RELIEFS AND PROCEDURE FOR PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 - AN OVER VIEW

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Abstract

Domestic Violence as a means to maintain unequal relationships has resisted the women’s lives both nationally and internationally. Particular to the context of domestic violence, the existing laws dealt with the recognition of cruelty as a ground for divorce under various personal laws and procedural laws and thereby providing maintenance to avoid destitution of women victims. With changing societal perceptions and demands, the struggle led to amendments in the criminal law that recognized cruelty within marriage as an offence. The Act aims at providing protection to women who are faced with violence within a domestic relationship. In its preamble, the Act mentions the rights of women under the Constitution, and the necessity of ensuring that these rights are recognized even in the private sphere of the home and family. The Act envisages comprehensive procedural tools and adequate relief measure to facilitate easy access to justice to any aggrieved party.

Key words: Domestic Violence, Relationships, Internationally, Amendments, procedure, etc.

Introduction:

The Domestic Violence Act provides a large number of avenues for an abused woman to get relief. The next aspect of the Act that needs to be analyzed is the relief it seeks to provide to the woman victim. A broad overview of the structured reliefs under the Act suggests that they are not punitive in nature. They are restorative in nature providing for protection of a woman victim from any further abuse or compensating her for the abuse already suffered and additionally restoring stability and harmony in the family unit. Applicability and establishment of tortuous liability in the cases relating to domestic violence is one of the significant aspects of the Act. It provides new civil remedies for the victims of domestic violence. This law recognizes new set of rights and obligations in the nature of torts remedy, to secure women in their own families. The main thrust of the law is to provide monetary assistance in the shape of damages, compensation, maintenance, exemplary cost and penalties. In the case of domestic violence, tortuous liability arises with due intention. Some conditions are required for intention which are totally employed by domestic violence, conditions are: motive, malice, recklessness.

The different modes of relief envisaged under the Act are: Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders and Compensation Orders. Each of such orders may be passed by the Magistrate while disposing of the application, depending on the reliefs sought for by the aggrieved person and taking into account the necessities of the victim at that point of time.

Protection Order

The Magistrate after giving the aggrieved person and the respondent an opportunity of being heard and on prima facie satisfied that domestic violence has taken place or is likely to take place, may pass Protection Order in favour of the aggrieved person. It may contain an order prohibiting the respondent from committing any act of domestic violence or aiding or abetting therein, entering the place of employment of the aggrieved person or if the person aggrieved is a child at school, or any other place frequented by the aggrieved person or attempting to communicate in any form whatsoever with the aggrieved person without the leave of the Magistrate, alienating any assets, operating bank lockers or bank accounts belonging to both the parties jointly or to the respondent singly, including her stridhan or any other property held jointly or separately by them, causing violence to the dependents, other relatives or any person giving the...
aggrieved person assistance from domestic violence or committing any other act as specified in the Protection Order. The Protection Orders would be in operation till the aggrieved person applies for a discharge (removal of the order). The court is duty-bound to study the application and ensure that there is a change in circumstances that warrants the discharge of the Protection Order, and the aggrieved person has not been subjected to any sort of coercion, before issuing the necessary orders.

**Residence Order**

Another type of relief envisaged under the Act is the Residence orders. In the Indian patriarchal society, most ownership and lease agreements are made in the names of male members of the family. Hence, women who reside in such premises, including wives, mothers, daughters and sisters, face the danger of being dispossessed from the same and forced to destitution. Many women are forced to tolerate domestic violence for fear of being on the streets, especially when they do not have support from their parents or government support for shelter. In situations where such women seek the court’s intervention in a situation of domestic violence, women also fear that the respondent would dispossess them from the premises by way of a reprisal or revenge.

Taking into account the vulnerability of a woman victim who faces violence in a domestic relationship she is ensured the right to reside in a shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law. To exercise this right, the Act provides for a residence order that may be obtained by the victim either restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household irrespective of whether or not he/she has a legal or equitable interest in it, directing the respondent to remove himself from the shared household, restraining the respondent or his relatives from entering into that portion of the shared household in which victim resides, restraining the respondent from alienating or disposing of or encumbering the shared household, restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate or directing the respondent to secure alternate accommodation for the aggrieved person of the same level as enjoyed by her in the shared household or to pay rent for the same. However, the Act clearly states that no residence orders against a woman may be obtained that directs her to remove herself from the shared household.

