

THE HIGH COURT OF TRIPURA
AGARTALA

W.A. 65 of 2014

Bachu Miah,
S/O Md. Tahim Miah,
R/O Salthang Manu (Manpathar),
P.O.: - Manpathar, P.S: Shantirbazar,
Dist.: South Tripura.

..... *Appellant*

- Vs. -

Ranu Begum,
W/O Bachu Miah,
D/O Abdul Mannaf,
R/O:- Vill: Durganagar,
P.O: K.K. Nagar, P.S: Bishalgarh,
District: Sepahijala.

..... *Respondent*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE MR. JUSTICE U.B. SAHA

For the appellant	: Mr. A. Bhowmik, Advocate.
For the respondents	: Mr. A.K. Bhowmik, Sr. Advocate. Mr. R. Datta, Advocate.
Date of hearing	: 08.01.2015
Delivery of Judgment & order.	: 05.02.2015.
Whether fit for reporting	: Yes.

JUDGMENT & ORDER

(Deepak Gupta, CJ.)

This writ appeal is directed against the judgment dated 25.08.2014 passed in W.P(Crl.)2 of 2014 whereby a learned Single Judge of this Court after discussing the entire law on the subject issued the following directions:-

"[17] On study of the various provisions of the PWDV Act, 2005, this Court holds as under:

(i) An aggrieved person within the meaning of Section 2(a) of the PWDV Act, 2005 may directly approach the Magistrate for passing any order under Section 12 read with Sections 18/19/20/21/22 & 23 of the PWDV Act without making any report to the Protection Officer.

(ii) When an aggrieved person or any other person gives information to the Protection Officer, the Protection Officer is under obligation under Section 9(1)(d) to make a Domestic Incident Report (DIR) to the Magistrate in the Form I under Rule 5 of the of the PWDV Rules, 2006.

(iii) If such DIR is available, the aggrieved person may file an application to the Magistrate under Section 12 of the PWDV Act, 2005 in Form II under Rule 6 of the PWDV Rules, 2006 taking or without taking assistance of the Protection Officer in preparing her application and forwarding the same to the concerned Magistrate. Even the Protection Officer may prepare application if the aggrieved person is illiterate. Such application shall be affirmed by affidavit in terms of Section 23(2) if there is any prayer for interim protection or order. Such affidavit shall be filed in Form III under Rules 6(4) and 7 of the PWDV Rules, 2006.

(iv) Rules 6(1) of the PWDV Rules, 2006 has not left any confusion which might arise whether the application in Form II can be filed without the DIR. A keen reading of the said Rules 6(1) would attract attention to the Clause 'or as merely as possible thereto' as appearing in Rule 6(1) of the PWDV Rules, 2006. It purports and imports that when the aggrieved person would directly file the application under Section 12 of the PWDV Act, the Form II may suitably be modified.

(v) When Section 12 of the PWDV Act enables an aggrieved person present an application to the Magistrate seeking one or more reliefs under of the PWDV Act without approaching the Protection Officer and when from a survey of the provisions of the PWDV Act it appears without any ambiguity that neither the Act, nor the Rules made thereunder, provide for getting a Domestic Incident Report from the Protection Officer or the service provider by the Magistrate before passing any order under Section 12 of the PWDV Act it cannot be said that the application filed under Section 12 can only be entertained by the Magistrate only on getting a Domestic Incident Report.

(vi) The Magistrate at his discretion, however may call for a Domestic Incident Report from the concerned Protection Officer before passing any order under Section

12 of the PWDV Act. But at no stretch of interpretation it can be held that the Magistrate cannot pass any order Under Section 12 in absence of the DIR.

(vii) It is obligatory for the Magistrate to take into consideration any DIR received by him from the Protection Officer or the service provider before passing any order under Section 12 of the PWDV Act. But again it is not obligatory for a Magistrate to call such report. The Magistrate, however, may consider the said report at any stage of the proceeding without any inhibition. But under no circumstances the report shall bind the Magistrate in any manner. The report is for assistance of the Magistrate in the enquiry for granting one or various reliefs by an order under Section 12 of the PWDV Act to the aggrieved person. The words appearing in proviso to Section 12 of the PWDV Act 'shall take into consideration' does not mean Magistrate has to act upon or accept the DIR. It only obliges the Magistrate to take note of the said report at the time of passing any order under Section 12 of the PWDV Act.

