

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(Crl) No.519 of 2011

In the matter of an application under Articles 226 & 227 of the Constitution of India.

Gangadhar Pradhan
S/o. Late Ladu Pradhan,
Vill: Banamalipur, P.O. Durudura,
P.S./Dist : Nayagarh

... Petitioner

-Versus-

Rashmibala Pradhan,
W/o. late Ananda Pradhan,
Vill: Banamalipur, P.O. Durudura,
at present C/o. Debraj Swain,
Vill: Kirialanji, P.O. Durudura,
P.S. Nayagarh, Sadar, Dist: Nayagarh

... Opp. Party

For Petitioner : M/s. Girija Shankar Mohanty,
S.P. Swain & S.K. Nayak

For Opp. Party : None

P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI V.GOPALA GOWDA
AND**

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 18.05.2012

B.N.Mahapatra, J. This Writ Petition has been filed challenging correctness of the order dated 16.04.2011 passed by the learned Additional Sessions Judge, Nayagarh in Criminal Appeal No.44 of 2010 whereby the order dated 07.09.2010 passed by the learned S.D.J.M., Nayagarh in CMC No. 116 of 2007 has been modified with a direction to the appellant-petitioner to pay a

sum of Rs. 1000/- towards monthly maintenance to the respondent-opposite party keeping all other conditions of the order unaltered.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are as follows:

Opposite party-Rashmibala Pradhan had filed an application bearing CMC No.116 of 2007 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, "Act, 2005") before the learned S.D.J.M., Nayagarh, who vide order dated 30.01.2008 directed the petitioner to pay monthly maintenance of Rs.300/- to opposite party until she is given her legitimate share in the joint family properties of the petitioner. Being aggrieved, the petitioner filed Criminal Appeal No.20 of 2008 before the learned Additional Sessions Judge, Nayagarh, who set aside the order of the learned S.D.J.M., Nayagarh with a direction to dispose of the case afresh after giving opportunity to both parties to adduce evidence. After hearing the parties and taking into consideration the evidence adduced by them, the learned S.D.J.M., Nayagarh vide order dated 07.09.2010 enhanced the monthly maintenance to Rs.1,500/- in favour of opposite party until there is partition among the co-shares providing definite share to the opposite party in the properties of the petitioner. Being aggrieved by the said order of the learned S.D.J.M., Nayagarh, the petitioner again filed an appeal bearing Crl. Appeal No.44 of 2010 before the learned Additional Sessions Judge, Nayagarh, who after hearing both parties directed the petitioner vide order dated 16.04.2011 to

pay a sum of Rs.1000/- as monthly maintenance to the opposite party keeping all other conditions imposed by the learned S.D.J.M., Nayagarh unaltered. Hence, the present writ petition.

3. Mr. G.S. Mohanty, learned counsel appearing on behalf of the petitioner submitted that the petitioner is the father-in-law of opposite party. The husband of opposite party died on 11.07.2006 due to Brain Fever and Malaria. Opposite party lodged an F.I.R. before the I.I.C., Nayagarh Police Station on 28.09.2006 on the basis of which P.S. Case No. 259 of 2006 corresponding to G.R. Case No. 463 of 2006 under Sections 498-A/506/34 I.P.C read with Section 4 of the D.P. Act was registered against the petitioner and other in-laws. While the said case was pending before the learned S.D.J.M., Nayagarh, the opposite party filed a petition under Section 12 of the Act, 2005. It was submitted that the petitioner is an old man, who does not have any source of income other than cultivation of his ancestral lands. The annual income from the agricultural land is insufficient to maintain his family. Therefore, the direction given by the learned Additional Sessions Judge, Nayagarh to pay monthly maintenance of Rs.1000/- is not justified and legal. The learned Court below has made an error by awarding maintenance to opposite party even though the opposite party had not made any such prayer in her petition bearing CrI. Misc. Case No.116 of 2007. The application under the provisions of Section 12 of the Act, 2005 is not maintainable against the

petitioner and his son as the alleged domestic violence took place prior to 26.10.2006, i.e. on the date on which the Act, 2005 came into force.

Despite notice none appeared for opposite party.

4. In the present case, the following questions fall for consideration by this Court:

- (i) Whether the application of opposite party under Section 12 of the Act, 2005 is maintainable before the S.D.J.M., Nayagarh as the allegation against the petitioner and his son was made prior to 26.10.2006 on which date the Act, 2005 came into force and the said Act has not been given retrospective effect ?
- (ii) Whether learned Additional Sessions Judge is justified to direct the petitioner to pay monthly maintenance of Rs.1,000/- to opposite party ?

5. Since both the questions are interlinked, they are dealt with together.

6. The 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 matter connected therewith or incidental thereto.

It is very much necessary to know the statements of object and reasons for enactment of the Act, 2005.

“STATEMENT OF OBJECT AND REASONS

Domestic violence is undoubtedly a human rights 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 (C E D A W) in it's 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 498A of IPC. The Civil Law does not however address this phenomenon in its entirety.

3. It, is therefore, proposed to enact a law keeping in view of 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 woman 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 family 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 women 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 organizations 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.”

