IN THE COURT OF JUDICIAL MAGISTRATE, 1st CLASS: KAMRUP AT GUWAHATI

Misc' case No: 197m/2010

Mrs. Mamoni Bibi

……Applicant

Vs.

Ismail Ali

..…….Respondent

(U/S 12 of the Protection of Women from Domestic Violence Act, 2005)

Present: Sri N.K Das, AJS
Judicial Magistrate, 1st class,
Kamrup at Guwahati

For the applicant: Mr. N. Muhtarin, Advocate
For the respondents: Mr. H. N. Islam, S. Rahman, Advocates

Application filed on: 30-11-2010
Evidence recorded on: 18-4-2011, 23-6-2011 and 2-7-2011
Argument heard on: 16-8-2011
Final order delivered on: 12-9-2011

FINAL ORDER

1. This application under section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter 'the Act') is filed by the applicant above named along with her minor son Moinul Hoque seeking reliefs of protection order under section 18 of the Act and monetary relief under section 20 of the Act against the respondent above named. The application is treated to be filed by the applicant only, as the Act permits only an aggrieved person, defined in section 2 (a) of the Act, to file an application under section 12 of the Act. The applicant in her application, inter alia, narrated that she got married to the respondent on 17-5-1998 and since then started to reside in the matrimonial home. After one year of her marriage the respondent started to torture her, subjected her to domestic violence, coerced her to bring money from her father for construction of a house wherein the applicant is presently residing, stopped providing her and her son any maintenance

and particularly on 12-9-2010 the respondent mercilessly beat her, poured kerosene on her to set her on fire. It is further stated that the father of the applicant is maintaining her and her minor son all along since the respondent stopped providing any maintenance to them. Though the applicant prayed for ex parte order also, this court deemed it fit to hear the respondent and finally dispose of the application.

2. The respondent, after receiving notice, appeared in court and vide order dated 29-3-2011 he was allowed to be represented by his learned counsel Mr. H.N. Islam as the respondent is in active service in CRPF an presently posted at Orissa. The respondent filed written statement through his learned counsel. In a nutshell, the respondent denied the allegation of torture, violence, demand of dowry, refusal to pay maintenance etc. He stated that he is a CRPF personnel and presently serving at Orissa and sometime visits and stays with the petitioner and the child and that he has been regularly providing maintenance to them. It is further stated that the respondent is under suspension at present. According to him the petitioner has filed the case to harass the respondent and hence he prayed for dismissal of the instant application. The parties were directed to attend counseling in view of section 14 of the Act but the respondent failed to appear for the same for his service duty.

3. The applicant approached this court directly without first going to the Protection officer concerned and therefore no domestic incident report is annexed with the application.

4. In view of section 28 of the Act, Rule 6(5) of the Protection of Women from Domestic Violence Rules, 2006, section 126 (2) and section 254 (1) of the Code of Criminal Procedure, 1973 (hereinafter 'CrPC') summons procedure was followed and the parties were directed to adduce their evidence.

5. The applicant, in support of her case, examined 2 (two) witnesses i.e. the applicant herself and her father. The respondent side adduced evidence of 1 (one) witnesses i.e. the father of the respondent and exhibited 9 (nine) documents.

I have heard the argument of both sides, perused the case record and considered the same. The learned counsel for the respondent also filed written argument a copy of which was simultaneously furnished to the learned counsel for the applicant. I have also considered the written argument of the respondent.

6. As laid down in Rule 6 (5) of the Protection of Women from Domestic Violence Rules, 2006 the procedure enumerated for deciding a case under section 125 CrPC is to be followed to decide an application under section 12 of the Act and for that reason section 354(6) CrPC would be applicable.

Therefore the following points arise for determination in this case.

(A) Whether the applicant is entitled for relief of protection order under section 18 of the Act against the respondent?

(B) Whether the applicant is entitled for monetary relief under section 20 of the Act against the respondent?

Discussion of evidence, decision and reasons therefor:

For convenience both the points for determination are taken up together for discussion as they are interrelated.

7. At the outset it would be appropriate to quote section 12 of the Act for better appreciation of the materials on record in view of the inability of the applicant to obtain and submit the Domestic Incident Report from the Protection Officer concerned.