(viii) Section 13 of the PWDV Act provides that a notice of the date of hearing fixed under Section 12 shall be given by the Magistrate to the Protection Officer and the Protection Officer shall get it served by such means as may be prescribed on the respondent and on any other person as may be directed by the Magistrate within a period of 2(two) days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt. The Magistrate in view of the provisions in Section 13 of the PWDV Act shall invariably serve the notice through the Protection Officer but under exceptional situations, the Magistrate may also direct the notice to be served by other means. In such cases, the Magistrate shall reflect in the order why such process has been adopted. However, it is made clear that for failure of the Magistrate to cause the notice through the Protection Officer inadvertently or otherwise shall not render the proceeding bad in law nor shall it render unsustainable. The purpose of notice is to prohibit any decision taken in absence of the persons against whom any order may be passed and such process is an inalienable component of natural justice and the rule of law. If the notice is served properly by other means and no prejudice has been caused to the respondent, for non-compliance of the provisions of Section 13 of the PWDV Act, the order passed under Section 12 of the of the PWDV Act cannot be held illegal, without jurisdiction or unsustainable."

2. As far as the directions given by the learned Single Judge are concerned, this Division Bench is totally in agreement with the directions given and these are reaffirmed. However, the issue raised by Sri A. Bhowmik, learned counsel, appearing for the husband is that the Magistrate passed the impugned order granting maintenance in favour of the wife without holding any inquiry and without giving any opportunity of leading evidence to the husband.

3. We have gone through the file of the Magistrate and find that the wife filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 and she prayed for an order of protection under Section 18, an order of grant of residence under Section 19 and an order for grant of monetary relief under Section 20 in her favour. This complaint was received by the Court on 08.10.2013 and notice was ordered to be issued to the respondents for 24.10.2013. On this date, the respondent husband appeared along with his counsel and the case was transferred to the Court of the Judicial Magistrate, 1st Class, Bishalgarh for disposal in accordance with law. On 11.11.2013, the parties appeared before the transferee Court and the matter was adjourned to 25.11.2013 when three of the respondents were present and two were absent. Again an adjournment was granted and the matter was adjourned to 10.12.2013. On this date, three respondents were present and two were absent. Written statement was filed on behalf of the

respondents and the matter was adjourned to 23rd December, 2013. On this date, the husband was present and the other respondents were absent. The matter was adjourned to 31st January, 2014. On the next date i.e. 31.01.2014, the aggrieved person (the wife) was absent and all the respondents were present. The matter was again adjourned to 12.03.2014. On this date again the wife was not present. Four of the respondents were present and one respondent was absent. The case was adjourned to 31st March, 2014 on which date, all the parties were present and the matter was adjourned to 22.04.2014 for appearance of both the parties and hearing and necessary orders. On 22.04.2014, four of the respondents filed an application that they may be discharged from the case and husband Bacchu Miah was absent. The matter was then adjourned to 27.05.2014. All the parties were present and on this date, the impugned order was passed. On behalf of the wife, it was urged that she has been tortured and she only prayed for grant of monetary relief claiming Rs.9,00,000/- in all. The respondents contested the allegations of mental or physical torture and it was contended that the aggrieved person wife was at liberty to come and stay in the house of the husband and therefore, she is not entitled to any relief.

4. The relevant portion of the order passed by the Court reads as follows:-

"Admittedly the aggrieved person is residing with her parents presently. On the other hand, the aggrieved

person asserted that the respondent have good source of income. Hence, it is quite obvious that the respondent has reasonable earnings to maintain the aggrieved person financially either on monthly payment or in one installment payment. However, considering the fact that the aggrieved person has loss her earning capacity and mental and social harassment and the damaged of her future life as well as the stigma that remained with the aggrieved person in the society, I find this is a fit case to allow the prayer for monetary relief to the aggrieved person.

Hence, in view of the above I find merit in the application filed U/S 12 of the Act and the relief sought by the aggrieved person is quite fair and justified.

Accordingly, the application U/s 12 of the Act and the monetary relief U/S 20 of the Act is hereby partially allowed."

Thereafter, the husband-petitioner was directed to pay Rs.3,000/- per month as monetary relief under Section 20 under the Act to the aggrieved person wife. The other respondents were discharged.

5. On behalf of the husband, it is contended by Mr. A. Bhowmik, learned counsel that the Magistrate has not given any finding that the wife was subjected to domestic violence and it has been urged that in case, the Magistrate wanted to pass any order he was bound to follow the procedure prescribed in Section 125 of the Code of Criminal Procedure because that is the mandate of Rule 6(5) of the Protection of Women from Domestic Violence Rules, 2006. It may be mentioned that the learned Single Judge only dealt with the question as to whether it is mandatory for the Magistrate to call for the report of the protection officer and is he bound to consider such report of the protection officer while passing the order or not.

