

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

**HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE**

&

HON'BLE SHRI JUSTICE VISHAL MISHRA

ON THE 8th OF AUGUST, 2023

WRIT PETITION No. 18589 of 2023

BETWEEN:-

**ASHWINI PRADHAN S/O SHRI ASHOK KUMAR
PRADHAN, AGED ABOUT 38 YEARS,
OCCUPATION: LT. COLONEL 332/1 G.S. SURI
ENCLAVE 506 ARMY BASE WORKSHOP
DISTRICT JABALPUR (MADHYA PRADESH)**

....PETITIONER

(BY SHRI ASHOK KUMAR JAIN - ADVOCATE)

AND

- 1. UNION OF INDIA THROUGH CHIEF
SECRETARY LAW AND LAGISLATIVE
DEPARTMENT 4TH FLOOR A WING
SHASTRI BHAWAN NEW DELHI (DELHI)**
- 2. SMT. PRIYANKA PRADHAN W/O SHRI
ASHWANI PRADHAN D/O BHAGWAN
SINGH PRADHAN, AGED ABOUT 31
YEARS, R/O 671/E/3, SANJAY VIHAR
COLONY, DAKRA GARHI, DISTRICT
DEHRADUN (UTTARAKHAND)**

....RESPONDENTS

***(SHRI PUSHPENDRA YADAV - DEPUTY SOLICITOR GENERAL FOR
RESPONDENT NO.1)***

.....

*This petition coming on for admission this day, **Hon'ble Shri Justice Ravi Malimath, Chief Justice** passed the following:*

ORDER

This petition is filed seeking for a writ of certiorari to quash Sections 21 and 31 of the Protection of Women from Domestic Violence Act, 2005 (for short "the DV Act") as being ultra vires the Constitution.

2. The learned counsel for the petitioner submits that the provisions of Section 21 and 31 of the DV Act are unconstitutional. So far as Section 21 of the DV Act is concerned, the same would refer to the custody of the child being given by the orders of the Magistrate. Section 21 of the DV Act which reads as follows:-

"21. Custody orders - Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit."

3. It is further pleaded that in terms of Section 12 of the Guardian and Wards Act, 1890 (for short "the Guardians and Wards Act") the provisions are quite different. The same reads as follows:-

"12. Power to make interlocutory order for production of minor and interim protection of person and property.

1. The Court may direct that the person, if any, having the custody of the minor, shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

2. If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

3. Nothing in this section shall authorise—

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property."

4. Therefore, the Guardian and Wards Act would apply for a manner in which an order could be passed. That recording of evidence is necessary before an order could be passed by the Court. That a child is required to be produced at such place and time and before such person as the Court deems appropriate for the purposes of granting temporary custody. None of this is present in Section 21 of the DV Act. Therefore, this provision is ultra vires the Constitution.

5. Reference is also made to Section 31 of the DV Act with regard to penalty for breach of protection order by the respondent. That in the

absence of any opportunity being given, a person can be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to Rs.20,000/-, or with both.

6. However, on considering the contentions, we do not find that any of the pleas of the petitioner could be accepted.

7. It is apposite to mention herein the Statements of Objects and Reasons of the DV Act, which reads as follows:

"Statement of Objects and Reasons.—Domestic violence is undoubtedly a human right issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law 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 is intended to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. The Bill, inter alia, seeks to provide for the following:—

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression “domestic violence” to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v) It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

5. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill."

8. The objects and reasons of the Domestic Violence Act mentioned hereinabove indicate that it is enacted with the solemn purpose to secure and protect certain rights of women which are constitutionally guaranteed and also to protect them from domestic violence. The Magistrate, therefore, under the Act has to pass appropriate orders in favour of the aggrieved person in accordance with the provisions of the Act. However, the Guardians and Wards Act is enacted with the object to secure interests of minors particularly in matters of appointment of guardians and protection of minor's property etc. Further, the Preamble of the Act is also significant to understand the full purport of the Act. The same reads as follows:

"An Act 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 or incidental thereto."

Therefore, the Act provides for protection of women from violence of any kind occurring within the family. As per Section 3 of the DV Act, the violence may be physical, sexual, verbal, emotional or economic. The upshot, as observed by the Hon'ble Supreme Court in *Hiral P. Harsora vs. Kusum Narottamdas Harsora* reported in (2016) 10 SCC 165, is to provide various innovative remedies in favour of women who suffer from domestic violence against the perpetrators of such violence.

9. The Hon'ble Supreme Court in the case of Kunapareddy vs. Kunapareddy Swarna Kumari reported in (2016) 11 SCC 774, has explained the object of the DV Act, which reads as follows:

"12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality....."

10. Further, the Hon'ble Supreme Court in the case of Vaishali Abhimanyu Joshi v. Nanasaheb Gopal Joshi reported in (2017) 14 SCC 373 has held as follows:

"21. The Protection of Women from Domestic Violence Act, 2005 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 or incidental thereto....."

11. Custody order is defined under Section 2(d) of the DV Act as an order granted in terms of Section 21. Section 2(a) thereof further defines 'aggrieved person' as 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. Section 21 of the Act empowers the Magistrate to grant temporary custody of child to the aggrieved person or the person making an application on her behalf and if necessary, may also make arrangements for visit of such child by the respondent. However, the Magistrate may refuse to permit visit to such child if he is of the opinion that any of such visit by the respondent may be harmful.