7. Now, the question arises as to whether the petition filed under Section 12 of the Act, 2005 is maintainable in respect of cause of action arose prior to the date, i.e., 26.10.2006, when the Act, 2005 came into force. It was argued that G.R. Case No. 463/2006 as well as Criminal Case bearing No. CMC 116 of 2007 arose out of the same cause of action. The opposite party had filed FIR before the IIC, Nayagarh P.S. on 28.09.2006 vide PS Case No. 259/2006 corresponding to G.R. Case No.463/2006 under Sections 498(A)/ 506/34 IPC read with Section 4 of the D.P. Act against the petitioner and other in-laws. The said cases are pending before the learned S.D.J.M., Nayagarh.

Thus, according to the petitioner, since the Act, 2005 came into force with effect from 26.10.2006, the domestic violence, if any occurred prior to that date the opposite party is not entitled to get any relief under the Act, 2005 as the Act, 2005 has no retrospective operation. The Act should be applied prospectively, i.e., from the date of its coming into force on 26th October, 2006. Act of domestic violence prior to 26.10.2006 shall be governed by the provisions of the Indian Penal Code.

8. The term “domestic violence” as defined under Section 3 of the Act, 2005 is extracted below:

“3. Definition of domestic violence.-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 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 specially 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 shared 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."

9. “Aggrieved person” as defined under Section 2(a) means any woman who is, or has been, in domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

10. The definition of “Respondent” as contained in Section 2(q) is that any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act, provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

11. Under the Scheme of the Statute if an aggrieved person is subjected to domestic violence she can present an application to the Magistrate seeking one or more reliefs under the Act. Besides, aggrieved person, a Protection Officer or any other person on behalf of the aggrieved person can also present an application to the Magistrate seeking one or more reliefs under the Act.

12 Sub-section (2) of Section 12 provides a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.

13. Section 20 of the Act, 2005 provides (i) 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 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. 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.

14. Section 22 deals with Compensation orders. It provides, in addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by that respondent.

15. Section 23 provides power to pass interim and ex parte orders.

16. Section 31 of Act, 2005 provides for penalty for breach of protection order by respondent. A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a

term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

17. As it appears from the order dated 30.01.2008, passed in CMC 116/2007 the opposite party in her petition under Section 12 of the Act, 2005 sought for following reliefs:-

- (a) direction to the respondent to give return of "Streedhan" properties, viz, a sum of rs.45,000/- given as dowry at the time of her marriage, gold ornaments worth Rs.65,000/- belonging to her,
- (b) an order of restraint prohibiting the respondents from alienating the properties, more fully described in Schedule 'A' of the petition; and
- (c) a direction to give possession of the said properties to her.

18. Relief claimed in the petition filed under Section 12 of the Act 2005 is civil in nature. Till date of filing of the petition under Section 12, the petitioner (opp. party herein) was not granted any of the reliefs sought for in her petition under Section 12 of the Act, 2005. Therefore, it is a continuous act of deprivation of petitioner's right. Admittedly, she was not given her share in joint family properties by the present petitioner. Thus, it is a continuous cause of action for which the petition filed under Section 12 of Act, 2005 claiming the above reliefs is maintainable and the provisions of Act, 2005 are squarely applicable to the present case.

19. As it appears, the criminal cases referred to above have been filed under the Indian Penal Code and the Dowry Prevention Act. Those

cases have nothing to do with the petition filed under Section 12(1) of the Act, 2005.

20. In view of the above, the plea of the petitioner that the petition filed by the opposite party under Section 12 of the Act, 2005 is not maintainable on the ground that the Act, 2005 applies only prospectively, i.e., from the date of coming into force on 26th October, 2006 is totally misconceived and not sustainable in law.

21. Now, the question arises as to whether the courts below are justified to grant monthly maintenance till the present opposite party gets her share in joint family properties.

While dealing with the right of maintenance under the Act, 2005, the Hon'ble Supreme Court in the case of ***Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008) 4 SCC 649***, held that the Act, 2005 provides for a higher right in favour of the wife, who not only acquires a right to be maintained but also thereunder acquires a right of residence which is a higher right. However, the said right as per the legislation extends only to joint properties in which the husband has a share.

22. In the instant case, admittedly, the husband has a right in the joint family properties. After death of her husband on 11.07.2006 due to Brain Malaria, opposite party has acquired such right. Since she has not been given her share in the joint family properties, the lower courts have rightly granted monthly maintenance to opposite party till she gets a share in the petitioner's properties.

23. As the petitioner has not given to opposite party her share in the joint family properties in question, the opposite party is entitled to get maintenance till she gets her share in the said properties. In absence of getting a share in the ancestral joint family properties, she is deprived of her economic and financial resources to which she is legally entitled to get.

24. In view of the definition of 'domestic violence' given in Section 3 of the Act, 2005 and Explanation (iv) explaining the economic abuse, the Courts below are fully justified to grant monthly maintenance to the respondent (opposite party herein) till she gets her share in the ancestral joint family properties. Considering the present standard of living, award of maintenance @ Rs.1000/- (rupees one thousand) per month by the Additional Sessions Judge, Nayagarh cannot be said to be on the higher side.

25. In the facts situation, we do not find any infirmity or illegality in the order dated 16.4.2011 passed by the learned Additional Sessions Judge, Nayagarh warranting interference of this Court. Accordingly, the writ petition is dismissed.

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B.N.Mahapatra, J.

V. Gopala Gowda, C.J. *I agree.*

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Chief Justice