6. As we have already indicated hereinabove, we are totally in agreement with the directions passed by the learned Single Judge in this regard. However, we are not in agreement with the following observation of the learned Single Judge:-

"That apart, there is no averment that the petitioner was denied the opportunity of adducing evidence in support of his statements made in the written objection. Whether the respondent in a proceeding under the PWDV Act would lead evidence either to dislodge the claim of the aggrieved person within the meaning of Section 2(a) of the PWDV Act or to buttress his counter claim in the objection is entirely at the option of the respondent. The Magistrate after recording the evidence led by the aggrieved person has the duty to ask the respondent whether he would adduce any evidence or not. There is no averment in this petition that the Magistrate has denied the petitioner such opportunity."

7. Section 12 of the Act provides that either the aggrieved person or the Protection Officer or any other person on behalf of the aggrieved person may file an application to the Magistrate seeking one or more of the reliefs under the Act. The proviso lays down that the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or service provider. We are in agreement with the learned Single Judge that it is not mandatory for the Magistrate to obtain this report and if there is no report he can pass an order on the basis of the averments made in the application supported by evidence. We are concerned only with the Section 20 which deals with monetary reliefs because this was the only relief which was finally claimed by the aggrieved person and granted by the Magistrate.

8. Section 20 reads as follows:-

"20. Monetary reliefs.—(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to, –

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent."

9. Section 23 empowers the Magistrate to pass any interim orders in respect to the reliefs which can be granted by

him under sections 18, 19, 20, 21 and 22 of the Act. Section 28 of the Act provides that unless otherwise provided under the Domestic Violence Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 shall be governed by the provisions of the Code of Criminal Procedure, 1973 though the Court may lay down its own procedure for disposal of such application under section 12 or under section 23(2).

10. We are of the considered view that even where the Court decides to lay down its own procedure, the said procedure must be in accordance with the rules of natural justice. The procedure cannot be such which is against the rules of natural justice.

11. Rule 6 of the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as the Rules) relates to applications made to the Magistrate and prescribed the form and procedure for filing such application. Sub-rule (5) of Rule 6 reads as follows :

"(5) 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 (2 of 1974)."

It is clear that the Magistrate while dealing with an application under Section 12 must follow the procedure laid down under section 125 of the Code of criminal procedure.

12. Section 126 of the Code of Criminal Procedure lays down the procedure which must be followed by a Magistrate while

dealing with an application under section 125. It reads as follows

:

"126. Procedure – (1) Proceedings under section 125 may be taken against any person in any district –

(a) Where he is, or

(b) where he or his wife resides, or

(c) Where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence to such proceedings 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 for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just."

The procedure laid down in section 126 must be followed by the Magistrate dealing with the matter under the Protection of Women from Domestic violence Act, 2005. Even where in terms of section 28(2) the Magistrate lays down his own procedure the same has to be consistent with the rules of natural justice and cannot totally deviate from the procedure laid down in section 126 of Cr.P.C because that is the mandate of the 6(5) of the Rules. From the orders passed on various dates which have been referred to above it is apparent that no evidence was

recorded in the presence of the petitioner and the procedure laid down in Section 126 of Cr.P.C was not followed.

13. Aggrieved person has been defined to mean any woman who 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. Domestic violence has been defined in Section 3 of the Act. It is a very wide definition. The power to grant relief under section 12 arises only when an incidents on domestic violence has taken place.

14. As far as section 17 is concerned, there is no requirement of proving domestic violence. The woman has a right to live in the shared household and she can pray for an order that she should not be evicted from the shared household even if there is no incident of domestic violence. However, Protection order under section 18 can only be passed by a Magistrate, if the Magistrate after hearing the respondent is prima facie satisfied that domestic violence has taken place or is likely to take place. No order under section 18 can be passed unless the Magistrate prima facie satisfies himself that either domestic violence has taken place or is likely to take place. An order of residence under section 19 can only be passed if the Magistrate is satisfied that domestic violence has taken place. As far as section 20 is concerned, the Magistrate is empowered to direct the respondent to pay monetary relief to the aggrieved person and any child on

account of the losses suffered by the aggrieved person and any child as a result of the domestic violence. Therefore, the Court will have to come to a finding that domestic violence has taken place. As far as custody orders under section 21 are concerned, it will be only the welfare of the child which shall be of prime importance and domestic violence need not be proved. Compensation orders under section 22 can be passed only when domestic violence in the nature of injuries mental torture, emotional distress caused by acts of domestic violence committed by the respondent are established. Section 23 empowers the Magistrate to grant interim relief.

