

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/SPECIAL CRIMINAL APPLICATION NO. 1303 of 2023**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE SAMIR J. DAVE**  
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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	-Yes-
2	To be referred to the Reporter or not ?	-Yes-
3	Whether their Lordships wish to see the fair copy of the judgment ?	-No-
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	-No-

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SAMIRKUMAR CHANDUBHAI JOSHI  
Versus  
STATE OF GUJARAT

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Appearance:

MR RC KAKKAD(389) for the Applicant(s) No. 1,2,3  
for the Respondent(s) No. 2,3  
MS MH BHATT, APP for the Respondent(s) No. 1

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**CORAM:HONOURABLE MR. JUSTICE SAMIR J. DAVE**

**Date : 26/04/2023**

**ORAL JUDGMENT**

1. By way of present application, applicants have requested to quash and set aside the judgment and order dated 30.12.2022 passed by the learned 2<sup>nd</sup> Additional Sessions Judge, Gir Somnath Veraval in Criminal Appeal No. 19 of 2022

as well as judgment and order dated 08.08.2022 passed by learned Judicial Magistrate, Talala below Ex. 32 passed in Criminal Misc. Application No. 27 of 2019.

2. Brief facts of the present case are as under:

2.1 That, the respondents No.2 and 3 have filed Criminal Misc. application No. 27 of 2019 under Section 12 of the Protection of Women from Domestic Violence Act 2005 (hereinafter referred to as “the Act”) and in that matter, vide Ex. 6, respondents No.2 and 3 have filed an application Ex. 6 under Section 23 of the Act seeking interim relief and after hearing both the parties, learned JMFC, Talala vide its order dated 22.11.2021 partly allowed the application of the respondents no.2 and 3 directing the applicants herein to pay maintenance amount to the tune of Rs. 5,000/- per month to the respondent no.2 and Rs. 2,000/- per month to the respondent no.3 till final disposal of the application filed under Section 12 of the Act. Thereafter, the applicants herein have filed their written objections vide Exh. 14 in the application filed by the respondents no.2 and 3 under Section 12 of the Act. That, during such proceedings, the applicants herein have filed an application Ex. 32 in Criminal Misc. Application No. 27 of 2019 and requested to discard the examination in chief on affidavit filed by the respondents no.2 and 3 herein and

direct them to give their oral submissions before the court, it means record the examination in chief orally. That, after hearing both the parties, vide order dated 08.08.2022, learned Judicial Magistrate First Class, Talala has rejected the application Ex. 32 filed by the applicants herein.

2.2 That, being aggrieved by the said order dated 08.08.2022, applicants herein approached the learned Sessions Court by filing Criminal Appeal No. 19 of 2022 wherein after hearing both the parties, the learned 2<sup>nd</sup> Additional Sessions Judge, Gir Somnath, Veraval has dismissed such appeal vide order dated 30.12.2022 and being aggrieved by the said order, applicants have approached this court by way of this application.

3. Heard learned advocate for the applicants.

4. It was submitted by learned advocate for the applicants that the orders passed by both the courts ie. JMFC as well as First Appellate Court are contrary to law and have been passed without appreciating the facts of the case and provisions of the law. That, both the courts below have failed to appreciate the provisions of Sections 28 of the Act and relevant rules thereof. That, there is no provision either in the CRPC or in the Indian Evidence Act to file an affidavit as a substitute for the oral evidence. As per Section 60 of the Indian Evidence Act, oral

evidence must be direct and there is no specific provision like the NI Act to led in evidence by way of filing a proof of affidavit. That, chief examination should be by way of oral evidence and if any deviation from the said procedure, prejudice would be caused to the parties. That, the orders passed by the learned courts below suffer from non application of mind and non application of the law to the facts of the case. That, both the learned courts below have not considered the law point and provisions of law while passing both the impugned orders.

5. It was further submitted by learned advocate for the applicants that Section 28 (1) unambiguously mentions that - "Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offenses under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)" - Now it is a Civil Law but bound by Criminal Procedure Code. Further Section 28(2) allows the learned Magistrate to lay down his own procedure while disposing the applications made under Section 12 & Section 23(2), it ts submitted that many a times applicant/s uses this provision to avoid the process of evidence and cross-examination and hence provides a preference to a women, which is a Clear violation of Article 14 of Constitution of India.

