

) The vs . on 27 July, 2010

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IN THE COURT OF Ms. VEENA RANI METROPOLITAN MAGISTRATE
PATIALA HOUSE COURTS, NEW DELHI.
IN RE:CC No. 478 of 2007
P.S.- Sarojini Nagar.

Mrs. Yogita W/o Sh. Durgesh Mishra
D/o Dr. R.K. Upadhaya, R/o F-75,
Ansari Nagar, New Delhi

.....Aggrieved/complainant

Vs.

1. Sh. Durgesh Mishra S/o Ajay Kumar Mishra
2. Ajay Kumar Mishra
3. Mrs. Lakshmi Mishra W/o Sh. Ajay Kumar Mishra
All R/o 75, Gali No:4, Guru Ram Dass Nagar,
Laxmi Nagar, Delhi-92

.....Respondents.

Complaint under the Protection of women from Domestic Violence Act, 2005 THE JUDGMENT

1) The applicant ☐ aggrieved Mrs. Yogita has filed the present application under S.12 of the Protection of Women from Domestic Violence Act, 2005 (PWDVA) on 14.12.2007. By way of this petition the following orders have been sought :

i. The orders u/s 18 of PWDV Act, 2005 thereby prohibiting the respondents from communicating with the applicant herein in way;

ii. The residence orders u/s 19 of PWDV Act, 2005 thereby directing the respondents to provide the applicant with the same level of residence as enjoyed by her when she lived with Ms. Yogita Vs. Sh. Durgesh Mishra etc. the respondent No.1;

iii. The monetary relief of Rs. Rs.25,000 per month u/s 20 of Act, 2005; iv. The litigation cost of Rs.10,000/ ☐ v. The compensation and damages of Rs.10 Lakh u/s 22 of Act, 2005; vi. The directions to the respondents to return the stridhan of the applicant to her. In case the said stridhan and articles are not returned the applicant has sought an additional compensation of Rs.12 Lacs;

vii. The directions to the respondents to allow the continued custody of the child with the applicant;

viii. The order prohibiting the respondents from committing acts of domestic violence and repeating the same as mentioned above;

ix. Such interim order or orders as deemed fit just and proper in the circumstances of the case.

2) The facts in brief are that the marriage of the applicant Aggrieved Mrs. Yogita and the respondent husband took place on 30.11.2001 at PTS Baraat Ghar, Malviya Nagar, New Delhi according to the Hindu Rites & Rituals. The dowry articles were given to the respondents which was kept by them.

The respondents were however not happy with the quantity of the dowry articles. The demands for Ms. Yogita Vs. Sh. Durgesh Mishra etc. dowry kept on pouring from the respondents side and some of the demands were met by the father of the applicant. A son was born to the couple in October 2002. The respondents turned the said occasion to an another opportunity for demanding more dowry from the applicant's parents. The applicant was not treated well and she turned anemic. The applicant was threatened with serious physical injuries in case the demands were not met. It was due to the intervention of the common friends that the respondent assured the applicant that he would keep her well. A letter of apology was written by the respondent husband and the Annexure P1 has been exhibited as Ex. CW/1. The apology of the respondent No.1 turned out to be hollow one and the said respondent resumed to treat the applicant with cruelty and abuse.

3) The applicant was compelled to file various cases against the respondents which are :

i. FIR No.392/2003, under Section 498A/406 IPC, registered at Police Station Defense Colony.(this FIR was quashed by the Hon'ble Delhi High Court on 19.01.2004) ii. FIR No. 840 / 2006 u/s 323, 34, 406, 498A, 506 of IPC(this FIR was again lodged due to the continued abuses);

iii. Case under s.125 Cr.P.C.

4) A case for the custody of the child was also filed by the respondent No.1 which is pending before the Guardianship Court. In the case the respondent No.1 had admitted that he is in a sound financial condition. The copy of the said petition is annexed as Annexure P2 and has been exhibited Ex.

CW/2.

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5) The applicant Aggrieved has also mentioned that on 16.06.2003 when she was at her parents' house the respondent No.1 had visited and made a demand of Rs.1,00,000/- on the pretext of his starting new business. On refusal the respondent turned aggressive and assaulted the applicant and her parents. The respondent No.1 refused to take the applicant back till his demands were fulfilled. The applicant and her parents were threatened and were told that the respondents had relations with the local Politian. Subsequently, the applicant was served with a legal notice dated 29.06.2003 to which she replied vide reply dated 10.07.2003 and the copy of the same Annexure P3 exhibited

as Ex.CW□/3. The applicant□aggrieved had filed the list of dowry articles before the CAW Cell which is Annexure□P4 and has been exhibited as Ex.CW□/4.

6) An FIR No.392/2003, under Section 498□A/406 IPC, registered at Police Station Defence Colony was registered against the respondents who were granted anticipatory bail subject to the condition that an amount of Rs.50,000/□was paid by them to the applicant□aggrieved. The said amount was paid to the applicant. However, the respondent sought the compromise of the matter and were able to convince the applicant. Subsequently, the applicant returned to her matrimonial house on 19.09.2003. Meanwhile , the respondent No.1 had filed CRL.M.C. 5133/2003 before the Hon'ble Delhi High Court seeking the quashing of the FIR No. 392 of 2003 in which the applicant was successfully persuaded to give statement in favour of the respondent No.1. Consequently, the FIR No.392/2003, under Section 498□A/406 IPC, registered at Police Station Defence Colony was quashed vide order dated 19.01.2004. However, the things would not improve for the applicant herein and she was again abused and mistreated by the respondents. The amount of Rs.50,000/□which paid during the anticipatory□bail proceedings was again asked to be returned to the respondents herein. Certain dowry articles were also returned by the applicant herein to the respondents. The amount of Ms. Yogita Vs. Sh. Durgesh Mishra etc. Rs.50,000/□was received by the applicant herein from her father vide receipt annexed as Annexure P□5A.