Magistrate is also empowered under the Act to impose any conditions or pass any direction that is necessary to protect the victim or any child of hers to require a bond to be executed from the respondent for the prevention of domestic violence, to impose any obligations relating to the discharge of rent and other payments; to direct the respondent to return any stridhan, property, or valuable security to which the victim is entitled; and to empower any officer in charge of the nearest police station or within the jurisdiction of the Magistrate to enable the implementation of such orders.

It is to be remembered in this context, that the right to residence is different from property rights that include right to own and dispose of a property. This law provides a right to the woman against being illegally dispossessed. She may be dispossessed through the procedure set out in law. The right to residence does not entitle the woman with the right of ownership over the premises.

**Monetary Reliefs**

The Act envisages Monetary reliefs where by 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 domestic violence including any maintenance, loss of earnings, medical expenses or any loss caused due to destruction, damage or removal of any property from the control of the victim, which is consistent with the standard of living she is accustomed to. In case of breach of such order by the respondent, the Magistrate may direct the employer or a debtor of the aggressor to directly pay the victim or to deposit the same with the
court a portion of the wages or salary or debt due to or accrued to the credit of aggressor which may be adjusted towards the monetary relief payable by him. This type of payment made to the victim out of the debts accrued from the aggressor and adjusting the same from it relates the Garnishee proceedings under the Code of Civil Procedure in India No specific criteria has been laid down or fixed by judicial interpretations as to the amount of compensation to be arrived at. So it can very well be deciphered that it depends on each case and its circumstances.

Custody Orders

The Act provides for Custody orders where by the magistrate may at any stage, grant temporary custody of any child or children to the victim or any person making an application on her behalf and specify the visitation rights of the aggressor, which may be refused if the Magistrate is of the opinion that it will be harmful to the child. Under this law, the aggrieved person cannot file an application for temporary custody alone; such an application has to be coupled with a protection order since the main aim of this law is to prevent domestic violence. Here by envisaging such reliefs to be ordered the ‘best interest of the child’ principle is revisited. The right of the child to violence free environment thereby ensuring developmental growth of children in a conductive atmosphere is emphasized. This relief is temporary in nature. Permanent custody of children would have to be determined and settled in separate proceedings in the Family Court or other appropriate court. Custody is distinct and separate from guardianship as custody refers to the child’s physical placement, while guardianship refers to all aspects of access, custody and care of the child and his/her property.

Compensation Orders

The Act also provides for Compensation orders that may be additionally granted by the Magistrate to the victim as compensation for any injury, including mental torture and emotional distress, which may have been caused by the aggressor. The law makes provision for positive entitlements through an interim monetary relief order related to a) maintenance for the victim or her children, b) compensation for physical injury including medical expenses, c) compensation for mental torture/emotional distress, d) compensation for loss of earning, e) compensation for loss due to destruction, damage, removal of any property from her possession or control. Thus, the Act for the first time goes beyond the framework of mere ‘punishment’ to the offenders and tries rather to protect women from violence at home.

The orders passed by the Magistrate may be of interim, final and exparte in nature. In addition to the primary relief and remedies granted by the Act, it also confers on the Magistrate the power to grant interim order/relief whenever he deems just, in any proceedings before him under the Act. Since the final order in a case may take a long time, the court can pass an interim order (when the proceedings are pending) to prevent further violence and provide immediate reliefs to the affected woman, including the right of residence.

In cases where the Magistrate, on the basis of an affidavit filed by the aggrieved, is satisfied that the application before him, prima facie, discloses that the respondent is committing or has committed an act of domestic violence or that here is likelihood that the respondent may commit an act of domestic violence he may grant an ex-parte order against the respondent An ex-parte order is one that is passed in the absence of the other party to the dispute, and without prior notice to the opposite party. Once a petition is lodged with the court, in the normal course, the court would serve a notice to the other party, so that both sides can be heard before an order is passed. This is in accordance with principles of natural justice. However, the Act makes an exception to this rule under limited circumstances, as it is intended to act swiftly in situations where the aggrieved person reasonably fears danger to her physical or mental well-being. Hence, if the court determines, on the face of the aggrieved person’s application, that the respondent is committing/has committed/likely to commit domestic violence, an ex parte order may be passed.
The Act envisages that an appeal may be preferred within 30 days to the Court of Sessions from any order passed by a Magistrate under the Act.