15. In view of the provision of section 28 of the Protection of Women from Domestic Violence Act, 2005, read with Rule 6 of the rules the Magistrate must normally follow the procedure laid down in section of 126 Cr.P.C. He may, however, in certain cases act in accordance with the situation and he can follow procedure of his choice but such procedure must conform to the rules of natural justice. Therefore, if there is no domestic incident report, the Magistrate can ask for evidence from the parties and dispose of the matter invoking its powers under section (1) of section 28. When there is no report of domestic violence then the aggrieved person will have to establish her case. This may be done on the basis of affidavits of the parties, but if there are disputed questions of fact then the opposite parties will have the right to cross-examine the witnesses. Before passing any order under

section 20, the Magistrate must come to the conclusion that domestic violence has taken place. In the present case, we find that no such finding was arrived at by the Magistrate.

16. Furthermore, we are not in agreement with the learned Single Judge that it is the duty of the respondent to pray for an opportunity to lead evidence. Whether it is the Code of Criminal Procedure which has to be followed or a procedure which the Magistrate on his own follows that procedures must be in accordance with the rules of natural justice and no party should be condemned unheard. The evidence or other material such as the domestic inquiry report or affidavit(s), if any, filed by the aggrieved person must be supplied to the respondents. The oral evidence, if any, must be recorded in the presence of the respondent(s) and they must be given an opportunity to lead evidence either by way of filing affidavits or by way of oral evidence. Without giving any opportunity to the respondents, no order for grant of relief can be passed except an order for interim relief in terms of section 23 of the Act.

17. In the present case, in the operative portion of the order in question, there is no finding that domestic violence has taken place. As already held above, the proper procedure has not been followed by the Magistrate. We also find that the respondent-husband was not given an adequate opportunity to put forth his case. Therefore, the order under challenge is not a legal order. Normally we would have to set aside the order but

since the rights of a woman are involved, we direct that this order shall be treated to be an interim order in terms of section 23 but we proceed to reassess the amount of maintenance awarded.

18. While assessing the maintenance, the Magistrate cannot ignore the income of the husband. In the present case, the husband has filed his affidavit which shows that the total income of the husband even in May, 2014 is 6,712/- and after his EPF contribution, Life Insurance contribution, Professional Tax etc., he gets salary of Rs. 5,463/- per month. Therefore, we are of the view that in such circumstances, the Magistrate could not have awarded maintenance of Rs.3,000/- per month, which is more than 50% of the income of the husband. Keeping in view all these factors, we modify the order dated 27.05.2014 and fix the maintenance @ 2,200/- per month and further direct that this shall be treated as interim maintenance under section 23 of the Act.

19. We, accordingly, dispose of the appeal in the aforesaid terms and also issue the following directions :-

- i) We reaffirm the directions given by the learned Single Judge which have been quoted above.
- ii) That in cases falling under the Domestic Violence Act, in terms of the section 28 of the Act and Rule 6(5) of the rules, the Magistrate shall follow the procedure laid down in the Code of Criminal Procedure, 1973 for deciding petitions u/s 125 of the Cr.P.C but if the Magistrate for reasons to be recorded

so decides, it may lay down its own procedure in terms of section 28(2), but such procedure must be consistent with the rules of natural justice.

iii) That before passing an order under section 20, the Court must come to the conclusion that domestic violence has taken place.

iv) While granting Protection orders under section 18, the Magistrate must prima facie satisfy himself that domestic violence has taken place.

v) Before passing a Residence order under section 19, the Magistrate must be satisfied that Domestic violence has taken place.

vi) As far as orders under section 17 and 21 are concerned as already held above, it is not necessary to establish domestic violence.

vii) Even in cases of orders passed under section 22, the Magistrate can pass an order only after coming to the conclusion that domestic violence has taken place.

viii) That before passing orders, the respondent must be heard and a procedure consistent with the code of Criminal Procedure or the rules of natural justice must be followed.

ix) Section 23 empowers the Magistrate to pass interim orders and these orders can be passed at the preliminary stages also if domestic violence is apprehended or the application prima facie discloses that the respondent has committed an act of domestic violence.

20. Our findings with regard to income are tentative in nature and it is for the parties to establish what is the income of the husband before the trial Court. The parties through their counsel are directed to appear before the Court below on **2nd March, 2015**. The Registry is directed to send the record to the learned Magistrate who shall now proceed to decide the matter and pass appropriate order u/s 20 of the Protection of Women from Domestic Violence Act, 2005 after following the law laid down hereinabove.

A copy of this judgment shall be circulated to all the Judicial Officers in the State.

JUDGE

CHIEF JUSTICE