7) The applicant herein did what the respondents wanted her to do in order to save her marriage. However, It turned out that the respondents had cleverly staged the compromise in order to get out of the criminal proceedings i.e. FIR No. 392/2003. The whole exercise was done in order have the said FIR quashed and when it was eventually quashed the respondents resumed to inflict abuses and violence on the applicant.

8) The applicant and the respondent No.1 were blessed with another son on 02.12.2004. The respondents would not allow the applicant to meet with her elder son. The applicant herein would another mental torture that the respondent is interested in marrying a lady name M. Punam Maheshwari a business associate of the respondent No.1. The applicant objected to the said relationship and suffered multiple physical injuries in the hands of the respondent No.1. The respondents would starve the applicant. On 06.10.2006 came to the applicant and asked for more money for the business of respondent No.1. On refusal the applicant was beaten by iron rod and an attempt was made to burn her by pouring the kerosene oil. The knob of the LPG gas cylinder was turned on. The applicant ran out of the house to rescue herself and reached the public road. Meanwhile, the mother□in□law of the applicant came and snatched the baby which the applicant was carrying. Before the applicant could have had recourse to the police authorities the respondent No.1 called the PCR van so that a false case could be registered against the applicant. By now the applicant had received much physical injuries leading to the swelling in the left forearm and the wrist. The police arrived but would not listen to the applicant. No FIR was registered against the applicant. On 07.10.2006 the applicant gave a complaint Ms. Yogita Vs. Sh. Durgesh Mishra etc. in writing to the police narrating the incidence. The applicant was sent for a medical check□up on 07.10.2006. The younger child's custody was restored to the applicant and she was sent to AIIMS for her medical check□up on 11.10.2006 where she was treated. The medical reports are annexed as Annexure P□6 and the copy of the same have been exhibited as Ex. CW□/6. Meanwhile the parents

of the applicant. Aggrieved pursued the matter with the senior police officer and got the FIR No. 840 / 2006 u/s 323, 34, 406, 498A, 506 of IPC registered against the respondents. However, the police did not do much investigations into the matter. Neither the amount of Rs.50,000/- was recovered nor the stridhan articles were restored to the applicant herein. The recovery of the amount of Rs.50,000/- The FIR etc. are Annexure P-7 (colly).

9) The respondent is said to admitted that he has sound financial position. The said respondent is said to be owning movable as well as immovable properties. The applicant herein has sought various prayers in her main application u/s 12 of the PWDV Act, 2005. The applicant got herself examined as CW and has tendered evidence by way of the affidavit and has exhibited various documents.

10) The respondents filed a reply and denied the allegations of domestic violence. It was also stated that the respondent No.1 has been disowned by his parents (R-2 & R-3) and that he had no property movable or immovable in his name. However, the respondents were proceeded ex parte on 15.04.2009. No evidence was lead by the said respondents.

11) At the very onset I need to address one necessary issue - the admissibility of documents. The applicant Aggrieved has not exhibited the original documents. The aspect is technical still Ms. Yogita Vs. Sh. Durgesh Mishra etc. required to be decided as the same relates to the admissibility of evidence. In the present case the applicant Aggrieved has exhibited the photocopies of various the documents in her favour. The general law is that the photocopies are not primary evidence.

12) At this juncture, Ss. 61, 62 and 63 of the Evidence Act need to be looked into. S.61 lays down that contents of the documents may be proved either by primary or by secondary evidence. This Section is based upon the principal that "best evidence" in the possession or power of the party must be produced. What the best evidence is, depends upon facts and circumstances of each case. Generally speaking, the original document is the best evidence. The contents of every written paper are, according to the ordinary and well established rules of evidence, required to be proved by the original document, and by that alone, if the document is in existence. It is, therefore, necessary that when a document is produced as primary or secondary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act. (see AIR 2008 BOMBAY 81 "Bank of India v. Allibhoy Mohammed" BOMBAY HIGH COURT). Truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of person who can vouch for the truth of the facts in issue as held by the Apex Court in Ramji Dayawala and Sons Pvt. Ltd v. Invest Import, A.I.R. 1981, S.C. 2085. Person with knowledge must be examined. Every document should first be started by some proof before the person who disputed that document can in any way be considered as proved because it's genuineness is not disputed by the opposite party. Documents do not prove themselves.

13) Let me now deal with the photo copies of the documents filed on record. S.63 of the Evidence Act provides for the leading of secondary evidence. Secondary evidence cannot be accepted without Ms. Yogita Vs. Sh. Durgesh Mishra etc. sufficient reason being given for non production of the original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but

was lost or misplaced (see AIR 1973 Bom

66. Filmistan Private Ltd. Co. v. The Municipal Corporation for Greater Bombay). The document unless shown to have been compared with original one, mere copy of the document does not become secondary evidence. The person giving oral evidence who accounts for the contents must have himself seen the original document and not a mere copy. "Seen" here will obviously mean "read". A person who proposes to testify the contents of a document, either by copy or otherwise, must have read it. The contents of private documents may be proved as secondary evidence by any witness who has in fact read them. The secondary evidence is required to be proved in the same manner in which primary evidence. S. 65 of the Evidence Act provides that in each type of cases secondary evidence relating to the document may be given. This Section enumerates the certain exceptional cases in which secondary evidence is admissible. Secondary evidence is of the contents which cannot be admitted without the production of document in such a manner within one or the other of the cases as provided for in the Section. The prior permission of the Court required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. To sum up, when anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents and there must be evidence of their loss.

14) In the present case no permission to lead secondary evidence was obtained by the applicant herein. As per the order sheet when the evidence by way of affidavit was filed on 15.04.2009 by the applicant herein it was nowhere stated that the originals were seen and returned. As far as the exhibits CW□/2 to CW□/6 are concerned, the exhibited documents cannot be said to be primary evidence Ms. Yogita Vs. Sh. Durgesh Mishra etc. since they are mere photo copies. No evidence is on record to show that at any time in the past, original documents were in existence and that they are lost. The secondary evidence of the contents of document is generally inadmissible until non production of the original is first accounted for, so as to bring it within one or the other category of the cases provided for in S. 65.