One of the pivotal purpose of the Act being restoring marital harmony, it provides that if the magistrate, on the receipt of an application from the aggrieved person or the respondent and is satisfied that there is a change in the circumstances requiring alteration, modification, or revocation of any order previously made under this Act, he/she may pass such orders as deemed or appropriate.

The Procedures of Implementation: A Mix of Civil Remedies and Criminal Procedure

A socially beneficial legislation is good if it is user-friendly from the point of view of the victims. In a nutshell the procedure to be undergone when an application is made is enunciated as follows; As far as the procedures for obtaining the orders and relief are concerned, an aggrieved person or Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking relief under this Act. A woman herself can approach the Court directly and approaching a Protection Officer is purely optional for the woman and is voluntary. Any person who has reason to believe that such an act of domestic violence has taken place or is likely to take place can inform the Protection Officer.

On receipt of a complaint, the Protection Officer shall make a Domestic Incident Report. A copy of it is to be served upon Service Provider of the area, Police officer within the jurisdiction and the Magistrate. As per the Rules, on an application being moved the Protection Officer shall prepare a “safety plan” which shall include measures to prevent further violence after making an assessment of damages involved. Aggrieved woman should be informed of her rights under the law. A Police Officer, Protection Officer, Service Provider or Magistrate who has received a complaint shall inform right to make an application for obtaining relief by way of protection order, an order for monetary relief, a custody order, a residence order, or a compensation order, the availability of services of the Protection officers, Service providers, including shelter homes and medical facilities; right to free legal services under the Legal Services authorities Act, 1987; and right to file a complaint under Section 498A of the Indian Penal Code, 1860. The Protection Officer makes a Domestic Incident Report to the Magistrate and forwards copies thereof to the Police Officer in charge. She/he must ensure that the aggrieved person gets all the benefits mentioned herein before.

Once the matter is with the Magistrate he/she shall fix the date of the hearing, which shall not ordinarily be beyond three days from the receipt of the application by the court, and shall endeavor to dispose every application within a period of sixty days from the date of first hearing. The means of serving notice and the effects thereof of non-serving etc are clearly enunciated in the Rules laid down for the purpose. A notice of the date of hearing shall be given by the Magistrate to the Protection Officer who shall serve it on the respondent and on any other person as directed by the magistrate within a maximum period of two days. Counseling order can be directed only after passing an order for interim relief. As to the intricate details of appointing a counselor and as to the role to be played by a counselor is set out in the Rules.

Counseling plays an important role in the Act to alleviate the plight of the victim of domestic violence. The counselor is to work under the supervision of Protection Officer or the Court. The Rules bring out the procedure involved in the counseling envisaged as per the Act. The main task of the Counselor as per the Rules is to bring out an effective remedy to the parties concerned and to prevent the violence.

Other options with the Magistrate are direct either of the parties, singly or jointly, to undergo counseling; seek assistance of a person, preferably a woman, engaged in promotion of family welfare, for assisting him/her in discharging his/her functions and conduct proceedings in camera. The aggrieved person in the meantime has the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the house and shall not be evicted. In the interim period of disposal of case, the Magistrate, after giving both parties an opportunity of being heard, and satisfied that domestic violence has taken place, can pass a protection order, or a
residence order, or direct the respondent to pay the aggrieved person monetary relief and in addition, can pass compensation orders, custody orders and ex-parte orders.

On receipt of an order from a Court, the protection officer can conduct home visit and can make appropriate enquiries regarding the salary assets, bank accounts and emoluments of the respondent liable to pay maintenance. The Court can also direct the Protection Officer or the police officer in charge of nearest police station to assist the aggrieved person in regaining custody of her children and assist the Court in the enforcement of the orders passed. No order can be passed under the Act directing a woman to remove herself from the shared household. The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of hers. The Magistrate shall ensure that a copy of any such order shall be given free-of-cost to the parties. If the protection order has been breached, it shall be punished with either imprisonment or fine or both as earlier narrated.

