

(2012) 04 GAU CK 0011
In the Gauhati High Court
Case No : Criminal Pet No. 434 of 2010

Abdul Haque (MD.)

APPELLANT

Vs

Jesmina Begum Choudhury and Another

RESPONDENT

Date of Decision : 25-04-2012

Acts Referred:

Constitution of India, 1950 — Article 20, 20(1), 31(1)
Criminal Procedure Code, 1973 (CrPC) — Section 125, 468, 473, 482
Penal Code, 1860 (IPC) — Section 406, 498(A)
Probation of Offenders Act, 1958 — Section 11, 11(3), 6
Protection of Women From Domestic Violence Act, 2005 — Section 12, 17, 18, 19, 2(a)

Citation : (2013) 1 DMC 384 : (2012) 4 GLT 668 : (2013) 3 RCR(Civil) 551 :
(2013) 3 RCR(Criminal) 530

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : B. Ahmed, Mr. S.K. Deori, Mr. H.I. Choudhury and Mr. K. Uddin, for the Appellant; M.H. Rajbharbhuiyan, Mrs. D. Bora, Raju Chetia, Ms. L. Das and Mr. K. Munir, Addl. PP, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—The proceeding u/s 12 of the Protection of Women from Domestic Violence Act, 2005 (Briefly, "PWDV Act"), pending in the Court of learned Additional Chief Judicial Magistrate, Hailakandi, Assam in MR Case No. 34 of 2008 is under challenge in this criminal petition. This application u/s 482 of the Code of Criminal Proceeding, 1973, read with Section 20(1) of the Constitution of India has been filed by the husband praying for quashing the aforesaid criminal proceeding against him.

2. Heard the arguments of Dr. B. Ahmed, learned counsel for the petitioner and that of Mr. MH Rajbarbhuiyan, learned counsel appearing for the respondent No. I/ complainant. The State was represented by Mr. K. Munir, learned Additional P.P. for the State.

3. Whether the PWDV Act is retrospective or prospective and whether, the

criminal proceeding is hit by Article 20(1) of the Constitution is the moot question for consideration before this court. In my view, before answering the question it would be just and appropriate to have an insight view of the facts of the case, which are briefly narrated below:

3.1. The marriage between the parties took place in the year 1996. The couple were blessed with a female child on 28.6.1998, who is presently in the custody of her mother. It was followed by giving birth of two stillborn children successively in the year 2000 and 2006. Thereafter, the matrimonial relation between the parties became strained and the complainant left her matrimonial home in the month of May, 2006 and returned to her parents' house.

3.2 It is the further case of the complainant that after few days, she was taken back by her husband in the matrimonial home at Karimganj. After two to three days of their union, the husband had allegedly indicated to his wife about his intention to marry her elder sister's daughter. It is the allegation of the wife that having not agreed to the aforesaid proposal, she was subjected to mental and physical torture and having learnt about the torture, she was again taken back to her parents' home by her younger brother.

3.3 It is the further case of the complainant that after about 15 days, her husband married another woman, namely, Musstt. Subetun Nessa against their personal law. Even thereafter, complainant's father reconciled the matrimonial relation with the help of mediators and a re-conciliation agreement was executed. It is the further case of the complainant that she apprehended that her husband may misappropriate her "stridhan" and the upbringing of their 9 year old daughter may also hamper. The wife has further alleged that her husband was also not providing proper medical treatment to her as well as adequate food and money for her medical treatment and as a result, she was suffering from economic, mental and physical torture. With these allegations. M.R. case No. 34 of 2008 was filed in the Court of learned Chief Judicial Magistrate, Hailakandi on 26.3.2008.

4. Prior to filing of the complaint u/s 12 of the PWDV Act, the wife had also filed a case u/s 125 of the CrPC; being M.R. case No. 214 of 2006 as well as a case u/s 498A of the IPC being CR Case No. 638 of 2006. In this way, the present case under PWDV Act was filed nearly after two years of their separation.

4.1 By filing the aforesaid complaint u/s 12 of the PWDV Act, the wife prayed for return of "stridhan", custody of the minor child, residence order and compensation under various Sections of the Act.

5. On receipt of a Report from the Protection Officer, the learned Magistrate passed an interim order on 17.5.2008, directing the husband to return the "stridhan" and also hand over the custody of the minor child to the complainant.