"12. Application to Magistrate.-

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub- section (1) may include 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:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub- section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub- section (1) within a period of sixty days from the date of its first hearing."

8. A plain reading of Section 12 of the Act shows that the aggrieved person can file application directly to the Magistrate concerned. This is the choice of the aggrieved person that instead of directly approaching the Magistrate, she can approach the Protection Officer and in case of emergency, the service provider and with their help to the Magistrate concerned. The word "or" used in Section 12 of the Act is material, which provides a choice of the aggrieved woman to approach in the aforesaid manner. There is nothing wrong in directly approaching the Magistrate for taking cognizance in the matter. This is for the Magistrate concerned to take help of Protection Officer and service provider after receiving the application provided, he feels it necessary for final disposal of the dispute between the parties. If the parties concerned or Magistrate takes help of the Protection Officer, she, will submit a Domestic Incident Report to the Magistrate concerned.

9. The proviso appended to subsection 1 of section 12 says that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. If the proviso is interpreted to denote that the aggrieve woman in every case has to submit domestic incident report along with the application the same would have the effect of preventing the aggrieved woman from approaching the magistrate directly. As because in every case where the aggrieved woman approaches the magistrate directly or the aggrieved woman is unable to furnish the domestic incident report or the domestic incident report is not annexed with the application under section 12 of the Act, the magistrate would have no option but to redirect the aggrieved woman to the protection officer concerned for preparation of a domestic violence report and then only approach the magistrate for relief by making an application. This would essentially render ineffective the subsection 1 of section 12 of the Act. In my view the legislature never intended such a situation. If we closely look at the wording of the proviso we find that the words used is “before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider” The magistrate is duty bound to consider the domestic incident report if the same is ‘received by him’ from the protection officer or the service provider. If the same is not received from the protection officer it would not be possible on the part of the magistrate to consider the same.

10. The situation become clearer if we look at the circumstances in which the domestic incident report is prepared. Section 2(e) of the Act defines domestic incident report as a report made in the prescribed form on receipt of a complaint of

domestic violence from an aggrieved person. Section 9 (b) of the Act casts a duty upon the protection officer to prepare a domestic incident report when a complaint of domestic violence is received by her. Rule 5 of the Protection of women from domestic violence Rules, 2006 requires the protection officer to prepare the domestic incident report in Form-1 and submit the domestic incident report to the magistrate concerned when complaint of domestic violence is received. A perusal of Form-1 reveals that the form has been prepared in order to enable the aggrieved woman to give the details of the incident of the domestic violence in clear terms. This is a social legislation and purpose of the Act is to assist the aggrieved person in filing the complaint, and Form has been prescribed in the Rules, only to facilitate filing of application so that it may contain all necessary particulars for decision of the case. If an application is drafted in such a manner with all necessary particular and usual information required by prescribed Form are contained therein, that cannot be said to be a bad application in the eyes of law. The Form prescribed by the Act is nothing else, but proper forum and facility given to the aggrieved woman for placing all relevant facts before the court concerned.

11. For the aforesaid reasons and discussion this court is of the view that there is nothing wrong on the part of the aggrieved woman to directly approach the court by filing an application without first approaching the protection officer concerned. Consequently if the aggrieved woman approaches the court directly the same would obviate the need of considering the domestic incident report for final disposal of the application if the application itself contains all the necessary particulars for decision of the case. The Magistrate would be required to consider the report of Protection Officer, only if there is one and not where there is none.

12. Having said so, let us now look into the points for determination of the case.

A protection order under section 18 of the Act can be passed only on being satisfied that domestic violence has taken place or is likely to take place. Therefore let us consider the evidence on record to see that domestic violence has taken place or is likely to take place. The magistrate is empowered by the Act, while disposing of an application under section 12 of the Act, to pass order under section 20 of the Act.