The Central and the State Government shall take measures to ensure that provisions of this Act are given wide publicity through media; Central and State government officials including Police officers, members of judicial service etc., are given periodic sensitization and awareness trainings on issues addressed by this Act; and also to ensure that there is effective coordination between the services provided by concerned Ministries and Departments dealing with law, home affairs, health and human resources, and that there is a periodic review of the same.

The whole procedures enumerated in the Act are contemplated to create an atmosphere of synergy between institutions of society, all of which are responsible for preventing violence against women. Whereas there has been a challenge to domestic violence over the years from the civil society, there has been no institutional response to that problem. The Police, performing their role under Section.498 A, are not an institution to challenge domestic violence. There were no institutions charged with liaising between different institutions charged with the duty to combat domestic violence. Therefore the Act to an extent brings out interplay between different institutions.

**The Consequences of Breaching the Judicial Orders**

While a range of civil remedies are provided for under the law, which an aggrieved person may choose according to her best interests, criminal sanctions are intended at providing a greater deterrent effect among the perpetrators. The Act provides that in case a protection order is breached, it shall amount to a cognizable and non-bailable offence and the aggressor shall be punishable with imprisonment, which may extend to one year or with a fine, which may extend to Rs.20,000/- or with both. Any such breach shall be tried by the Magistrate who passed the order. The Rules prescribe the manner in which a breach of order is to be handled by the Magistrate or by the Protection Officer as the case may be. Moreover, the Court may conclude that such an offence has been committed upon the sole testimony of the aggrieved person. This provision has been severely criticized as it would erode the presumption of innocence and it is even more stringent than the English counterpart under which, if the victim considers that the aggressor has failed to comply with an occupation order or a non-molestation order, he may apply for the issue of a warrant of the arrest against the aggressor. However, the relevant judicial authority shall not issue a warrant on an application unless it is substantiated on oath and the relevant judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order. The Act also does not make it clear what the penalty would be, in case there was any breach of a residence order, a custody order, or a compensation order by the respondent.

**Merits of the Act**

This is a significant advance of the Act that it shows commitment to the cause of ending violence against women. The objective articulated behind the Act is “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. The Act intends to itself to prove itself more serious about the issue and to tackle the same. The protection of women from domestic violence is not the sole goal but a holistic view is adopted in the Preamble to show the eagerness in promoting the rights guaranteed under the Constitution to the women who are victims. The intention behind is not to take cognizance of the criminal act of domestic violence but overall promotion of rights guaranteed to the women in India. This objective legitimately takes care of the different types of acts recognized as domestic violence in the Act. It takes into account the multifaceted violations of human rights of women victims.

The Act provides a temporary or urgent relief from a violent atmosphere at home. It gives a broad definition of domestic violence as including physical, sexual, verbal, emotional and economic abuse. It addressed domestic violence against all women, including wives, mothers, daughters, sisters, widows, second wives or any women in the home. The law could be used against any male person in the home, including fathers, brothers, sons, husbands, or any relative of the woman. The Act gave women the right to reside in the house, to get protection orders, and to maintenance, custody, compensation, and protection from violence. It provided women with several mechanisms to access the law, including the appointment of Judges, Protection Officers, Service Providers and Police Officers. It also established the right to a speedy trial and disposal of cases within 60 days.

Recognizing that women need state mandated infrastructure to access the law, the institution of Protection Officers is created to record all reported instances of domestic violence, to enable the woman to access the courts by assisting in drafting applications and to assist the courts in collecting evidence and in enforcing the orders. He is the first port of call to address the concerns of women who will be stigmatized to litigating against one’s own family, difficulties in getting the orders enforced etc. He/she is to assist the victim in accessing the court and other support services (such as legal aid, medical aid, shelter homes etc.) and second to assist the court during the course of the proceedings and in the enforcement of orders. It’s a multiple option law in that a woman can access it herself or else can approach the following to enable her access it: Protection Officer, police, lawyer, Service Providers or can even go directly to the magistrate. A multiple channel of communication has been set up under the law and it is up to the woman to choose which is more suitable to her. Again this is in keeping with the concept that access to justice has to be democratic.