6. On receipt of the notice, the husband filed two petitions on 2.5.2009. In the first application, the husband/petitioner prayed for closing the case, pleading that

the alleged tortures were committed in the month of January. February and May, 2006, whereas, the Act came into force on and from 26.10.2006. In the second application, the petitioner prayed for calling the records of maintenance case u/s 125 of the CrPC wherein a different date of incident was mentioned. Both these petitions were rejected on 13.5.2009. The learned Additional Chief Judicial Magistrate held that the law is retrospective in view of Section 26 of the Act. Similarly, the prayer for calling the records of maintenance case was rejected on the ground that the complaint u/s 12 of the PWDV Act would be examined on the basis of the materials and evidence that may be given in the case and the contradictory statement in the maintenance application would have no bearing.

7. The aforesaid order was again challenged by the husband by filing a petition u/s 25 of the Act. This application for modification of the order dated 17.5.2008 was filed on the ground that in between this period, the matter was referred for counselling and the Counsellor's report is in favour of the husband. Besides this, the issue with regard to the custody of the child was being examined by the District Judge on an application by the father. However, this application was also rejected vide order dated 24.7.2009. The aforesaid orders were then challenged by the husband in the Court of learned Sessions Judge, Hailakandi in Criminal Appeal No. 33 of 2009. The appeal was also dismissed on 3.8.2010, holding that in view of the provisions u/s 26 of the Act, the learned Magistrate has rightly taken cognizance of the complaint. However, the learned Magistrate was directed to reconsider the modification of the order dated 24.7.2009 with regard to the maintenance and custody of the child.

8. The petitioner is basically challenging the order dated 13.5.2009 passed by the learned trial Magistrate and the judgment dated 3.8.2010, passed by the learned Sessions Judge, wherein, it has been held that panel provisions of PWDV Act are retrospective in operation.

9. Dr. B. Ahmed, learned counsel for the petitioner submitted that admittedly, PWDV Act came into operation with effect from 26.10.2006, whereas, the alleged offences were committed prior to May, 2006 and, as such, the learned Additional Chief Judicial Magistrate committed wrong in taking cognizance of the alleged offence. Referring to Article 20(1) of the Constitution, the learned counsel contended that the petitioner cannot be convicted for the alleged offences, which were allegedly committed prior to May, 2006 when the PWDV Act was neither published nor was in force. In support of these submissions, the learned counsel relied upon the judgments of Hon'ble Supreme Court rendered in the case of West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras, ; Rattan Lal Vs. State of Punjab, ; Punjab Tin Supply Company Vs. Central Government & Ors. : AIR 1984 SC 87 (1); Dayal Singh Vs. State of Rajasthan, and the Judgment of Rajasthan High Court, rendered in the case of Smt. Hema alias Hemlata and Another Vs. Jitendra and Another, .

10. Per contra, Mr. Rajbharbhuiyan, learned counsel for the respondent No. 1 submitted that till date, the matrimonial relation between the parties has not

been legally snapped and the parties are continued to be husband and wife and, as such, even if the offences are committed prior to the enactment of the law, complaint u/s 12 of the Act is still maintainable. The learned counsel further submitted that the reliefs claimed in the complaint are nothing but continuing obligations and responsibilities of the husband and on this ground also, the complaint is maintainable. With regard to the application of Article 20 of the Constitution, the learned Counsel submitted that it is also in-applicable in the case inasmuch as the complainant is not seeking any conviction of the husband. According to the learned counsel, provisions of PWDV Act are basically remedial in nature and are not penal provisions. The learned counsel also referred to Section 36 of the Act which provides that the provisions of the Act are in addition to and not in derogation of the provisions of other laws, which are in force. In support of his submissions, the learned counsel relied upon the judgments of the Apex Court rendered in the case of *The State of Maharashtra Vs. Vishnu Ramchandra*, *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*, and *Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Another*, .

11. In the case of *West Ramnad Electric Distribution Co. Ltd (supra)*, the Apex Court was examining the acquisition of the petitioner's Undertaking by way of an Act, enacted in the year 1954 validating the acquisition that took place under 1949 Act. Differentiating the phraseology "a law in force at the time" and the "authority of law" referred in Articles 20(1) and 31(1) of the Constitution, their Lordships observed as below:

14. Mr. Nambiar then contends that the impugned notification is invalid and inoperative because it contravenes Article 31(1) of the Constitution. Article 31(1) provides that no person shall be deprived of his property save by authority of law. It is urged that this provision postulates the existence of an antecedent law before a citizen is deprived of his property. The notification was issued on the assumption that there was an antecedent law viz. the earlier Act of 1949; but since the said Act was non est, the notification is not supported by the authority of any pre-existing law and so, it must be held to be invalid and ineffective. In our opinion, this argument is not well founded. If the Act is retrospective in operation and Section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act. it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore, in considering whether Article 31(1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31(1) must be held to have been complied with in that sense.

