

Original Paper

ISSN: 2321-1520

Judicial Response to Unseen Wounds of Domestic Violence

Suja S. Nayar^{1*} & Dr. Mayuri Pandya²

1. Research scholar and perusing Ph.D. in Law
 2. Principal I/C GLS Law College, Ahmedabad.
- *Corresponding Author

Received Date : 9-2-2018

Published Date : 7-3-2018

Prologue:

"For centuries past, women all over the world have not only been denied full justice, social, economic and political, but as a weaker sex, they have been used, abused, exploited, and then, discarded to lead immoral, street vagrant and destitute life till their death"¹

Wrecking the Havoc on the State of Gujarat for the casual approach adopted for appointment of Protection Officers under the provisions of Domestic Violence Act the above words were heard from Hon'ble Mr. Justice J B Pardiwala as their Lordships described the plight of women that exists since centuries and are prevailing even today. Quoting any sort of violence against women as intolerable and unacceptable in the said judgment, it has been made sure by the High Court of Gujarat in the said decision that the implementation of the Provisions of Protection of Women against Domestic Violence Act, 2005 is done in its true sense and with complete responsibility. The High Court of Gujarat while dealing with a Suo-Motu Public Interest Litigation cognizance of which was taken by the Hon'ble High Court on the basis of a newspaper item that reflected an incident where a lady was asked to wait for 3 months prior to registration of complaint under the Provisions of Domestic Violence Act due to pendency of more than 700 cases with only 1 Protection Officer to deal with the same.

Domestic Violence is a universal problem and is the one of the most common of human rights violation. Women are always considered as physically and emotionally weaker than males, whereas at present women have proved themselves in almost every field of life affirming that they are at par with men owing to their hard work whether at home or work-places. Domestic violence

is faced not only in Indian society but by every society of the world, though it may have its own form and matter. Almost two-third of married Indian women are victims of **Domestic Violence** attacks and as many as 70 per cent of married women in India between the age of 15 to 49 are victims of beating, rape or of forced sex.² Domestic violence is a reflection of our pseudo-civilized society. But the number of cases that are reported every year raise a high alarm, because of which the society calls for fair and speedy justice from courts. But domestic violence cases are different from any other cases which come before the courts, because in these cases both the parties are related to each other. They may be husband-wife, brother-sister or father-daughter. So, in the cases of domestic violence, the role of the court become more responsible as in these cases the court have to give judgment against and in favor of the same family members. This article is an attempt to analyse the trend of the Gujarat High Court on the cases pertaining to domestic violence in the last 5 years.

The Protection of Women from Domestic Violence Act, 2005:

The Protection of Women from Domestic Violence Act 2005 is an Act by the Parliament of India enacted to provide protection to the wife or female live-in partner from domestic violence at the hands of the husband or male live-in partner or his relatives, the law also extends its protection to women living in a household such as sisters, widows or mothers. The Act provides for the first time in Indian law a comprehensive definition of "domestic violence", The Protection of women from Domestic Violation Act, 2005 was passed by both the houses of parliament had received the assent of the president of the India on 13th Sep. 2005. It came on the statue book as The Protection of Women from Domestic Violence Act, 2005. It came into force on 26-10-2006.³

In exercise of the power conferred by sec 37 of the Protection of Women from Domestic Violence Act, 2005, the Central Government has also enacted rules.

Definition of domestic violence under the protection of women from domestic violence Act, 2005.

The enactment of such a benevolent legislation was with an intention to protect each and every right of a woman, which included the recognition of their equal status with their husband in terms of social, economic and physical background. This was for the very first time that any such legislation came into force to protect even the psychological state of women. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) Harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any

conduct mentioned in clause (a) or clause (b); or

(d) Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—for the purposes of this section,—

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "Sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "Verbal and emotional abuse" includes—

(a) Insults, ridicule, humiliation, name calling and insults or ridicule especially with regard to not having a child or a male child; and

(b) Repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "Economic abuse" includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the share household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) Prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.⁴

This clarifies the very intent of the Legislature while enacting the provisions of this law, that not only the physical violence committed on a woman, but all sorts of violence committed on women are recognized and redressed. Physical violence is merely an attack on the body of a woman, but economic and social abuse has got a harder impact on a woman's psyche and results in more deterioration of her condition.