The duty to prepare a safety plan is an important responsibility vested with the Protection Officer, under Rule 8(1) (IV). The safety plan is a document prepared for the aggrieved woman that identifies ways in which the aggrieved party can protect herself during a violent incident and reduce the risk of serious harm. It must be based on the types of abuses faced by her and the remedies she has asked for in court. It is not an alternative, but in addition to the remedies she seeks through the court. The rules under the Act provide a format for a safety plan in Form V. The provision on safety plans is an example of how the Act works at the preventive level.

Counseling envisaged in the Act, can take place at the pre - litigative and post- litigative stages of proceedings. At the pre - litigative stage, counseling would aim at restoring the aggrieved woman’s self-esteem, dignity, provide psychological support to her and facilitate her to decide whether or not to pursue a legal recourse. At the litigative stage, counseling would be aimed at getting the perpetrator to give an undertaking not to inflict further domestic violence. This form of counseling is important in re-establishing “basic trust and a sense of safety” for the woman facing domestic violence. The overall objective of counseling as envisaged under this law is to prevent any further acts of violence from being perpetrated. In cases where joint counseling is ordered, the proceedings take on the complexion of a mediation process. However, Rule 14 specifies that settlements are to be attempted only at the behest of the aggrieved person.

One of the most important remedies visualized under this law is to stop violence, particularly violence of emergency nature, and therefore we have the ‘stop violence order’ in the form of protection orders. The intention of course, is to give a woman facing domestic violence a space free from violence where she can evaluate her options and choose her future course of action.
It is meant to be an immediate and emergency law. The Act works in addition to other laws and does not make the existing pre 2005 legal regime redundant.

There is no period of limitation stated in the Act within which the aggrieved party should approach the court. This is because domestic violence is to be viewed like a continuing offence rather than a “one time offence”. The Supreme Court has repeatedly held that in the absence of an express provision on period of limitation in the statute concerned, a beneficial legislation has no period of limitation.

The Act is laudable for the recognition of different types of abuses that are likely to be perpetrated to woman in her natal and matrimonial family. The courts have on various occasions interpreted a wife's right to reside as being part of her right to maintenance. But still to provide for this right through a legislative framework is a laudable leap in ensuring the very right to existence and survival in the society. The right to reside contemplated under the Act is irrespective of the pattern of ownership and is over the space where the woman and the perpetrator of violence have lived together in a domestic relationship. Through judicial interpretations several significant progressive changes are coming forth in the status of victims of domestic violence.

This new law put real power in women's hands in a court system which ought to be committed to using the laws effectively. They provide that women can go back to court to ask the judge to find the man in contempt of court if he violates such an order. Upon finding him in contempt, the judge can fine the batterer or send him to jail to convince him there are real penalties for disobeying the law. The difference between this and a criminal law remedy is that the woman does not have to convince often recalcitrant police or prosecutors to take action; she has the right to go to court on her own behalf without the officials taking any action at all. In addition, once she has the order she can threaten the batterer, in effect, not to harass her or that she is potent to take steps to have the respondent thrown in jail.

The Act plays a stellar role in protection of women's rights in the household and in guarding them from domestic violence. In the very first instance, a recognition of domestic violence as something unacceptable, where it has become yet another social practice, is necessary and indeed, commendable in a patriarchal society. Having recognized the rights of women and the violation of these rights, the next step taken is providing innovative and efficacious remedies to enforce the same. The conceptualization of the thus far is admirable.

**Conclusion:**

Domestic Violence Act a purely theoretical level, the Act has been a colossal leap for the women of India because it has, for the first time, recognized the fact that Indian women are not only the victims of individual acts of physical and sexual abuse, as it is prevalent in many societies, but also victims of a well-established oppressive social hierarchy that constantly and systematically stunts their economic growth and perpetuates their dependence on the male members of their family and has attempted to remedy the situation.

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