12. In the case of *Rattan Lal (supra)*, their Lordships were confronted to examine as to whether an appellate court could exercise Section 6 of the Probation of

Offenders Act, 1958, which did not exist when the accused was convicted by the trial Court. In that context, their Lordships made the following observations:

6. The first question is whether the High Court, acting u/s 11 of the Act, can exercise the power conferred on a court u/s 6 of the Act. It is said that the jurisdiction of the High Court u/s 11(3) of the Act is confined only to a case that has been brought to its file by appeal or revision and, therefore, it can only exercise such jurisdiction as the trial court had, and in the present case the trial court could not have made any order u/s 6 of the Act, as at the time it made the order the Act had not been extended to Gurgaon district. On this assumption, the argument proceeds, the Act should not be given retrospective operation, as, if so given, it would affect the criminal liability of a person for an act committed by him before the Act came into operation. In support of this contention a number of decisions bearing on the question of retroactivity of a statute in the context of vested rights have been cited. Every law that takes away or impairs a vested right is retrospective. Every *ex post facto* law is necessarily retrospective. Under Article 20 of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. But an *ex post facto* law which only mollifies the rigour of a criminal law does not fall within the said prohibition. If a particular law makes a provision to that effect, though retrospective in operation, it will be valid. The question whether such a law is retrospective and, if so, to what extent depends upon the interpretation of a particular statute, having regard to the well-settled rules of construction. Maxwell in his book *On Interpretation of Statutes*, 11th Edn., at pp. 274-75, summarizes the relevant rule of construction thus:

The tendency of, modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful influences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

13. In the case of Punjab Tin Supply Company (supra), the following proposition was laid with regard to the retrospective or prospective application of a law.

17. All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not.

14. In the case of Dayal Singh(supra), their Lordships of the Apex Court approved the view taken in the case of Rattan Lal (supra) that ex-post facto law which only mollify the rigour of a criminal law can be given retrospective operation. It held that a penal statute which creates new offence is always prospective. It would be fruitful to extract the relevant observations, which are as below:

11. The decision approves of the principle that ex post facto law which only mollifies the rigour of the criminal law, though retrospective in operation, will be valid. After enunciating this principle the Court interpreted Section 11 of the Probation of Offenders Act and came to the conclusion that on a true interpretation of the provision the High Court had jurisdiction to exercise the power at the appellate stage, and this power was not confined to a case where the trial court could have made that order. The phraseology of the section was wide enough to enable the appellate court or the High Court when the case came before it, to make such an order. We, therefore, do not find that Rattan Lal made a departure from the well-settled principle that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than with which he might have been inflicted under the law in force at the time of the commission of the offence.

This Court only laid down the principle that an ex post facto law which only mollifies the rigour of a criminal law did not fall within the said prohibition, and if a particular law made a provision to that effect, though retrospective in operation, it will be valid. Rattan Lal was, therefore, decided on an interpretation of Section 11 of the Probation of Offenders Act which was not a penal statute in the sense that it did not create an offence and provide for punishment thereof. We, therefore, do not find that principles laid down in Rattan Lal depart from the well-settled principles that a penal statute which creates new offences is always prospective and a person can be punished for an offence committed by him in accordance with law as it existed on the date on which an offence was committed.

15. In the case of Hema Vs. Jitendra (supra), the Hon''ble Rajasthan High Court was directly examining the issue whether the provisions of PWDV Act were retrospective in operation. In this case, His Lordship has held that there is no provision in the Act giving retrospective effect. His Lordship quashed the criminal proceeding on the ground that the marriage between the parties was dissolved in the year 2003, whereas PWDV Act came into force only on in the month of October, 2006.

16. In the case of Vishnu Ram Chandra (supra), referred by the learned counsel for the respondent No. 1, the Hon''ble Supreme Court was considering a challenge of an order of externment of the petitioner on the ground that provisions of Bombay Police Act, 1951, as on the date of petitioner's conviction, which was made the basis of his expatriation was not in force. Section 57 of the Act, empowered the authorities to remove persons convicted of certain offences within the local limits of their jurisdiction. In that context, their Lordships observed that statutes, which create no new punishment but authorise some action based on past conduct, the principle of prospective operation is not applied. Their Lordships further observed that if the law is designed to protect the public against acts of harmful character may be construed retrospectively.