13. PW-1 (Mamoni Begum) is the applicant as well as the aggrieved woman. According to her, she got married to Ismail Ali i.e. the present respondent on 17-5-1998 and since then started to reside in the matrimonial house. But after marriage her husband, father in law and mother in law started to demand dowry in the form of cash and house and she was tortured. When her husband comes on

leave, he also tortures her, beat her with belt. She did not lodge complaint at that time as she hoped that her husband would mend his ways. Thus she remained in her matrimonial house for two years and eight month and when the torture became unbearable she returned to her father's house. Thereafter, complying with the earlier demand, her father constructed a house in the land belonging to her husband wherein she is presently residing and all her expenses of maintenance are being borne by her father till date. In the year 2001 she lodged a maintenance case which was however compromised on the promise of her husband that he will be a better person. In the year 2006 her son was born and at present he is studying but all of his expenses is borne by her father. On 10-9-2010 her husband came on leave and in the evening her husband came drinking wine and beat her with belt and gave her blows. Then in the morning of 12-9-2010 her husband beat her and poured kerosene oil on her with intent to set her on fire for which she lodged an ejahar and her husband was arrested. Her husband still threatens her that he will kill her. According to her, her husband draws salary amounting to rupees 28000/- (Rupees twenty eight thousands only). She is facing acute financial hardship and she needs maintenance of Rs. 4000/- (Rupees four thousands only) and Rs. 10000/- (Rupees ten thousands only) for her and her son respectively as her son is reading in preparatory class at Assam Jatio Vidyalaya.

14. PW-1 was cross examined at length by the learned counsel for the respondent. However, the respondent side could not elicit anything to indicate that what she deposed in her examination in chief was untrue or exaggeration or that she is a witness who is untrustworthy. In her cross examination the learned counsel was able to brought forth facts like: she did not annex the Kabinnama with her application, documents relating to the case filed in family court are not annexed in the present application, she filed the case in family court for her torture by her husband and parents in law, her father gets a salary of Rs. 1300/- as a village headman (Gaoburah), her husband brings cloths etc. to his father and brother whenever he comes on leave etc. These are additional facts which in no way render her unworthy of credit. Further facts technical in nature such as filing of documents relating to other case is largely a decision based on purely legal consideration. The filling of the other case in family court rather gets fortified in her cross examination. The marriage itself is not in dispute and that the respondent resides with her when he comes on leave is also an admitted fact as revealed from paragraph 3 of the written statement. Therefore the assertions made by PW-1 in her examination in chief regarding commission of domestic violence by the respondent remained unassailed in her cross examination. The learned counsel was only able

to elicit the ignorance of the applicant about the facts as to whether her husband is under suspension or not, whether one of her brothers in law is of unsound mind or not, as to how much it cost to construct a RCC building in per square foot etc. These elicited facts only indicate that the witness is not aware of those facts. They do not render the witness untrustworthy or they do not demolish the assertion of commission of domestic violence as revealed in her examination in chief. The evidence of this witness, therefore, is found to be cogent, coherent and above any reproach.

15. PW-2 (Md. Makib Ali) who is the father of the applicant corroborated and supported the version of PW-1 in all material particulars. In his cross examination he admitted the fact that he did not see with his own eyes the torture and violence committed by the husband and parents in law of his daughter. This fact is quite understandable. The alleged torture and violence was perpetrated upon the applicant when the said PW-2 was not around and the very nature of the allegation suggests that the atrocities were committed within the four walls of the house. Therefore this admission by PW-2 of not being a direct witness to the torture and violence does not help the respondent side at all because he (PW-2) deposed in his examination-in-chief that his daughter narrated to him in her own words about the torture and violence. PW-2 also expressed his ignorance whether the respondent is under suspension or not. In fact it is, rather, in his cross examination by the learned counsel for the respondent that PW-2 deposed that for the torture and atrocities the case in the family court was filed. It is of course not expected of a layman to know exactly the finer nuances of the legal procedure and therefore this court is unable to find fault with him for saying that for torture and atrocities a case was filed in the family court. How a village layman is to know what kind of cases are filed in family court. Indian condition being what it is, it would be too much to ask for if we expect that a layman will have to know every type of cases filed in every kind of court. In the same breath we are unable to find fault with the applicant (PW-1) for saying that for torture and violence the case was filed in the family court. The evidence of PW-2 therefore is supportive of the deposition given by PW-1 and the learned counsel for the respondent could not demolish his deposition rather the fact of torture got fortified in his cross examination.

16. The respondent adduced the evidence of one witness through DW-1 (Md. Iman Ali). He is the father of the respondent. He admitted the marriage between his son and the applicant and the birth of his grandson. He deposed that after their marriage they lived in his house for little more than two years.