15) Now the question is whether or not the photocopies should be admitted as evidence. In this regard I rely upon an authority of the Hon'ble Supreme Court in the cases of Narbada Devi Gupta v. Birendra Kumar Jaiswal (2003) 8 SCC 745 : (AIR 2004 SC 175) and R. V. E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V. P. Temple, (2003) 8 SCC 752 : (AIR 2003 SC 4548). In the later case the Supreme Court has pointed out two different classes of 'objections' by observing as under :□ "..... Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:

- i. an objection that the document which is sought to be proved is itself inadmissible in evidence, and ii. where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient.

In the first case, merely because a document has been marked as "an exhibit", an Ms. Yogita Vs. Sh. Durgesh Mishra etc. objection as to its admissibility is not excluded

and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons, firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there, and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court."

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16) In the present case the respondents have been participating in the proceedings from 15.12.2007 till 15.04.2009. The evidence by way of Affidavit was rendered on 15.09.2008. It therefore very relevant to consider that the said respondents were proceeded ex parte long after the evidence by way of the affidavit was rendered. Not only that, the order sheet dated 28.01.2009 reveals that the respondents were represented and that they had sought time to cross-examine the applicant herein. The only unconvincing inference that could be drawn from the above circumstance is that the respondents had ample opportunity to raise objections to the admissibility of the exhibited documents. The ratio of *Narbada Devi Gupta case* (2003) 8 SCC 745 and that of *R. V. E. Venkatachala Gounder case* [(2003) 8 SCC 752] comes to the rescue of the applicant herein.

17) The other reason for this court to admit the photocopies is that the said documents are not creating any right in favour of any party but only recording something. Such documents are admissible in evidence. This view is supported by an authority of the Hon'ble Bombay high court "*Tex India v. Punjab and Sind Bank*" reported in AIR 2003 BOMBAY 444. Keeping the above dimensioned authorities in mind I am not hesitant to hold that in the interest of justice the

documents exhibited as CW□/2 to CW□/7 are admitted as evidence.

18) However, the document exhibited as Ex.CW□/1 stated to be the apology of the respondent□ husband and hand□written by the said respondent is held not admissible for the reason that no writing can be received in evidence as a genuine one until it has been proved to be in the writing of a particular person. The production of the document purporting to have been signed or written by a certain person is no evidence of its authorship. A writing, by itself, is not evidence of the one thing or the other. Proof, therefore, has to be given of the handwriting. A writing, by itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence. For Ms. Yogita Vs. Sh. Durgesh Mishra etc. the above□said reason the Ex.CW□/1 is excluded.

19) In Sait Tarajee Khimchand v. Yamarti Satyam, AIR 1971 SC 1865, the Hon'ble Supreme Court has very categorically held that mere marking of an exhibit does not dispense with the proof of documents. To the similar effect is the decision in Thagiram Borah v. State of Assam, AIR 1980 Gau 59 and in Punjab National Bank v. Britannia Industries Ltd., 2002 (3) Civil Law Times

517. Now that the Ex. CW□/2 to CW□7 have been admitted as an evidence the same does not dispense with the burden of proving them. The said evidence needs to be now be evaluated.

20) Before coming to the merits of the case it is necessary to examine the historical background of the said Act, the objects and reasons for the said enactment and the provisions contained therein. This Act was actually enacted with a view to implement the General Recommendation No. XII (1989) of The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). India is a signatory to CEDAW, having accepted and ratified it in June 1993. Article 16 of the said Convention, which deals with measures to eliminate discrimination against women in matters relating to marriage and family relations, reads as follows :

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women :

(a) The same right to enter into marriage;

(b) The same right freely to choose spouse and to enter into marriage only with their Ms. Yogita Vs. Sh. Durgesh Mishra etc. free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable

them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choosing a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

21) The PWDV Act, 2005 has been based on the Beijing Declaration which was build on consensus and Ms. Yogita Vs. Sh. Durgesh Mishra etc. progress made at various United Nations conferences and summits □on women in Nairobi in 1985, on children in New York in 1990, on environment and development in Rio de Janeiro in 1992, on human rights in Vienna in 1993, on population and development in Cairo in 1994 and on social development in Copenhagen in 1995 with the objectives of achieving equality, development and peace. The focus is on equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as the Declaration on the Elimination of Violence against Women and the Declarationon the Right to Development. It was recognized that women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision□making process and access to power, are fundamental for the achievement of equality, development and peace.

22) The need was felt that there ought to be equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their wellbeing and that of their families as well as to the consolidation of democracy. It was further recognized that reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment. Very intriguingly it was also observed in at the Beijing Declaration that Local, national, regional and global peace is attainable and is inextricably linked with the advancement of women, who are a fundamental force for leadership, conflict resolution and the promotion of lasting peace at all levels. The men were sought to be encouraged to participate fully in all actions towards equality and to promote women's economic independence. The Strategic objective was to revise national laws and administrative practices to ensure women's equal rights and access to economic resources. The Ms. Yogita Vs. Sh. Durgesh Mishra etc. national governments were expected to undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies. It was in this background that India responded by enacting various laws

and the PWDV Act, 2005 happens to be the most recent one.

23) The first three paragraphs of the statement of object and reasons under which the Bill No. 116 of 2005 for passing the act was placed before the Parliament, are as under (published in the Gazette of India Extraordinary Part II Section 2 page 22 dated 22nd August, 2005) :□I. "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 (CEDAW) in its 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.

II. 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 498□A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety. III. It is, therefore, proposed to enact a law 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."