12. Section 28 of the DV Act provides for procedure to be adopted by the Magistrate for disposal of applications. The same reads as follows:

"28. Procedure.—(1) Save as otherwise provided in this Act, 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, 1973 (2 of 1974).

(2) 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."

Therefore, Section 28(1) directs that save as otherwise provided, proceedings under Section 21 shall be governed by the provisions of the Code of Criminal Procedure, 1973.

13. Section 12 of the Guardians and Wards Act empowers the Court to make orders for temporary custody and protection of the person or property of the minor. Under the Guardians and Wards Act not only the mother can claim temporary custody of a minor child but the father can also apply for the same. However, under the DV Act only a woman who is subjected to domestic violence or the person making an application on her behalf can apply for the temporary custody of child.

14. By enacting Section 21 of the DV Act the legislature has taken care of a situation where domestic violence is committed against the woman and where she is in constant fear or apprehension of being separated from her child. In such circumstances, the DV Act provides some respite to such woman by giving her right to ask for temporary custody of her child.

15. In the case of Parijat Vinod Kanetkar (Dr.) v. Malika Paruat Kanetkar reported in 2016 SCC OnLine Bom 10047, the issue before the Bombay High Court was as to whether an interim custody order under Section 21 of the DV Act could have been passed by the Magistrate when the matter was already pending before the Family Court. It was argued therein that the provisions of the Family Courts Act, 1984, namely, Sections 7, 8 and 20 oust the jurisdiction of Magistrate to grant interim custody under Section 21 of the DV Act. The Court after considering the Objects and Reasons of the DV Act held as follows:

"14.when one considers the non-obstante clause contained in section 21 of the DV Act, the purpose that it seeks to achieve and the nature of power it confers upon the Magistrate. The non-obstante clause unbounds the Magistrate from similar powers of other courts in other enactments and regardless of those powers, he can go about the issue of interim custody on his own. The purpose that this section seeks to achieve is protection of the aggrieved person, for the time being from domestic violence, which is discernible from the condition prescribed for exercise of the interim custody power under section 21 of the DV Act. Pendency or filing of an application for protection order or any other relief under the DV Act is must and in such proceeding the issue of interim custody can be raised. The reason being that it is also an issue of domestic violence as it harms the mental health of an aggrieved person who maintains a perception and is capable

of demonstrating at least in a prima facie manner, that welfare of the child is being undermined. The nature of the power is temporary and coterminous with the main application filed for protection or any other relief. It begins with filing of such main application and comes to an end with disposal of the main application or may merge with the final decision rendered in the proceeding. Such being the nature and purpose of power of the Magistrate under section 21 of the DV Act, it would have to be said that it is separate and independent from and not covered by either of the parts of section 7 of the Act, 1984. If such interpretation is not given to section 21, DV Act power, the section itself can be rendered otiose in a given case and the Magistrate will be divested of his power to adjudicate upon that species of domestic violence issue which arises from jeopardising the welfare of the child. Such is, however, not the intention of the legislature, rather, the interpretation made earlier is in consonance with the intention of the legislature and object of the DV Act to protect women from domestic violence."

16. Even otherwise, what is provided under Section 36 of the Act is that the said Act would not be in derogation of any other law. The same reads as follows:-

"36. Act not in derogation of any other law—The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force."

17. Therefore, even if the plea of the petitioner were to be accepted that there are certain anomalies in the instant Act, the same would stand covered by Section 36 of the Act to the extent that all provisions of the said Act are in addition to and not in derogation of the provisions of any other law.

18. The doctrine of harmonious construction lays down that in order to avoid conflict, statutes must be interpreted harmoniously. It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the legislature.

19. The Hon'ble Supreme Court in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of U.P., reported in 1960 SCC OnLine SC 16 has held that in the interpretation of the statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. Therefore, a provision of a statute cannot be used to defeat another unless it is impossible to effect reconciliation between them. Hence, the interpretation which involves conflict, must be avoided.

20. The Hon'ble Supreme Court in the case of Aphali Pharmaceuticals Ltd. v. State of Maharashtra, (1989) 4 SCC 378 has explained the principles of interpretation of statutes. It has been held as follows:

"39.The best interpretation is made from the context. Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere. It is unjust to decide or respond as to any particular part of a law without examining the whole of the law. Interpretare et concordare leges legibus est optimus interpretandi modus. To interpret and in such a way as to harmonise laws with laws, is the best mode of interpretation....."

21. In the case of Grasim Industries Ltd. v. Collector of Customs, reported in (2002) 4 SCC 297, the Hon'ble Supreme Court held as follows:

"10.Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions....."

22. At this stage, it would also be apt to take note of Section 26 of the DV Act reads as follows:-

"26. Relief in other suits and legal proceedings.—(1) Any relief available under sections 18, 19,20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for 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.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

Therefore, as illustrated in Section 26 of the Act itself, any such relief could also be initiated in any other court of law. Therefore, only because a wrong order is passed by the concerned authority, would not render the statute itself to be unconstitutional.

23. Under these circumstances, when the remedies have already been provided for proceeding under any other law for the time being in force and also the provisions of the said Act are in addition to and not in derogation of the provisions of any other law for the time being in force, we do not find that either Section 21 or 31 of the Protection of Women

from Domestic Violence Act, 2005 could be quashed as being ultra vires the Constitution. Hence, we are of the view that the same is in tune with the Constitution and does not call for any interference.

24. For the aforesaid reasons, the writ petition being devoid of merit, is dismissed.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

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