Thereafter they stayed at Bongaigaon for five/six years and then at Chhaygaon wherein a plot of land was purchased. According to him in that plot of land his son i.e. the respondent constructed a house with his (respondent's) own money. He further deposed that his son was suspended in August, 2010 and since then he is paying maintenance to the applicant and her son. He exhibited the suspension order (Exhibit-1) to prove the fact of suspension of his son, Exhibit-2 to Exhibit-8 (bank and Postal receipts) to prove the fact that his son is paying maintenance to the applicant and Exhibit-9 (pay slip) to prove the fact that after suspension his son is drawing a salary of Rs.4895/- (Rupees four thousands eight hundreds and ninety five only). On a close scrutiny it is found that out of the total seven exhibits (Exhibits 2 to 8) exhibit-7 is addressed to Md. Makib Ali (PW-2 as well as father of the applicant) and the remaining exhibits are addressed to the applicant. These exhibits go to show that some amount of money was in fact given to the applicant by the respondent. However the latest of the said receipts (exhibit-7) is of the month of July, 2010. This goes to show that after the month of July, 2010 nothing has been paid by the respondent. Exhibit-1 (suspension order) and Exhibit-9 (Pay slip) are of the month of November, 2010. Exhibit-1 reveals that the respondent was placed under deemed suspension w.e.f. 17-9-2010. Therefore these two exhibits only show the fact that the respondent was placed under suspension. In the second paragraph of Exhibit-1 it is written that the respondent joined his duty on 15-10-2010 after release from the judicial custody. This fact supports the version of PW-1 and PW-2 that in connection with the torture perpetrated by the respondent upon the applicant on 10-9-2010 and 12-9-2010 during "Eid", PW-1 lodged an ejahar for which the respondent was arrested. The fact of arrest is admitted in the written argument filed on behalf of the respondent in paragraph-11. From the date of suspension on 17-9-2010 almost one year has elapsed. Therefore the said Exhibit-1 and Exhibit-9 do not reflect the present position. Though DW-1 deposed in court on 23-6-2011 on behalf of the respondent he could not produce any document showing the subsequent development but he admitted, in cross examination, that his son is drawing salary even after November, 2010. Though he deposed that he is paying maintenance to his daughter in law after suspension of his son, his assertion of the same is completely demolished in cross examination when he deposed in cross examination that he does not know what has happened to them after two and half years of their marriage. The said time period of two and half years after which DW-1 knew nothing as to what has happened to them, rather support the version of PW-1 and PW-2 because both of them deposed that after about the same period it is PW-2 who is maintaining PW-1. In spite of not

knowing the present position DW-1 deposed in court as if he is aware of the happenings between the applicant and the respondent. The net result of the above is that the claim by DW-1 about the payment of maintenance by him to the applicant is not correct. This witness therefore could not be of any help to the respondent.

17. The learned counsel for the applicant Mr. N. Muhtarin contended that the aggrieved woman was harassed, tortured and she has been made to live in abject poverty due to the neglect of the respondent. The father of the aggrieved woman is looking after her but with his megre income he is also facing great difficulty in providing her maintenance. He further contended that the applicant side has been able to clearly prove the case that domestic violence was committed and the respondent has refused to maintain the applicant and her son. Therefore the applicant is entitled to get the reliefs claimed for.

Countering the arguments of the learned counsel for the applicant, Mr. H. N. Islam, learned counsel for the respondent contended that no such Act by the name of “Protection of Women From Domestic Violence Act, 2005” has been passed by either Indian parliament or the state legislature, that the applicant did not sign in first page of the section 23(2) affidavit, that in paragraph 6 of the said affidavit it is written that the contents of the affidavit is explained to the applicant in Hindi and English but she stated in cross that the contents were explained to her in Assamese, that on 30-11-2010 i.e. filing of the application the applicant was absent, that there is a difference between PW-1 and PW-2 as to whether “Kabin Nama” is annexed with the application, that in the verification portion instead of writing “application” “Written statement” was written, that father of the applicant with his minimal income can not construct RCC house, that the house where the applicant was staying was constructed by the respondent himself, that according the learned counsel, presumably the applicant gave her signature on blank paper and that there is contradiction between the evidence of PW-1 and PW-2 regarding arrest of the respondent. Therefore, according to the learned counsel, the application is liable to be dismissed.