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24) The PWDV Act,2005 was challenged in a case Aruna Parmod Shah v. Union of India reported in 2008(3) R.C.R.(Criminal) 191. The ground was that the PWDV Act, 2005 provided protection only to women and not to men. The DB of the Hon'ble Delhi Court while upholding the vires of the PWDV Act,2005 held:

"Domestic violence is a worldwide phenomenon and has been discussed in international fora, including the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995). The United Nations Committee Convention on Elimination of All Forms of Discrimination Against women (CEDAW) has recommended that States should act to protect women against violence of any kind, especially that occurring within the family. There is a perception, not unfounded or unjustified, that the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against exploitation of women. The argument that the Act is ultra vires the Constitution of India because it accords protection only to women and not to men is, therefore, wholly devoid of any merit. We do not rule out the possibility of a man becoming the victim of domestic violence , but such cases would be few and far between, thus not requiring or justifying the protection of Parliament."

25) CHAPTER IV of the PWDV Act, 2005 deals with the PROCEDURE FOR OBTAINING ORDERS OF RELIEFS. The provision of S.12 of the said Act empowers the Magistrate to deal with the application under S.12 of the PWDV Act, 2005 and is worded thus:

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 Ms. Yogita Vs. Sh. Durgesh Mishra etc. 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.

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26) The provision of S.12 of the PWDV Act, 2005 speaks of 'one or more reliefs under this Act' which refers further to the other provisions providing various reliefs. The applicant herein has sought various reliefs mentioned in the provisions from S.18 to S.22 of the said Act. For granting such relief under S.12 PWDV Act, 2005 it is essential to first see whether 'domestic violence' has been perpetuated. The PWDV Act, 2005 defines domestic violence in S.3 (Ch. II) thus:

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

(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;

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(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 Ms. Yogita Vs. Sh. Durgesh Mishra etc.

(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.

27) The definition of 'domestic violence' is widespread and overlaps with the definition of 'cruelty' as provided under S.498A IPC. Therefore, a demand of dowry would both be a penal offence as well as a domestic violence. The prescription provided under the IPC is the 'imprisonment' up to three years whereas under the PWDV Act, 2005 the remedy provided is more of civil in nature. It was observed by the HON'BLE MADHYA PRADESH HIGH COURT in "Ajay Kant v. Alka Sharma"

reported in 2008 CRI. L. J. 264 that basically the act has been passed to provide the civil remedy against domestic violence to the women. However, as provided by Sections 27 and 28 of the Act, a Judicial Magistrate of the first class or the Metropolitan Magistrate has been empowered to grant a protection order and other orders and to try the offence under the Act. Vide Section 28 of the Act, it is mentioned that save as otherwise provided in this Act, all proceedings under Ss. 12, 18, 19, 20, 21, 22 and 23 and the offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973, Vide sub-sections 3 and 4 of Section 19, it is also provided that a Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence and such order shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 and shall be dealt with accordingly, Chapter VIII of Cr. P.C. dealt with security for keeping peace and for good behavior which runs from Sections 106 to 124. In Ms. Yogita Vs. Sh. Durgesh Mishra etc. these Sections, it is provided that for keeping the peace and maintaining good behavior, a person can be directed by a Magistrate to execute a bond with or without sureties and in case of non-compliance of such order, that person can be detained into custody. Section 31 of the Act provides penalty for breach of protection order passed by the Magistrate, which is punishable as an offence.

28) We therefore find that though the PWDV Act, 2005 primarily addresses a civil remedy, the procedure adopted is that of the criminal procedure. That is not unusual as the provision of S.125 Cr.P.C. too, operates in the same fashion. The civil remedy under the PWDV Act, 2005 ranges from providing damages to injunctions. The said act does not provide for the punishment such as imprisonment or fine etc. The PWDV Act, 2005 also does not define 'domestic violence' as a new 'offence' altogether.

It is a different matter that S.31 PWDV Act, 2005 does prescribe breach of protection order by respondent as a cognizable offence.

29) The provision of S.3(a) & (b) relates to the 'dangers' to the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person. The provision of S.3(c) relates to the threat to the aggrieved person by any conduct as mentioned in S.3(a) or S.3 (b). Therefore not only the actual harassment is covered but any act, omission or commission or conduct of the respondent having the effect of causing such a harassment shall constitute domestic violence. The terms like 'dowry' are also included in the definition. Here I would like to point out one more intricacy as far as the illegal demand (of dowry is concerned). The term 'dowry' has not been used in the provision of S.498A I.P.C. but S.3 of the PWDV Act, 2005 does use the term 'dowry'. Another intricacy relates to the fabric of the offence inasmuch as the S.498A I.P.C. being a criminal offence needs evidence Ms. Yogita Vs. Sh. Durgesh Mishra etc. beyond the reasonable doubt whereas under S.3 PWDV Act, 2005 the illegal demand may be proved by merely indicating the effect of any act, omission or commission or conduct of the respondent. The civil remedy of 'dowry' as the 'domestic violence' under the PWDV Act, 2005 is thus differentiated from the criminal justice of 'illegal demand' under the I.P.C. It is also for the said reason that any decision under the PWDV Act vis-à-vis 'dowry' ought not affect the decision given under the criminal proceedings such as S.498A I.P.C.