Procedure for redressing the Grievance

The act provides for a complete machinery which not only recognizes the rights, but also provides for enforcement and implementation of the same. The act is a complete code in itself which takes care of all the needs of a woman. It is well settled by the Hon'ble Supreme Court in

various cases that the reliefs to be granted under the provisions of Domestic Violence Act are civil in nature, but when it comes to procedure the support of Code of Criminal Procedure, 1973 is taken so as to quickly redress the grievance of women. This led to certain conflicting views regarding the applicability of the inherent powers of High Court under the CrPC and hence the Hon'ble High Court of Gujarat in the case of *Suo-Motu versus Ushaben Mistry* Criminal Reference no. 6 of 2015 laid down the procedure for adjudication of the proceedings under the Domestic Violence Act. It has been settled by the High Court that the institution of proceedings under the DV Act can be challenged by way of invoking the writ jurisdiction, but once any relief as prayed in the complaint is granted or refused, the same shall be challenged as per the provisions of DV Act and CrPC. This decision on the aspect of procedure has clarified various anomalies existing in the procedures for seeking relief under the provisions of DV Act⁵.

Application to the magistrate:

An application is to be preferred under the provisions of the Act for enforcement of rights recognized under the act and also for any other form of violence attempted on a woman.

- The aggrieved person or
- A protection officer or
- Any other person on behalf of aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act.⁶

The relief may be for Protection orders, Residence orders, monetary relief, Custody orders, and Compensation orders.

Jurisdiction of court:

The first class magistrate court or metropolitan court shall be the competent court within the local limits of which

- The aggrieved person permanently or temporary resides or carries on business or is employed
 - The respondent permanently or temporarily resides or carries on business or is employed
- or
- The cause of action arises.

Any order made under this Act shall be enforceable throughout India. While disposing application the magistrate shall take in to consideration any domestic incident report received from the protection officer or service provider. The relief sought under this section includes the issuance of order of payment or compensation or damages without prejudice to the right of such person to institute suit for compensation or damages for injuries caused by the act of domestic violence. If the magistrate is satisfied that an application prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood of such violence, he may grant ex parte interim order against the respondent on the basis of affidavit of the aggrieved person. Magistrate can issue different orders such as Protection order, residence order, monetary relief, custody order or compensatory orders as per the circumstances of the case.

In case of an earlier decree of compensation or damages passed by any other court, in favor of aggrieved person, the amount if any paid shall be set off against the order of amount payable under this act. The application to the magistrate shall be as nearly possible to the formats prescribed under this Act and Rules. After receiving the application the Magistrate shall fix the date of first hearing within 3 days and the magistrate shall endeavor to dispose of every application be within a period of 60 days of the first hearing. The notice of the date of hearing shall be given by the magistrate to the protection officer who shall get it served to the respondent. At any stage of the application, the magistrate may order, counseling of the respondent or aggrieved person either singly or jointly with any member of service provider. The magistrate may secure the service of suitable person preferably a woman including a person engaged in the welfare of women for assisting the court in the discharge of its function. If the circumstance of the case so warrant and if either party so desires the magistrate may conduct the proceedings on camera.⁷

Response of High Court of Gujarat on Domestic Violence:

The judicial trend of the Gujarat High Court can be viewed from the different judgments delivered by the High Court of Gujarat. The High Court of Gujarat has taken into account the principles laid down by the Supreme Court of India while deciding the cases on the provisions of the Act.

Quoting the words of Gujarat high court in the case of Suo-Motu PIL where directions for appointment of Protection Officers and the plight of the infrastructure provided to such officers has been considered, the High Court terming the delay in effective implementation of the same as mockery of the provisions of DV Act.

