let us how the Apex Court has treated a proviso in the scheme of interpretation. In *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal*[11], it has, per K. Ramaswamy J, has held that "a proviso to

---

6*Bennion on Statutory Interpretation*, 723-24 (LexisNexis, 2008)
7Crawford's *Statutory Construction*, 605-06 (Thomas Law Book Company, Saint Louis, 1998)
8M. P. Singh, *Principles of Statutory Interpretation*, 221 *(LexisNexis, 14 ed. 2016)*
9Ibid (internal quotations omitted)
10Ibid (internal quotations omitted)
11AIR 1991 SC 1538

a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other."

38. First, "an aggrieved person or a Protection Officer or any other person" on the aggrieved person's behalf may present an application to the Magistrate. She does it "seeking one or more reliefs under this Act. Then comes the proviso. The proviso is an appendage, not an annihilator, of the principal provision. This proviso requires the Magistrate to consider "any domestic incident report" received by him from the Protection Officer or the service provider before he passes "any order" on the victim's application.

39. So we can safely conclude that the proviso governs what has been stated in sub-section (1) of section 12 but not other sub-sections. Before granting relief under sub-section (1), the Magistrate needs to consider "any domestic incident report" from the Protection Officer or the service provider. First, the victim herself can apply; the assistance or help from a Protection Officer is not mandatory. So the Domestic Incident Report is not a precondition for the victim to maintain her compliant. If she approaches the court directly, at least at the stage of issuing notice, the report does not exist. It may come later to assist the court. On the other hand, if the victim first goes to a Protection Officer and that Officer files the application before the court, then, he files his domestic incidence report along with the application under section 12 of the DV Act. For this reason, the proviso to sub-section (1) talks about "any" domestic incident report not "the" domestic incident report.

40. Section 9 of the DV Act enlists the duties and functions of the Protection Officer. He is to assist the Magistrate in the discharge of his functions under this Act. He is "to make a domestic incident report" to the Magistrate. But it must be only when that Officer receives a complaint of domestic violence. Similarly, under section 10 (1) any voluntary association or a company may register itself with the State Government

as a service provider. That service provider "shall have the power to record the domestic incident report and forward a copy to the Magistrate and the Protection Officer. But, again, it needs to be sent if "the aggrieved person so desires". So, looked from any perspective, the domestic incident report is not the integral part of adjudication under the DV Act. It is a desirable document to assist the Magistrate, but always optional. Nowhere does the DV Act compel the Magistrate to call for a domestic incident report. That report, as we have noted, is incidental, not integral, to the proceedings. Period.

41. It is time we nailed the contention that even before "fixing the date of first hearing" the Magistrate should consider the domestic incident report. That is, he should apply his mind, provide reasons and write a speaking order while issuing notice under sub-section (4) of section 12. We have already concluded that the report, if available, assists the Magistrate in his ordering relief under sub-section (1) of section 12 but not, especially, when the respondent is notified about the proceedings —to be precise, before fixing the date of the first hearing. To conclude thus, there is another reason.

42. Section23 deals with the Magistrate's power to grant interim and ex parte orders. In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper. If the Magistrate is satisfied that "application" *prima facie* discloses that the respondent is committing, or has committed, an act of domestic violence or that there is a likelihood of his committing an act of domestic violence, he may grant an ex parte order. It is based on the "affidavit" of the aggrieved person under section 18, 19, 20, 21 or, 22 of the DV Act. Section 23, thus, does not speak of the domestic incident report.

43. If we insist that the Magistrate must consider the domestic violence report and provide prima facie reasons for his putting the respondent on notice it sounds preposterous. It is because an ex parte

relief does not require domestic incident report but a mere notice or fixing the date of first hearing does.

Is the Magistrate's fixing a date of first hearing an "order" under the proviso to section 12(1) of the DV Act?

44. The Magistrate's fixing a date of hearing cannot be treated as an "order" referred to under the proviso to sub-section (1). That proviso, on the contrary, refers to the orders *vis-à-vis* the reliefs the applicant has claimed in sub-section (1). And that passing of order—or granting of relief under sub-section (1)—requires the Magistrate to "take into consideration any domestic incident report received by him".

45. Sub-section (2), too, refers to the "the relief sought for (sic) under sub-section (1)" may include a relief for issuance of an order for payment of compensation or damages. Until we reach sub-section (4), section 12 deals with the reliefs sought and the orders that may be passed.

The Rules:

46. Before we sign off, we may as well consider the Protection of Women from Domestic Violence Rules, 2006 to the extent they are relevant for the Magistrate to fix the date of first hearing. Rule 6 elaborates on what has been mandated under section 12 of the DV Act. According to it, an aggrieved person's application under section 12 shall be in Form II or as nearly as possible to that Form. The aggrieved person may seek the assistance of the Protection Officer in preparing her application and forwarding it to the Magistrate concerned. The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973.

47. Besides, Rule 12 sets out the procedure for serving notice on the respondents. It actually elaborates what is contained in section 13 of the DV Act. The notices for appearance shall contain the names of the person alleged to have committed domestic violence, the nature of domestic violence and such other details which may facilitate the identification of

the person concerned. Thus, the details in the notice are meant to serve the purpose of identifying the recipient. For serving the notices under section 13 or any other provision of the Act, the provisions under Order V of CPC or the provisions under Chapter VI of the Cr PC "as far as practicable may be adopted".

48. The Magistrate may follow the procedure either under Order V of CPC or Chapter VI of Cr PC, "depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act". Further, in addition to the procedure prescribed under the Order V CPC or Chapter VI Cr PC, the court may "direct any other steps necessary with a view to expediting the proceedings to adhere to the time limit provided in the Act".

49. From the above, we can safely conclude that the Magistrate under the DV Act enjoys procedural freedom. He may adopt the procedure under the CPC or Cr PC or any other procedure "with a view to expediting the proceedings".

Conclusion:

(a) The D.V. Act is a civil remedy for the victims of domestic violence. Only the forum is under criminal law.

(b) The forum has abundant procedural freedom; it can follow its own procedure for disposing applications under section 12 or under sub-section (2) of section 23.

(c) Once, the court decides to follow its own procedure under section 12, any discussion on the procedural limitations under Cr PC becomes otiose.

(d) The DV Act is in addition to and not in derogation of other enactments.

(e) The concepts of issuing process, taking cognisance, treating the respondents as accused or suspects do not apply.

(f) Nor should the courts insist on the respondents' presence for every adjournment as if they were accused.

(g) Section 12, until it reaches sub-section (4), focuses on the reliefs sought and the orders that may be passed granting those reliefs.

(h) The proviso to sub-section (1) of section 12 governs only that sub-section, not the rest of the provision.

(h) If a summoned respondent demonstrates before the court that he has nothing to do with the allegations in the application, the Magistrate may close the proceedings against him.

(i) The concepts of discharge, acquittal, conviction do not apply to the proceedings under section 12. Nor does the idea of recalling the process.

(j) Fixing a date for the first hearing cannot be equated with issuing of process. So relying on the domestic incident relief or rendering a detailed 'order' under section 12 (4) is not a condition precedent for the Magistrate to fix the date of first hearing.

Result:

I, therefore, dismiss the Criminal Writ Petition as devoid of merits.

DAMA SESHADRI NAIDU, J.

NH