30) The 'domestic violence' is drafted to have included physical abuse, sexual abuse, verbal & emotional abuse and economic abuse. As far as the evidence of the perpetration of 'domestic violence' in the present case concerned the same has to be gauged in terms of the principles of legal proof. The applicant-aggrieved herein has averred physical violence against her. The applicant-aggrieved had filed the list of dowry articles before the CAW Cell which is annexed as Annexure P4 and has been exhibited as Ex.CW-4. The complaints were made from time to time to the police. The particular incidence of 06.10.2006 has been narrated in detail by the applicant where she was beaten up. The applicant ran out of the house to rescue herself and reached the public road. Meanwhile, the mother-in-law of the applicant came and snatched the baby which the applicant was carrying. Before the applicant could have had recourse to the police authorities the respondent No.1 called the PCR van so that a false case could be registered against the applicant. By now the applicant had received much physical injuries leading to the swelling in the left forearm and the wrist. The police arrived but would not listen to the applicant. No FIR was registered against the applicant. On 07.10.2006 the applicant gave a complaint in writing to the police narrating the incidence. The applicant was sent for a medical check-up on 07.10.2006. The younger child's custody was restored to the applicant and she was sent to AIIMS for her medical check-up on 11.10.2006 where she was treated. Meanwhile the parents of the applicant-aggrieved pursued the matter with the senior police officer Ms. Yogita Vs. Sh. Durgesh Mishra etc. and got the FIR No. 840 / 2006 u/s 323, 34, 406, 498A, 506 of IPC registered against the respondents. The medical reports are annexed as Annexure P6 and the copy of the same have been exhibited as Ex. CW-6. The said medical report reflects that the injuries were due to 'assault by the husband'. That goes to say that the applicant while reporting the matter to the doctor gave the information that it is her husband who did it. The said stand was not changed even in the averments made in her application under S.12 of PWDV, Act 2005 which was filed on 14.12.2007. The evidence seems credible and trustworthy.

31) Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) has laid down certain rules regarding the burden of proof. The above principles have been duly incorporated in the

provisions of S.101 and s.102 of the Indian Evidence Act, 1872. Two essential rules are :

"(1) the facts alleged as the basis of any legal inference must be clearly proved connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability."

32) The given segment of evidence encompasses the incidence particularly the one which had occurred on 06.10.2006. The legal burden to introduce the said segment of evidence was on the applicant. She did it. The mere introducing was not enough for her to have a decision. A fair support of documents was required. The applicant did that as well. The issue of domestic violence became very much alive and relevant in order to attract judicial deliberations. It was fairly established that the domestic violence happened. The next step was to demolish the case put by the applicant. This could only have been done through the cross-examination. The opportunity was indeed granted to the Ms. Yogita Vs. Sh. Durgesh Mishra etc. respondents but they never availed it. The applicant herein discharged her burden and the respondent did not offer any evidence to counter or negate the evidence of the applicant. This is how the applicant succeeded in establishing the fact dated 06.10.2006 and the series of facts thereafter. The narrated incidence depicts act or conduct (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 herein) and is supported by the documents and has been clearly established by her in her evidence.

33) As far as the sexual abuse is concerned the ingredients as per S.3 PWDV Act, 2005 includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. The applicant-aggrieved herein has not made any averments of that sort.

34) As far as "verbal and emotional abuse" abuses are concerned the applicant-aggrieved herein has narrated incidences when she was insulted and ridiculed for bringing less dowry. The applicant was tricked to give a favorable statement during the proceedings to have the FIR No. 392 of 2003 quashed. The FIR instituted by her were quashed. However, the respondents again resumed to torture her. As a matter of fact the incident dated 06.01.2006 occurred when the FIR No.392 of 2003 were already quashed and the applicant was hoping a happy marital life. There is something intriguing about the terms 'verbal' & 'emotional' being used together. The term 'verbal' typifies a louder abuse - in tone. The 'emotional' abuse on the other hand is more characterized by 'silence'. However both sorts of such abuses are mutually co-existing and the learned legislatures were sharp enough to use the combination of 'verbal and 'emotional' together. In the present case it is not denied by the respondents that the applicant-abused is living separately from the respondents. Living separately:

Ms. Yogita Vs. Sh. Durgesh Mishra etc. either by choice or by compulsion, is an emotional abuse. Another aspect of the emotional abuse happens to be the relationship of respondent No.1 with Ms. Punam. I therefore hold that the emotional abuse stands established so far it relates to the inflicting of the physical violence which resulted in the physical injuries sustained by the applicant.

35) As far as the economic abuse is concerned it would be relevant to state that this is the sort of abuse which is the most prevalent. According to a research "Abuse in Intimate Relationships : Defining the Multiple Dimensions and Terms. National Violence Against Women Prevention" by Vera E. Mouradian, PhD. Batterers control victims' finances to prevent them from accessing resources, working or maintaining control of earnings, achieving self-sufficiency, and gaining financial independence. In another report "The Battered Women's Justice Project, Civil Office" by Christine Thomas (Staff Attorney, BWJP Civil Office, June 2004) it has been observed:

"Because economic dependence and severe financial stress on abused women can so acutely impact a survivor's choice to stay or leave an abusive relationship and because economic abuse by batterers is often an aspect of the power and control over their lives, stronger legal advocacy for economic safety and restitution is important to the economic empowerment of battered women and the goal of assuring that women may live free of violence and oppression by their intimate partners. The economic relief available through a protection order may be an essential temporary mechanism to ensure safety and promote economic justice for the survivor."

36) The above-mentioned report also stated that effective strategies to end violence against women must include strong measures that promote economic security and restitution for survivors. Many women Ms. Yogita Vs. Sh. Durgesh Mishra etc. are compelled to stay in abusive relationships or return to their batterers because of financial constraints and economic concerns. Moreover, protection order proceedings are an appropriate and necessary venue to address the economic injustice that often characterizes domestic violence. It is pertinent to acknowledge that even in the most developed countries like the USA there are strong economic provisions for the women. For instance, child support and/or temporary spousal maintenance awards are specifically authorized by most state statutes; typically, these forms of emergency financial support to survivors and their children can be obtained in protection order proceedings.

37) The PWDV Act, 2005 is a legislation aimed at strengthening the economic independence of a woman and therefore includes the aspect 'financial deprivation to the women' in the category of 'economic abuse'. Economic abuse can manifest itself in many different ways, and abusers can victimize their partners even after they have left the abusive relationship. The PWDV Act, 2005, has perceived that a woman needs 'economic' contribution from her husband in the light of 'domestic violence'. The said Act is law which provides 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. In the present case it is not disputed that the child is being brought up by the applicant-aggrieved single handedly and any economic deprivation to the child (in which the applicant is certainly interested) is the economic deprivation of the applicant.