18. This court took note of the rival submissions made on behalf of the parties and considered the same. It is apparent from the aforementioned contentions of the learned counsel for the respondent that instead of going into the merit or demerit of the case based on the evidence on record, hyper technical and superficial arguments were put forward to advance the case of the respondent. Needless to say that the Protection of Women From Domestic Violence Act, 2005 after being duly passed by our parliament came into effect from 26-10-2006 but it

appears the learned counsel is not aware of the same. Regarding not signing the first page of the affidavit and paragraph 6, it is sufficient to say that the format of the affidavit is provided in Rule-7 read with Rule 6(4) of the Protection of Women From Domestic Violence Rules, 2006 and the learned counsel for the applicant scrupulously followed that same and in the form it is not provided that the applicant must sign on the first page. It is nowhere provided that on the day of passing the first order on the petition the applicant needs to be present in person in court. It is true that there is variation between the two witnesses regarding the Kabinnama. But this variation is superficial and does not go to the root of the petitioner's case. At the time of marriage the responsibility of preparation of Kabinnama etc. normally falls on the shoulder of the family members who are elders. The girl has nothing much to say or do in such matters. Therefore her ignorance of the same is not to be taken serious note of. True it is that in the verification portion instead of writing "Application" the word "Written statement" was written. This is a genuine mistake on the part of the learned counsel on her behalf. If this court is to dismiss the application on that ground alone it would amount to miscarriage of justice. In the same breath it can be said that the word "respondent" written in ink in paragraph-6 of the application is also a mistake of the same kind because the context in which the word occurs clearly indicate that it was meant to denote the aggrieved woman. This Act being a beneficent piece of legislation enacted for providing minimum relief to an aggrieved person affected by domestic violence, even if there is any minor procedural deviation, such minor procedural deviation being technical in nature, need not be taken serious note of and on that ground, the application can not be rejected. If such hyper technical view, as suggested by the learned counsel for the respondent, is taken then this court would not even be able to consider the written statement and the written argument filed on behalf of the respondent because both these two documents are filed by the learned counsel on behalf of the respondent and not by the respondent himself and the verification of the written statement is done by the counsel and not the respondent. In the statement of objects and reasons it is provided that the Act was enacted 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 woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. The fact that the father of the applicant constructed the house where the applicant is presently residing remained unassailed in his cross examination and therefore the contention of the learned counsel does not hold good. With respect to the last two

contention of the learned counsel for the respondent it is sufficient to say that mere presumption does not prove a fact and as pointed out earlier the petitioner and her father being ignorant of the finer intricacies of law no fault can be found with the applicant (PW-1) for saying that her husband was arrested in connection with this case.

19. Therefore from the discussion and reasons we find that the evidence on record clearly establishes the fact that the applicant was subjected to domestic violence by the respondent and she has not been looked after by the respondent. There is likelihood that the applicant may be subjected to domestic violence in the future. The conduct of the respondent clearly comes within the purview of section 3 of the Act.

For the reasons and discussion aforesaid both the points for determination are answered in the positive and the applicant is found to be entitled to a protection order under section 18 of the Act as well as an order for monetary relief under section 20 of the Act.

Accordingly it is ordered as follows:

(i) Protection order, under Section 18 of the Act, is passed in favour of the applicant (Mrs. Mamoni Bibi) who is residing at village Singkhat muslimpara, P.S. Chhaygaon, Kamrup, and the Respondent (Ismail Ali) is: (a) prohibited from alienating the assets of the applicant/aggrieved woman including her stridhan, (b) prohibited from committing any act of domestic violence and (c) prohibited from causing violence to the dependants, other relatives or any other person who give the aggrieved woman assistance from domestic violence.

(ii) The Respondent is also directed, under Section 20 of the Act, to pay a consolidated sum of Rupees 8000/-(Rupees eight thousands only) per month to the applicant for her maintenance and maintenance of her minor child Moinul Hoque w.e.f the month of September, 2011 to be paid in court until further arrangement is made in this regard subsequently. The said amount shall be paid on or before the 7th day of every month starting with 7th day of October, 2011.

20. Furnish free copies of this final order to all concerned.

The final order is pronounced in open court and given under my hand and seal on this 12th day of September, 2011.

Judicial Magistrate, 1st Class,
Kamrup at Guwahati