17. In the case of Hitendra Vs. Thakur (supra), the Apex Court was considering amendment of TADA act and not prospective or retrospective operation of a new law. Even then, the legal principles set out by their Lordships are relevant to determine the legislative intention as to whether a law is prospective or retrospective. Hence, the relevant propositions of law laid down by their Lordships are extract below to determine the issue :-

26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

18. The authority of *Chanmuniya* (supra) cited by the learned counsel for the respondent No. 1 is not applicable. In the said case, the Apex court was considering the issue as to whether strict proof of marriage is essential to get an order of maintenance u/s 125 of the Cr.P.C. While referring the issue before a larger Bench, their Lordships made a passing remark that under PWDV Act "live-in relationship" is considered to be a marital relationship.

19. What emerges from the aforesaid authorities is that every new enactment is presumed to be prospective in operation, unless either expressly or by necessary intendment is made retrospective. Prospective operation of law is also presumed, if it creates new rights and liabilities and this principle has to be applied more rigorously if the law provides penal provisions inasmuch as Article 20(1) of the Constitution, inter-alia, clearly stipulates that no person shall be convicted of any offence except for violation of "law in force" at the time of commission of the act. Only those enactments which only relax the existing procedure or mollify the rigour of the criminal law can be given retrospective operation.

20. Coming to the PWDV Act, I find that there is no indication in the law that under certain circumstances the provisions can be given retrospective effect. Since, the impugned orders have been passed on the basis of Sections 26 and 36 of the Act, it would be appropriate to quote the aforesaid provisions, for ready reference:

26. Relief in other suits and other 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.

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.

21. A bare reading of Section 26 of the Act shows that the reliefs, which are available under Sections 18, 19, 20, 21 and 22 under the Act, may also be sought by way of legal proceeding in other forums, like the Civil Court, Family Court or Criminal court. For instance, residence order, monetary reliefs, protection order, compensation and an order for custody of minor children can be obtained from a competent Civil Court and Family Court. Similarly, an order for maintenance allowance provided u/s 20 of the Act can also be obtained from Court of a Magistrate, u/s 125 of the Cr.P.C. At the same time, the offence of mental and physical torture can also be raised before a Magistrate u/s 498A of the IPC. In other words, Section 26 does not speak about retrospective or prospective operation of the law, as has been held by the Courts below. This is further clear from Section 36 which clarifies that provisions of PWDV Act are in addition to and not in derogation of provisions of any other law. To put it differently, Sections 26 and 36 in no way confers jurisdiction upon a Magistrate to take cognizance of offence of domestic violence, which, was committed prior to coming into force of the law, unless the offence is a continuing one.

22. As noted above, the PWDV Act is a comprehensive law. It is basically a civil law, addressing the phenomenon of domestic violence in different forms like physical abuse, sexual abuse, emotional abuse and economic abuse etc. Under Chapter - IV, various reliefs can be granted to the aggrieved person and some of the reliefs that can be granted under Sections 17 to 22 have already been reflected in this judgment. Although the orders are not ipso facto punitive, but the orders become punitive u/s 31 if the orders are breached and not complied by the respondent(s). In my considered opinion, protective orders that can be passed under Chapter -IV cannot be equated with the penal provisions of IPC. The learned counsel for the respondent No. 1 rightly contended that the law is more in the nature of protecting the aggrieved persons and finding out the remedy of domestic violence instead of imposing sentences and penalty upon the respondent (s).

23. Section 2(a) defines "aggrieved person" and Section 2(f) defines "domestic relationship". These definitions may be of some help to determine the issue and, as such, the same are reproduced below:

(a) "aggrieved person" means 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;"

"(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

24. The definition of "aggrieved person" is couched in present-indefinite tense in perfect infinitive sense. Unlike Section 125 of the CrPC it does not admit a "divorcee" within the meaning of "aggrieved person". In this way, most of the

reliefs that can be granted on the basis of an application u/s 12 can be granted only if an "aggrieved person" is in domestic relationship with the respondent (s). Though, the definition of "domestic relationship" gives an indication that to obtain certain reliefs under Chapter -IV of the Act the "aggrieved person" need not be in continuing relationship with her husband and in-laws it also does not admit a divorcee. However, a wife or a woman in "domestic relationship" can seek reliefs provided under Chapter-IV though she may be living separately at the time of filing of application u/s 12 of the Act. Keeping in mind, the definition of "aggrieved person" and domestic relationship", it can be held that though the Act is prospective, reliefs can still be granted to the "aggrieved person" if the domestic relationship between the aggrieved person and the respondent (s) continue to exist.