38) In the present case there happens to be the most elaborated averment with in regard to 'stridhan' of the applicant-aggrieved. It has been deposed by CW-1 that all the articles have not been returned to her. When the FIR No.392/2003, under Section 498A/406 IPC, was registered at Police Station Defence Colony the Sessions Court had granted the anticipatory bail to the accused on

the condition Ms. Yogita Vs. Sh. Durgesh Mishra etc. that Rs.50,000/□would be given to the applicant herein. The amount of Rs.50,000/□was returned by the applicant herein to the respondents to improve the relations. The applicant herein did what the respondents wanted her to do in order to save her marriage. The issue of the wrongful retaining of Stridhan and the amount of Rs.50,000/□is certainly an economic abuse if proved. The sort of evidence that was required was the examination of the father who purportedly played part in returning the money to the respondents. That has not been done. The sole evidence that we have is the averment of the applicant. Certain dowry articles were also allegedly returned by the applicant herein to the respondents. The amount of Rs.50,000/□was received by the applicant herein from her father vide receipt annexed as Annexure P□5A. It is relevant to hold that the receipt that is being mentioned of is the one which was issued by the applicant and not the respondent. Moreover, the said receipt has not been exhibited and proved. The applicant herein has not been able to discharge that initial burden of establishing the particular fact of giving the The amount of Rs.50,000/□to the respondents. The economic abuse regarding the stridhan and the amount of Rs.50,000/□is not established.

THE RELIEF SOUGHT u/s 19 of the PWDV Act,2005

39) The provision of S.19 essentially deals with the Residence orders:

"(1) While disposing of an application under sub□section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order □

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

Ms. Yogita Vs. Sh. Durgesh Mishra etc.

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

(2) 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 such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. (4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly. (5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court Ms. Yogita Vs. Sh. Durgesh Mishra etc. may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order. (8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to."

40) The relief(s) u/s 19 PWDV which have been sought the applicant herein are :

i. The residence orders u/s 19 of PWDV Act, 2005 thereby directing the respondents to provide the applicant with the same level of residence as enjoyed by her when she lived with the respondent No.1;

ii. The directions to the respondents to return the stridhan of the applicant to her. In case the said stridhan and articles are not returned the applicant has sought an additional compensation of Rs.12 Lacs;

41) The S. 19(1) (f) PWDV Act, 2005 provides that on being satisfied that domestic violence has been perpetrated on the aggrieved woman the magistrate may direct the respondent to secure same level of Ms. Yogita Vs. Sh. Durgesh Mishra etc. alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require. There is no doubt that the said provision is aims at securing a shelter over the head of a woman either in the shared household or elsewhere. The responsibility to do so is fastened on the

respondents.

42) The kind of proof that was required on part of the applicant was the proof of the level of accommodation that she had enjoyed in the shared household. There happens to be no cogent evidence with that regard. An inference can only be drawn from the overall financial position of the respondents. The mere averments would show that the respondents are enjoying a comfortable life style. The provision of S.19(6) empowers the magistrate to impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

43) It is pertinent to see that even before the advent of the Act, the right of a wife to reside in the matrimonial home, was recognized as part of her right to maintenance, in so far as Hindus are concerned. In para 2 of its judgment in B.P. Achala Anand v. S. Appi Reddy and Another, 2005(3) SCC 313, the Supreme Court laid down the law on the point as follows :

"A Hindu wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection. She is also entitled to separate residence if by reason of the husband's conduct or by his refusal to maintain her in his own place of residence or for other just cause Ms. Yogita Vs. Sh. Durgesh Mishra etc. she is compelled to live apart from him. Right to residence is a part and parcel of wife's right to maintenance. The right to maintenance cannot be defeated by the husband executing a Will to defeat such a right. (See Mulla : Principles of Hindu Law, Vol. I, 18th Edn., 2001, paras 554 and 555). The right has come to be statutorily recognised with the enactment of the Hindu Adoptions and Maintenance Act, 1956. Section 18 of the Act provides for maintenance of wife. Maintenance has been so defined in clause (b) of Section 3 of the Hindu Adoptions and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance the term "wife" includes a divorced wife."

44) In the paragraph No. 17 of the petition filed by the respondent husband it has been admitted that the respondent herein had a sound financial background. The applicant herein cannot be expected to stay in her father's house indefinitely. She is also entitled to separate residence if by reason of the husband's conduct or by his refusal to maintain her in his own place of residence or for other just cause she is compelled to live apart from him.

45) In the present case it has already been held that the domestic violence stands established by the applicant particularly with respect to the incidence of physical injuries inflicted upon her body on 06.10.2006. That is sufficient reason for her to stay in a separate residence. I therefore direct the respondents to pay a monthly rent of Rs.10,000/- (Rupees Ten Thousand) so that the applicant could arrange for her accommodation.

Ms. Yogita Vs. Sh. Durgesh Mishra etc.

46) The facts relating to the 'stridhan' articles essentially involve the factum of 'possession' of the movable articles. The expression "possession" is a legal term and its proof varies with the nature of property under the scrutiny of the courts and it can be proved by credible oral evidence as well. The expression "Evidence" has been defined under Section 3 of the Evidence Act which means and includes all statements which Courts permit or require to be made before it by witnesses in relation to matters of fact under inquiry such statements are called oral evidence. The testimony of a reliable witnesses about the possession cannot be brushed aside by giving superficial treatment or by ignoring it. The Courts are required to weigh to the oral testimony adduced by the parties and its ignorance would be treated to be fatal. In abundant caution, it is held that Courts while analysing oral statements of the witnesses are required to keep in view the statements of those witnesses who had deposed the acts of possession leading to an inference about possession of a party according to the nature of the property under consideration in preference to the statements of the witnesses who had stated only about possession simpliciter without stating any act of possession in favour of one party or other. (see AIR 1997 RAJ. 230 "Kanti Lal v. Shanti Devi").