While issuing the directions the HC quoted, "There is one universal truth, applicable to all countries, cultures and communities: Violence against woman is never acceptable, never excusable, and never tolerable." With this observation, the administration was asked to make regular appointment of protection officers, support staff and set up infrastructure in two months".⁸

Income of Wife: Still Entitle for Maintenance

There has been quite an uproar regarding the grant of maintenance to a wife who is earning enough to maintain herself and the issue is riding a see-saw as a straight jacket formula cannot be made applicable to any set of facts. But when it comes to High Court of Gujarat, the Courts have been justifying the benevolent legislation to its core and the same is reflecting in majority of the decisions. In one such decision where the Gujarat High Court remanded the matter to the Trial Court which rejected the application of the wife for maintenance under the provisions of DV Act solely on the ground that the wife was an advocate notary and so she was earning. While remanding the matter to the Trial Court it was directed by the High Court that the aspect of earnings of the wife shall not be taken into consideration while deciding the quantum of maintenance. Merely the situation that the wife is earning shall not disentitle the wife from seeking maintenance from the husband.⁹

Application under DV Act: Applicability of Limitation

While clarifying the legal position regarding the applicability of limitation under Section 468 of the Code of Criminal Procedure in a case where the application preferred by the wife was after 6 years of leaving the house of the husband. It was contended by the husband that the said proceedings were time-barred and hence the provisions of Section 468 shall be applicable. The trial court allowed the application of the husband and the complaint preferred by wife was rejected. The said order was set aside in appeal by the Sessions Court and in such view when the said order was subjected to challenge before the High Court in its revision jurisdiction, the High Court while settling the issue of applicability of the Section 468 for the proceedings under the DV Act has categorically held that there is no applicability of Section 468 of the Code of Criminal Procedure in the proceedings under the DV Act unless there is a breach of any of the protection orders passed. Only on such breach and initiation of proceedings under Section 31 of the DV Act, such question of limitation under Section 31 may come into play.¹⁰

Liberal interpretation of the Maintenance Laws

The Gujarat High Court held that The Family Courts Act, 1984 sec 7 and The Protection of women from domestic violence Act, 2005 sec 17 are to be interpreted liberally. During the substance of marriage, the wife has a right to reside in the house of husband. Family Court cannot grant injunction restraining the wife from entering matrimonial house especially when such right is conferred upon the wife under the provisions of DV Act.

In the petition preferred challenging the order passed by the Family Court restraining the wife from entering the shared household of the husband, it has been clarified by the High Court of Gujarat, when the statutory remedy is available to the wife to seek residence in the shared household of the husband, then the Family Court cannot overlap such a remedy and pass an injunction order to the contrary. The petition preferred under Art 226 and 227 of the constitution of India challenging the order of the family court was quashed and set aside. Rule was made absolute and petition was allowed in favour of the wife.¹¹

Operation of the Act: Retrospective or Prospective?

A specific contention to the effect that proceedings under the provisions of Domestic Violence act are prospective in nature and retrospective operation of the same alleging the incidence of cruelty prior to 2005 cannot be considered for invoking the provisions was raised in this case by the petitioners and the same was turned down by the Hon'ble Court and it was observed that the harassment as described under the provisions of Domestic Violence Act is a continuous act and the same continues till the respondent wife is subjected to any one of the form of harassment as contemplated under the Act. The Court also pointed out an illustration "In a given case if a wife is driven out of matrimonial house or she is compelled to leave her matrimonial house due to acts of husband and / or his family members before the Act came into force and thereafter (i.e. after the Act came into force) if the marriage is not dissolved in accordance with law and the wife stays, or has to stay, separate if the situation compelling the wife to stay separate continues, then subject to other conditions under the Act, the remedy provided under the Act viz. to pray for "order of residence"

would be available to the wife and the plea that she left the matrimonial house before the Act came into force hence order of residence cannot be made, would not be available in light of the scheme of the Act, intention of the legislature and provisions under the Act."¹²