25. In the case of Smt. Sujata Mukherjee Vs. Prashant Kumar Mukherjee, the Hon"ble Supreme Court was considering the prayer of accused persons to transfer a case u/s 498A IPC from one court to another on the ground that the alleged offence was not committed in the court of learned CJM, Raipur, where the case was filed. Their Lordships have held that the offence of maltreatment and humiliation to a victim of mental and physical torture is a continuing offence and, as such, restored the jurisdiction of the court, where the complaint was filed.

26. An identical view has been taken in the case of Sanapareddy Maheedhar and Another Vs. State of Andhra Pradesh and Another, . In this case, the Apex Court was examining an issue as to whether a complaint u/s 498A and 406 IPC r/w Sections 3 and 4 of the Dowry Act can be entertained by a court even after the statutory period of limitation. While answering the issue in the affirmative, their Lordships have held that while considering the applicability of Section 468 CrPC to the complaints made by the victims of matrimonial offences, the court can invoke Section 473 CrPC and can take cognizance of an offence even after the period of limitation since the offence of cruelty is a continuing offence and affects the society at large. Their Lordships have also approved the view taken by the Apex Court in the case of Vanka Radhamanohari (Smt) Vs. Vanka Venkata Reddy and Others, , wherein the following trend-setting observations were made with regard to matrimonial offences:

It is true that the object of introducing Section 468 was to put a bar of limitation on prosecutions and to prevent the parties from filing cases after a long time, as it was thought proper that after a long lapse of time, launching of prosecution may be vexatious, because by that time event the evidence may disappear. This aspect has been mentioned in the statement and object, for introducing a period of limitation, as well as by this Court in the case of Sarwan Singh (supra). But that consideration cannot be extended to matrimonial offences, where the allegations are of cruelty, torture and assault by the husband or other members of the family to the complainant. It is a matter of common experience that victim is subjected to such cruelty repeatedly and it is more or less like a continuing offence. It is only as a last resort that a wife openly comes before a court to

unfold and relate the day-to-day torture and cruelty faced by her, inside the house, which many of such victims do not like to be made public. As such, courts while considering the question of limitation for an offence u/s 498A i.e. subjecting a woman to cruelty by her husband or the relative of her husband, should judge that question, in the light of Section 473 of the Code, which requires the Court, not only to examine as to whether the delay has been properly explained, but as to whether it is necessary to do so in the interests of justice

27. In view of the aforesaid authorities and keeping in mind the benevolent provisions of PWDV Act I hold that course of justice would be defeated if a complaint u/s 12 of Act is thrown out rightly on the technical ground that the law is prospective in operation. In other words, though the Act is prospective, a court of Judicial Magistrate would still be competent to take cognizance of the offences and grant relief (s) to the aggrieved person, provided it is found that the offences are continuous in nature and subsists at the time of filing the complaint.

28. In the case at hand, the admitted fact is that respondent No. 1 is still the wife of the petitioner since she has not been divorced by her husband. Though the complainant/ respondent No. 1 has filed separate cases for maintenance u/s 125 CrPC and for her torture u/s 498(A) IPC the reliefs claimed in the application u/s 12 of the PWDV Act do not cover the reliefs prayed for in other cases. In fact, vide order dated 17.5.2008, the learned Magistrate has only ordered return of "stridhan" as well as handing over the custody of the minor child to the complainant and these reliefs cannot be granted by the Judicial Magistrate, either in Section 125 Cr.P.C. or u/s 498(A) of the IPC. However, if the application for custody of the child is pending for consideration before the learned District Judge, it would be just and proper for the learned Magistrate to refrain himself from pursuing implementation of his order with regard to the custody of the minor child. It is also necessary to avoid passing of conflicting orders by two different courts, having parallel jurisdiction. Though the Judicial Magistrate is competent to pass custody order of any child or children u/s 21, Section 26 makes it clear that the same relief can also be sought for in other legal proceeding before a Civil Court etc. Since, the husband/respondent has approached the Court of District Judge, seeking custody of their minor daughter, propriety demands that superior court should be allowed to take a decision in the matter, unless, the superior court i.e. the District Judge directs the respondent to contest the issue before the Magistrate.

29. With the aforesaid clarification of the order of the Judicial Magistrate regarding custody order, the Criminal Petition stands dismissed.

30. Both the parties are directed to appear in the trial court on 21.5.2012. The Registry is directed to return the LCR with a copy of this Judgment.