47) Although the applicant herein has filed the list of dowry articles before the CAW Cell which is Annexure□4 and has been exhibited as Ex.CW□/4. However, the mere list would not prove the possession. The handing over of the dowry articles is that segment of fact which should have been brought out clearly by the applicant herein. In the Indian culture the actual delivery of the possession of the dowry articles is done either by the father/son or by any concerned person who could even be a relative. A bride sits pretty in the marriage while the arrangements etc. are made. She only has an idea what she would take in her matrimonial house. That is to say that she does not have the best knowledge of what she carries. The actual knowledge could only be provided by the father / brother / relative etc. who handed the possession. It is for this reason that when a list of dowry articles is Ms. Yogita Vs. Sh. Durgesh Mishra etc. prepared the same ought to be signed and countersigned by the giver and the taker. I can understand that this could appear a bit awkward at the time of the marriage but the courts can come to definite conclusion only after being satisfied of the 'possession' by one evidence or the other. Even the oral testimonies of the persons would do. It is for this reason that I am skeptic of relying solely on the oral testimony of the applicant herein. The sole oral evidence of the applicant (CW□) is not able preponderate the probability.

48) There happens to be other difficulty in granting the relief of the recovery of the 'stridhan'. The recovery has to be specific and so has to be evidence otherwise great difficulty arises in implementing the same. The applicant has not been able to adduce that precise evidence which could lead her to have the said relief. The ration in the judgment AIR 1997 RAJ. 230 "Kanti Lal v. Shanti Devi" could not come to the rescue of the applicant. The rigors of the legal proof ought be undergone in order to establish a particular fact. The prayer of the applicant with respect to the restoring of the stridhan articles is declined.

49) However, I would caution myself in commenting more on the aspect of 'stridhan' a criminal proceeding' is also pending u/s 406 IPC. I have only held on the basis of the requirements of the PWDV Act, 2005.

THE RELIEF SOUGHT u/s 20 of the PWDV Act,2005

50) Now I come to the monetary relief(s) to the applicant□aggrieved. The scheme of the PWDV Act, 2005 does provide for the interim monthly relief as well as the compensation & monetary damages to the said applicant. According to S.20 of the PWDV Act, 2005:

Ms. Yogita Vs. Sh. Durgesh Mishra etc. (1) 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. (2) The 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. (3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require. (4) The Magistrate shall send a copy of the order for monetary relief made under sub□section (1) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the Ms. Yogita Vs. Sh. Durgesh Mishra etc. period specified in the order under sub□section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub□section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

51) The provision of S.20 PWDV Act,2005 deals with the monetary relief. It speaks of "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." The monetary relief under S.20 thus takes adequate care of the reality that an aggrieved□woman may have to bring up the children on her own. However, the provision is characterized by two relevant factors:

i. the expenses incurred and ;

ii. the losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.

52) The losses as prescribed include the loss of earnings; the medical expenses; the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person. The evidence that was required on part of the applicant was to establish that the appropriate facts with respect to the losses as mentioned under S.20 PWDV Act, 2005. The applicant had merely averred Ms. Yogita Vs. Sh. Durgesh Mishra etc. and deposed the financial status of the respondents. The said provision is based on specific reimbursement rather than general monetary maintenance. The applicant has sought Rs. Rs.25,000 per month and the following prayer(s) which apparently fall under S.20 PWDV Act, 2005 and the litigation cost of Rs.10,000/□

53) There can be no doubt that S.20(3) empowers the to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

Therefore the piece of evidence that would be required on part of the applicant herein in order establish the monetary claim under S.20 is the elaboration of the expenses required and the loses suffered. The only loss averred is that of Rs.10,000/□on the litigation. As far as the monthly monetary relief is concerned the principle is that the sum so granted must be reasonable and consistent with the standard of living to which the aggrieved person is accustomed. In *Bhagwan v. Kamla Devi* (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The applicant has admitted that she is getting some maintenance under S.125 Cr.P.C. According to S.20 PWDV Act, 2005 the magistrate may still grant an additional maintenance depending on the facts of the case. The applicant has asked for Rs.25,000/□per month

54) The term `maintenance' is defined in Black's Law Dictionary, (6th Edn. pp.953□54) thus; "The furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife'`. For computing maintenance the following test have been laid down by the Hon'ble Supreme Court in *Jasbir Kaur Sehgal v. District Judge, Dehradun and Ors.*, 1997 (7) SCC 7, wherein it has been observed that "No set formula can be laid for fixing the amount of maintenance. It has, in the very *Ms. Yogita Vs. Sh. Durgesh Mishra etc.* nature of things, to depend on the facts and circumstances of each case. Some scope for leverage can, however, be always there. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

55) Considering the facts of the case I am inclined to grant a monthly maintenance of Rs.10,000/□ (Rupees Five Thousand) per month from the date of order after deducting the amount paid to the applicant under the other litigations.

THE RELIEF SOUGHT u/s 22 of the PWDV Act,2005

56) Compensation to the victims of the crime is also covered under S.357 of the Cr.P.C. In awarding compensation, it is necessary for the Court to decide if the case is a fit one in which compensation deserves to be awarded. If the Court is convinced that compensation should be paid, then quantum of compensation is to be determined by taking into consideration the nature of the crime, the injury suffered and the capacity of the convict to pay compensation etc. It goes without saying that the amount of compensation has to be reasonable, which the person concerned is able to pay. If the accused is not in a position to pay the compensation to the injured or his dependents to which they are held to be entitled to, there could be no reason for the Court to direct such compensation. (Sarwan Singh and Ors. Vs. St. of Punjab AIR 1978 SC 1525 : 2 (1978) 4 SCC 111 Ms. Yogita Vs. Sh. Durgesh Mishra etc.

57) In Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Anr. [(2007) 6 SCC 528] explaining the scope and the purpose of imposition of fine and/or grant of compensation, it was observed that the purpose of imposition of fine and/ or grant of compensation to a great extent must be considered having the relevant factors therefore in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other, factors enumerated out of the same; but S.357(3) does not impose any such limitation and power there□nder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a Judge.