Females as Respondent in the Proceedings

The High Court of Gujarat while dealing with an argument of the relatives of the husband in the domestic violence proceedings negated the contention that only the male members of the family of the Husband can be impleaded as respondent in the proceedings under the DV Act. It was held that such strict interpretation of the term "respondent" shall fall away from the intent of the Act and thus taking the support of the proviso to Section 2 (q) of the Act, the High Court has categorically held that the relatives of the respondent husband irrespective of the gender can be impleaded as respondent in the proceedings and the order for protection and other reliefs can be passed against them looking to the facts and circumstances of each case.¹³

The said issue has recently been settled by the Hon'ble Supreme Court of India by striking down the word "adult male" from provisions of Section 2(q) of the DV Act, and permitting the impleading of female relatives of the husband under the Act. There was a direct challenge to the provisions of Section 2(q) of the Act with the words "Adult Male" as the same is held to be unconstitutional and restrictive of Article 14.¹⁴

First Preference is Amicable Settlement

The Hon'ble Gujarat High Court while dealing with a complaint filed under the provisions of Domestic Violence Act, had forwarded the case to mediation and then after positive outcome of the reference to mediation, the parties came to an amicable settlement and it was mutually decided by both the parties that the proceedings are to be brought to an end in the interest of both the parties and thus the court observed as "when the offence is predominantly in arena of private dispute and when the settlement between the parties have arrived at and there is no harm to person and property, continuation of the proceedings would create consternation and would be count productive of justice. The Court shall strive to perpetuate a situation where peace is prevailed rather than creating consternation of feuds between the parties"¹⁵

The path of Gujarat High Court

Gujarat High Court in has also adopted a trend of safeguarding the interest of the women by prescribing certain pre-conditions even for issuance of notices while the husbands approach the High Court for some reliefs, especially to pay the outstanding arrears to the wife and then the matters are heard on merits. The said approach directly reflects the situation that a Husband is asked to first deposit the outstanding arrears so that the wife can be paid her legal right at priority basis then the legality of the orders can be assailed. Such an approach helps a lot while striking a balance for continuing the legal battle as the wife who is not able to maintain herself cannot be made to keep on hiring lawyers without there being any financial assistance. The Gujarat High Court in its jurisdiction has in another manner also made an attempt to nourish and flourish the image of women in the State of Gujarat to a similar extent to prosperity in the field of business and

commerce. Whenever and wherever the need has arose, Gujarat High Court has stepped in and passed such orders which help a woman regain her economic and social well-being. The State of Gujarat is always known for its peace and prosperity and the same reflects in the trend adopted by the Gujarat High Court for addressing such issues, especially it has been a procedure adopted to refer the matter to mediation for better settlement of the disputes between the parties affected in the Domestic Violence Proceedings.

References

SuoMotu vs. State of Gujarat reported in 2013(2) GLR 1047

Report of United National Population Fund 2005, cited in <http://www.express>

The Protection of Women from Domestic Violence Act, 2005

Sec 3 The Protection of women from domestic violence Act, 2005

SuoMotu versus UshabenKishorbhaiMistry: Criminal Reference no. 6 of 2015: Gujarat High Court

Sec 12 the Protection of Women from Domestic Violence Act, 2005.

https://en.wikipedia.org/wiki/Protection_of_Women_from_Domestic_Violence_Act,_2005 access on 22-10-15

Endless wait for domestic violence victims:<http://timesofindia.indiatimes.com/city/ahmedabad/>

Endlesswait-for-domestic-violence victims/articleshow/19732741.cms access on 23-10-15

SimabenMaheshbhaiSonivs State Of Gujarat Special Criminal Application no. 1072 of 2012- decided on 21.10.2015

YogeshAnantrai Bhatt and Ors.Vs.State of Gujarat and Ors. 2017 CRLJ 615

Yama VsAnkitManubhai Patel [2015(1) GLH 701]

DilipkumarRajaramKoshtiVs. State of Gujarat & Others [SCRA 225 OF 2012]

JaydipsinhPrabhatsinhJhala and Ors.v. State of Gujarat and Ors,(2010) 51 G.L.R. 635

Hiral P. Harsora and Ors.VsKusumNarottamdasHarsora and Ors.AIR 2016 SC 4774

Mahesh DayadasPahiwaniVs. State of Gujarat & Others [SCRA 3595 OF 2012]