

**(2010) 12 BOM CK 0135**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No"s. 70 and 76 of 2010

Mr. Krishna Gopal Gupta and Mrs. Veena Krishna Gupta

APPELLANT

Vs

Mrs. Radhika Gupta and The State

RESPONDENT

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**Date of Decision :** 13-12-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Constitution of India, 1950 — Article 14, 141, 15, 21

Criminal Procedure Code, 1973 (CrPC) — Section 125

Penal Code, 1860 (IPC) — Section 498A

Protection of Women From Domestic Violence Act, 2005 — Section 12, 12(2), 18, 19, 20

**Citation :** (2010) 12 BOM CK 0135

**Hon'ble Judges :** N.A. Britto, J

**Bench :** Single Bench

**Advocate :** S.G. Dessai and A. Gaonkar, for the Appellant; Sudin Usgaonkar and C.A. Ferreira, Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

N.A. Britto, J.—These petitions can be conveniently disposed off by this common Judgment.

2. Both the petitions arise from an application filed by the Respondent-wife u/s 12 of the Protection of Women from Domestic Violence Act, 2005 for obtaining various reliefs under the said Act (Act, for short).

3. Some facts are required to be stated to dispose off these petitions.

4. The Petitioners herein are the parents-in-law of the Respondent-wife. The said application u/s 12 of the Act was filed against the husband as well as the said parents-in-law who were arrayed as Respondent Nos. 1 to 3. The parties hereto therefore are hereinafter referred to in the names as they appear in the cause title of the said application.

5. The applicant-wife married Respondent No. 1-husband on 17-4-1998, and according to the applicant-wife they came to reside at the Respondents' house, namely the bungalow at Green Valley at Porvorim. Thereafter, on 5-6-2008 both husband and wife took up a rental flat at Prudential Palms under leave and licence and started residing there and according to the applicant-wife this change of residence was done under the pretext of living away from his parents; but from 15-9-2008, the Respondent-husband bought another flat and started residing there. On 9-10-2008 the applicant-wife filed two complaints against the Respondent-husband, one at the Porvorim Police Station and the other at Women's Police Station. Copies of both the complaints were filed along with the application u/s 12 of the Act.

6. In the complaint filed to Women's Police Station, the applicant-wife had stated that the Respondent-husband had moved into a separate apartment on 15-9-2008 leaving her and her young daughters alone and that now he had barged into the flat at Prudential Palms where she was staying, abusing her and calling her names, etc.

7. The Respondent Nos. 2 and 3, the parents-in-law of the applicant, filed an application for dropping them from the proceedings but the same came to be dismissed by the learned J.M.F.C., Mapusa by Order dated 4-8-2009. The Petitioners/Respondent Nos. 2 and 3 preferred an appeal against the said Order to the Court of Sessions but the same came to be dismissed by Order dated 4-1-2010. Criminal Writ Petition No. 70 of 2010 has been filed challenging this Order dated 4-1-2010.

8. The applicant-wife filed an application on 21-7-2010 for amendment of the application filed u/s 12 of the Act, and the same came to be granted by Order dated 23-8-2010 of the learned J.M.F.C., Mapusa, observing that the amendment sought by the applicant was relevant to decide the real controversy between the parties, though it was filed after a long time. Criminal Writ Petition No. 76 of 2010 has been filed against the said Order of the learned J.M.F.C. dated 23-8-2010. I shall proceed to dispose off this Writ Petition, first.

9. I have heard Shri S. G. Dessai, learned Senior Counsel on behalf of the Petitioners/Respondent Nos. 2 and 3 and Shri Sudin Usgaonkar, learned Counsel who has appeared, on behalf of the applicant-wife, without a formal notice having been issued to him.

10. Shri Dessai, learned Senior Counsel submits that the proceedings u/s 12 of the Act is another facet of Section 498A I.P.C. Learned Senior Counsel then submits that the procedure to decide an application u/s 12 has been set out u/s 28 of the Act which provides that the procedure shall be governed by the provisions of the Code of Criminal Procedure, 1973. Here, it may also be noted that Sub-section(2) of Section 28 of the Act also provides that nothing in Sub-section (1) shall prevent the Court in laying down its own procedure for disposal of an application u/s 12 or under Sub-section(2) of Section 23. Learned Senior

Counsel then submits that the proceedings u/s 12 are criminal proceedings and there is no reason otherwise, in case they were civil proceedings, that they should be inquired into by a criminal Court like J.M.F.C. Next, learned Senior Counsel points out to Section 31 of the Act which provides for penalty for breach of protection order by the Respondent. Learned Senior Counsel further points out that Section 23 deals with the power of the Court to grant interim and ex-parte orders and the legislature has made an express provision in that regard which would not have been made in case the proceedings u/s 12 of the Act were civil proceedings for in that event the provisions of Order 39 Rule 1 and 2, CPC would apply. Learned Senior Counsel has fairly brought to the notice of the Court two Judgments of this Court, one in the case of Raosaheb Pandharinath Kamble and Ors. v. Shaila Raosaheb Kamble and Ors. CDJ 2010 BHC 1543 and the other in the case of Mrs. Jovita Olga Ignesia Mascarenhas e Coutinho v. Mr. Rajan Maria Coutinho and Anr. 2010 ALL MR 3107 and has submitted that both the said Judgments have to be considered "sub silencio" as they have not considered the provisions of Section 28 of the Act and in this regard, learned Senior Counsel has placed reliance on the judgment of the Apex Court in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, wherein it has been held that "precedents sub-silencio and without argument are of no moment". The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated under Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. "It is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles laid down therein". "Any declaration or conclusion arrived at without application of mind" or "proceeded without any reason cannot be deemed to be declaration of law" or "authority of a general nature binding as a precedence".