58) As far as the monetary relief under S.22 PWDV Act, 2005 is concerned the same deals with compensatory orders and says:"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."

59) The compensation provided under S.22 is a onetime payment in addition to the payment (monthly or lump□sum) granted under S.20 of the PWDV Act,2005. The scheme of the said act covers the aspect of human agony and also uses the terminology of 'damages' which is usually used in the Indian Contract Act, 1872. However, the commercial transactions under the contractual obligations give little significance to the human agony. For instance the illustration (n) appended Ms. Yogita Vs. Sh. Durgesh Mishra etc. to S.73 of the Indian Contract Act, 1972 says: "A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined.

A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment."

60) The human agony of a trader being ruined by the untimely payment of money from his debtor attracts no more remedy than the mere principle amount along with the interest. In the commercial transaction the damages must have been arisen naturally in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. The provision under S.22 PWDV Act, 2005 though speaks of 'damages' and 'compensation', there happens to be a human touch to it. The said human touch is further strengthened by the fact that no statutory device has been provided in order to gauge the said damage. It is even more human that the provision of S.20 of the PWDV Act, 2005 which is guided by the loss of earning etc. Now the question is what amount is deserved by the applicant in the present case in the circumstances where in particular the emotional & economical abuses stand reasonable established.

61) The statute PWDV Act,2005 uses two terms together i.e. 'compensation' and 'damages' and by using two terms together the legislators have imported the concept of compensatory damages and the punitive damages which could deter the respondent from committing a similar action in the future. The ingredients of the measure of such compensation & damages are roughly enumerated as in terms of: the injuries, including mental torture and emotional distress. There is however no test provided. How can the mental torture and the emotional distress be proved? It has been held in AIR 1973 Delhi 200 that it may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. Proof beyond Ms. Yogita Vs. Sh. Durgesh Mishra etc. reasonable doubt is not postulated where human relationship is involved and eye witnesses are difficult to obtain. Similar proposition was laid down in Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121. As far as 'emotional distress' is concerned the said terminology is more akin to torts. While granting damages there are 'mitigation rules' whereas in 'emotional distress' there happens to be no mitigation rules particularly when one is dealing with the human relations out of matrimony and the likes. By combining 'damages' with 'emotional distress' the provision of S.22 of the PWDV Act, 2005 thus seems to have enunciated the concept of 'matrimonial tort'. Courts have awarded damages for emotional distress primarily when the 'physical injury' has resulted and not otherwise. Originally at common law, a plaintiff could not recover for physical injury from fright alone absent an impact even though the defendant was shown to have operated a railroad negligently (shock without impact). In an English case Victorian Railways Commissioners v. Coultas [(1888) 13 AC 222] a woman was barred from recovery due to shock despite suffering a miscarriage. Even with intentional conduct, absent material damage, claims for emotional harm were similarly barred. "Mental pain or anxiety, the law cannot value, and does not pretend to redress, when the unlawful act causes that alone. Courts had been reluctant to accept a tort for emotional harm for fear of opening a "wide door"

to frivolous claims. [Mitchell v. Rochester Railway Co. 151 NY 107 (1896)]. The idea that shock without impact would be a bar to recovery was first questioned at the Queen's Bench in Pugh v. London etc. Railroad Co.([1896] 2 QB 248.)

62) The PWDV Act, 2005 has added 'mental torture' thereby clarifying that 'mental injury' is as much the part of 'emotional distress'. The definition of 'emotional distress' is thus expanded under the PWDV Act, 2005. This expanded definition finds great support from the recently developed concept of Intentional infliction of emotional distress (IIED) which is a tort that results in extreme emotional distress. Some jurisdictions refer to it as the tort of outrage.

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63) In matrimonial cases the very domestic violence would cause mental distress whether physical abuse is inflicted or not. The physical abuse would add to emotional distress. The PWDV Act, 2005 addresses such emotional distress by providing for the damages to the aggrieved woman. The measure of the damages could well be done by the general principles of applying test of directness while not relying too much upon the remote possibilities even if human agony is considered. Compensation can assist women to deal with the aftermath of violence at both a practical and symbolic level. The applicant Aggrieved has been able to establish the physical abuse and has sought Rs.10 Lakh as compensation and damages. After going through the whole evidence and the overall circumstances I am inclined to grant the damages and compensation of Rs.1 Lakh to the applicant Aggrieved.

THE RELIEF SOUGHT u/s 21 of the PWDV Act,2005

64) The applicant is having the custody of the child. There also happens to be a Guardianship case pending. In that view the custody of the child shall remain with the applicant herein subject to any order / direction etc. of the concerned Guardianship Court.

65) In view of the whole case the following relief(s) under S.18 of the PWDV Act,2005 is granted to the applicant and the respondents are restrained from :

- i. committing any act of domestic violence;
- ii. aiding or abetting in the commission of acts of domestic violence;
- iii. causing violence to the dependants, other relatives or any person who give t
person assistance from domestic violence;

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66) The relief under S.19 of the PWDV Act,2005 : The respondents shall jointly & severally pay Rs.10,000/□(Rupees Ten Thousand) per month towards the rent of the separate residence for the applicant herein;

67) The relief under S.20 of the PWDV Act,2005 is granted to the applicant and the respondents are directed to Rs.10,000/□(Rupees Fifteen Thousand) per month after adjusting any amount paid to the applicant in any other litigation.

68) The Relief under S.21 of the PWDV Act,2005: the custody of the child shall remain with the applicant herein subject to any order / direction etc. of the concerned Guardianship Court.

69) The Relief(s) under S.22 of the PWDV Act,2005: The respondents shall jointly & severally pay Rs.1,00,000/□(Rupees One Lakh) as damages to the applicant.

70) The other relief(s) sought are declined. The present case is disposed of in the terms as above□ said.

71) The file be consigned to the record room.

Announced in the open court on 27th July, 2010.

(VEENA RANI)
METROPOLITAN MAGISTRATE: SOUTH DELHI

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