Further, Rule 6 (5) specifies that all applications under Section 12 are dealt with and Orders are enforced as defined in Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974). It is submitted that to get more clarity as to whether the Protection of Women from Domestic Violence Act 2005 is a Civil or a Criminal Law, one has to do a conjoint reading of the S.28(1) & (2) of the Act, Rule 6 (5) and Sections 125 - 126 of the Code of Criminal Procedure, 1973 (2 of 1974). Ultimately, it was submitted by learned advocate for the applicants to allow present application.

6. Having heard learned advocate for the applicants and considering the averments made by the applicants in the present applications as well as while considering the conclusions made in both the impugned orders, it appears that during the pendency of the Criminal Misc. application No. 27 of 2019 filed under Section 12 of the Act by the respondents No.2 and 3, the applicants have filed an application vide Ex. 32 objecting the examination in chief filed by the respondents No.2 and 3 on affidavit and requested to record their examination in chief in oral manner.

7. For concluding the said issue, first of all, this court would like to consider the legal provisions, which speaks that what is of great significance is that the 2005 Act is to provide for

effective protection of the rights of women who are victims of violence of any kind occurring within the family. The Preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. A plain reading of these provisions clearly indicates that the DV Act provides effective protection to women, who are victims of domestic violence. The Act prescribes mandatory time limit for fixing the date of hearing, service of notice and disposal of the application with an intent and object of providing expeditious and speedy relief to the aggrieved women.

8. In case of **Aniket Subhash Tupe v/s Piyusha Aniket Tupe & Another**, reported in **2018 SCC OnLine Bom 601**, the High Court of Bombay, Criminal Appellate Jurisdiction has held that:

“13. Section 28 of the DV Act prescribes the procedure to be followed by the Magistrate. Sub Section 1 of Section 28 provides that all proceedings under Sections 12,18,19,20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure. Sub Section (2) of Section 28 of the DV. Act provides that nothing in Sub Section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under Sub Section 2 of Section 23 of the DV Act.

15. At this stage, it would also be advantageous to refer to Sub Section (2) of Section 126 Cr.P.C. which prescribes procedure for dealing with applications under Section 125. This provision states

that all evidence in proceedings under Section 125 of Cr.P.C. shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed in summons case.

23. As stated earlier, Sub Section 2 of Section 28 enables the Court to lay down its own procedure in deciding the applications under Section 12 or 23 of the DV Act. The rules framed in exercise of powers under Section 37 of the Act cannot override this substantive provision under the Act.”

26. These principles have to be borne in mind while interpreting the provision under section 28 (2) D.V.Act. As stated earlier the D.V.Act is a beneficial piece of social welfare legislation aimed at providing to the victims of domestic violence speedy reliefs, which are civil in nature. Though, unlike Negotiable Instrument Act, there is no specific provision in the D.V. Act to give evidence on affidavit, section 28(2) with words plain, simple and unambiguous gives flexibility to the Court to depart from the procedure prescribed under Section (1) of Section 28 and to devise its own procedure in deciding application under Section 12 or 23(2) of the Act. This enabling provision, which intends to achieve the object of the Act, would override sub section (1) of section 28 the Act as well as Rule 6(5) of D.V. Rules.

9. In case of **Manish Kumar Soni & Ors. Vs. State of Bihar and Anr.** Reported in **II(2016) DMC 207**, Hon’ble Patna High Court has held in para 27 that;

"27. Hence, though the provision under Section 28(1) of the Act stipulates that the proceeding under Section 12 of the Act shall be governed by the provisions of the Code of Criminal Procedure,

but the same is directory in nature and any departure from the provisions of Code of Criminal Procedure will not vitiate the proceeding initiated under Section 12 of the Act."

10. Thus, while considering the aforesaid discussion, this court is of the view that Court can allow evidence on affidavit in its discretion and while considering the aims and objects of the D.V. Act including the scope of Section 28(2), court can deviate from procedure mentioned under Sub Section (1) of Section 28 read with Rule 6(5) and devise its own procedure which would include permitting evidence by way of an affidavit and thus, the learned trial court as well as learned first appellate court have not committed any error in passing impugned orders and therefore, both the impugned orders are ordered to be confirmed.

11. With aforesaid observations, present application stands rejected at the admission stage without issuing any notice to the otherside.

K. S. DARJI

**(SAMIR J. DAVE,J)**