11. I am afraid, the submissions made by learned Senior Counsel cannot be accepted. True, the Legislature in its wisdom, u/s 28 of the Act, has provided that the proceedings u/s 12 and others mentioned therein would be governed by the provisions of the Code of Criminal Procedure. At the same time, the legislature has given freedom to the Court inquiring into an application u/s 12 from laying down its own procedure for disposal of an application u/s 12 or under Sub-section(2) of Section 23. The whole purpose of making the procedural provisions of the Code of Criminal Procedure applicable or for that matter procedure being laid down by the Court was done only for the purpose of giving a faster relief to the women for whose benefit the Act has been enacted. In fact, the Act provides, by virtue of Section 36 that 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 and not only that Section 26 provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal

proceedings, before a Civil Court, family court or a criminal court, affecting the aggrieved person and the Respondent whether such proceedings are initiated before or after the commencement of this Act. This Court in *Raosaheb P. Kamble and Ors. v. Shaila Raosaheb Kamble and Ors.* (supra) observed that the provisions of the Act are mainly made for giving relief to the affected women due to domestic violence, etc. The Respondent in such case is not an accused until he commits a breach of an order passed by the Court under the provisions of the Act after such breach the Respondent is treated as an accused u/s 31 of the Act. In other words, the proceeding under the Act are of a quasi civil nature and in such proceeding, the Court would have power to allow amendment in an application and written statement. Again, in *Mrs. Jovita Olga Ignesia Mascarenhas e Coutinho v. Mr. Rajan Maria Coutinho and Anr.* (supra) this Court observed that although the Magistrate is required to follow the procedure as governed by the Code of Criminal Procedure or its own procedure, the nature of the proceedings like those u/s 125 of the Code, would be civil. (See *Pandharinath Sakharam Thube Vs. Kum. Surekha Pandharinath Thube and Others*, . There is preponderance of judicial opinion to support the view that the proceedings u/s 125 of the Code are of civil nature. (See also Division Bench judgment of P. H. High Court in *Smt. Kamla Devi and Others Vs. Mehma Singh*, apart from the fact that it is also the view of this Court consistently held that proceedings u/s 12 of the Act cannot be different. In other words, the said finding in *Mrs. Jovita Olga Ignesia Mascarenhas e Coutinho v. Mr. Rajan Maria Coutinho and Anr.* (supra) has been given after taking note of Section 28 of the Act, and, therefore it cannot be said that the said decision is not binding. That apart, the statements and objects behind enacting the Act would show that the Legislature had taken note of the phenomenon of domestic violence being widely prevalent but it had remained largely invisible in the public domain. The Legislature had also noted that if a woman is subjected to cruelty by her husband or his relatives it is an offence u/s 498A, I.P.C. The civil law does not however address this phenomenon in its entirety and therefore it was proposed to enact the Act 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 from domestic violence and to prevent the occurrence of domestic violence in the society(emphasis supplied). In other words, the reliefs which a J.M.F.C. gives to a woman under the Act is in relation to civil rights and therefore this is yet another reason why the proceedings under the Act have to be considered as civil proceedings brought under the domain of the procedure prescribed by the Code with a view to give a summary and expeditious relief to a woman who is a victim of domestic violence. That a specific provision has been made for interim relief is no reason to hold otherwise. I am, therefore, of the view that the proceedings being of civil nature, the learned J.M.F.C. was justified in allowing the applicant-wife to amend her petition u/s 12 of the Act.

12. After the said amendment was allowed by the Order of the learned J.M.F.C. dated 4-8-2009, the appeals filed by the Petitioners/Respondent Nos. 2 and 3

could have been disposed off as infructuous, in the light of the amendment carried out to the main application u/s 12 of the Act.

13. The learned J.M.F.C. by Order dated 4-8-2009 rejected the application of the Petitioners-Respondents Nos. 2 and 3 to drop the proceedings against them observing that if one perused the petition there were words "Respondents"(in plural) and also there was mention of words family members in the hand written complaint dated 9-10-2009 to the Women's Police Station, Panaji wherein it was stated that the family members were helping Respondent No. 1 and had forced the applicant-wife out of her matrimonial house, and, therefore there was prima facie evidence against the Petitioners-Respondent Nos. 2 and 3. The learned Sessions Judge also noted that the applicant had alleged in the complaint to the Women's Police Station that her husband had been physically, mentally and emotionally assaulting her and forcing her to give him divorce. She had also alleged in the said complaint that her husband along with his family members had forced her out of the matrimonial house(60, Green Valley, Alto Porvorim, Goa) three months earlier, etc. and this aspect could be considered by the learned J.M.F.C. on a proper inquiry and not in appeal during which they would have ample opportunity to show that they are not necessary parties to the proceedings and/or the applicant was not entitled for any relief against them. The application u/s 12 in para 3(i)(a), inter alia seeks protection order u/s 18 prohibiting acts of domestic violence by granting an injunction against the Respondents(in plural) from in any manner causing any physical bodily harm to the Petitioners like the incident of 9-10-2008, or in any manner abusing or insulting with harsh words or tone the Petitioner in public or in any place, etc. It would be too early in the day to claim that the said protection order was sought by the applicant-wife only against the Respondent-husband.

14. Lastly, it may be noted that the Magistrate would be required to consider the report of Protection Officer, only if there was one and not where there is none, as contemplated by the proviso below Sub-section(1) of Section 12 of the Act.

15. There is nothing in the case of G. Sagar Suri and Another Vs. State of U.P. and Others, which can help the case of the Petitioners herein.

16. In view of the above discussion, I find there is no merit in these petitions, and consequently the same are hereby dismissed with no order as to costs.

17. Parties are directed to remain present before the learned J.M.F.C. on 6-1-2011 at 10.00 a.m. for further proceedings.