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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 14.05.2018

% Judgment delivered on: 09.07.2018

\+ **CRL.M.C. 878/2018 & Crl.M.A. No. 3240/2018**

SABINA SAHDEV & ORS ..... Petitioners

Through: Mr. Prosenjeet Banerjee with Ms.Shreya Singhal, Advocates

versus

VIDUR SAHDEV ..... Respondent

Through: Mr. Sanjiv Bahl with Ms. Eklavya Bahl, Ms. Apoorva Bahl and Mr. Pawas Aggarwal, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S. TEJI

J U D G M E N T

VIPIN SANGHI, J.

1. The above is a petition preferred by the petitioner-wife, under Article 227 of the Constitution of India read with Section 482 Cr PC., being aggrieved by the order passed by the Ld. ASJ on 22.01.2018 in the appeal preferred by the respondent-husband under Section 29 of the Protection of Women from Domestic Violence Act (DV Act). Before the learned ASJ, the petitioner-wife had contended that the appeal under Section 29 of the DV Act – against the order granting interim maintenance, was not maintainable in the light of the decision of a learned Single Judge of this Court in ***Rajeev Preenja v. Sarika & Ors.,*** *(*2009) 159 DLT 616, which

directs that the appellant-husband should be required to deposit the complete arrears of interim maintenance (awarded under Section 125 Cr.P.C.) before the revisional remedy (under Section 399 read with Section 401 Cr.P.C.) is entertained. The judgment of another learned Single Judge in ***Brijesh Kumar Gupta v. Shikha Gupta & Anr***., 2015 SCC Online Del 7086 was placed before the learned ASJ wherein it was, in effect, held that the statutory remedy of appeal under Section 29 of the DV Act could not be curtailed by imposition of such a condition. The Ld. ASJ by the said order rejected the submission of the petitioner- wife that the subsequent decision in ***Brijesh Kumar Gupta*** (supra), is *per incurium* the decision in ***Rajeev Preenja*** (supra). He held that the two decisions were mutually reconcilable. The Ld. ASJ held that the statutory appeal under Section 29 of the DV Act was maintainable, as the appellant-husband had cleared arrears of maintenance up to the extent of 50%, till the date of filing of the appeal.

2. On 07.03.2018, the learned Single Judge observed that in view of the decision of the Supreme Court in ***Central Board of Dawoodi Bohra Community & An. V. State of Maharashtra & Anr.***, (2005) 2 SCC 673, the learned Single Judge while deciding ***Brijesh Kumar Gupta*** (supra) could not have disregarded the earlier judgment in ***Rajeev Preenja*** (supra) – since both were decisions of benches of co-equal strength. However, he made a reference of the legal issue involved in the case to a larger Bench, in view of two conflicting opinions of two learned Judges of this Court. Hon'ble the Acting Chief Justice has, accordingly, placed the reference before this Bench for its consideration.

3. We have heard learned counsels for the parties on the said issue and we proceed to answer the reference.

4. In ***Rajeev Preenja*** (supra), this Court was dealing with two petitions – both preferred by the petitioner husband.

4.1 Crl. MC. No.1859/2008 was directed against an order passed by the learned ASJ, Delhi dismissing the husband's Criminal Revision and affirming the order passed by the learned MM under Section 125 Cr.P.C.- directing him to pay interim maintenance to his wife – respondent no.1 and his minor son respondent no.2. Crl. MC. No.3089/2008 had been preferred to assail the order passed by the learned MM in execution proceedings arising out of the maintenance order.

4.2 While entertaining the said petitions, this Court directed the petitioner to continue to pay the interim maintenance as awarded by the Trial Court during pendency of the petitions. However, despite two adjournments, the petitioner did not comply with the said direction on account of stated financial incapacity. The learned Single Judge considered the submissions advanced by the petitioner husband and rejected the same on merits. Both the petitions were, accordingly, dismissed with costs.

4.3 The learned Single Judge then proceeded to consider the issue concerning implementation of the order passed by the learned MM under Section 125 Cr.P.C. directing payment of interim maintenance. The learned Single Judge while dealing with this aspect, firstly,

rejected the petitioners submission that an execution petition was not maintainable before the learned MM, since there was no statutory backing for the same in the Cr.P.C. For that purpose, the learned Single Judge placed reliance on the language of Section 125(1) Cr PC. The learned Single Judge then proceeded to observe as follows:

> *"15. The other phenomenon that requires to be discouraged is that a mere filing of a revision petition by a husband against an order granting interim maintenance to the wife and/or child is construed as an implied stay of that order. As a result the wife has to wait for an even longer period for the implementation of the order in her favour.* ***The method that should be deployed to overcome this hurdle is for the revisional Court to insist that the husband's revision petition will not be entertained till such time the husband against whom the order of interim maintenance has been passed, deposits the entire arrears of interim maintenance up to date in terms of the said order of the learned MM in the Court of the learned ASJ.*** *Otherwise the husband will be able to indefinitely postpone the implementation of the orders of interim maintenance by driving the wife from one Court to another without her receiving any payment whatsoever. This only compounds the agony of the wife and serves to defeat the interest of justice. This situation ought not to be allowed to continue if justice in the real sense should be done to an Indian wife who is in dire straits and unable to survive with her child for want of economic means of subsistence. Given the huge pendency of work in the Courts of the learned MM, an application under Section 125, Cr.P.C. is unable to be disposed of within a year. Even an order of interim maintenance is able to be passed only after a year.*
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> *16.* ***It is accordingly directed that when a revision petition is filed by husband in the Court of the learned***

> ***ASJ against an order of interim maintenance passed by a learned MM in favour of the wife, the said revision petition will not be entertained by the learned ASJ till the entire amount of interim maintenance due under the order of the learned MM up to the date of filing of the revision petition is first deposited in the Court of the learned ASJ.*** *The respondent wife and child, if any, should be permitted by the learned ASJ to withdraw the whole or part of the said sum, upon such terms and conditions as may be determined by the learned ASJ."(*emphasis supplied*)*

4.4 The learned Single Judge further observed in para 20 as follows:

> *"20. Keeping in view the fact that interim maintenance applications are likely to take a year for being disposed of and that the payment to the wife is likely to be made only thereafter,* ***it is only just and fair that the revisional Court should insist on the deposit in Court of the interim maintenance payable in terms of the order under challenge as a pre-condition to entertaining the revision petition.*** *Otherwise a recalcitrant husband can, despite suffering an adverse order, defeat that order merely by filing a revision petition and not being burdened with the responsibility of complying with it".* (emphasis supplied)

4.5 Thus, by issuing the above quoted general directions, the Ld. Single Judge directed all Sessions Courts to insist, without exception –while hearing Criminal Revisions under Section 399 Cr.P.C. against orders granting interim maintenance under Section 125 Cr.P.C., for deposit of the entire arrears before entertaining the revision petition.

5. In ***Brijesh Kumar Gupta*** (supra), this Court was dealing with a petition directed against the order passed by the Sessions Court in an appeal under Section 29 of the DV Act.

5.1 The said statutory appeal was entertained by the Appellate Court/ Sessions Court subject to deposit of arrears of maintenance as granted by the Trial Court, while permitting the petitioner to deduct a certain amount from the amount due. The challenge to the appellate order before this Court was on the ground that no pre-condition could be imposed for hearing a statutory appeal under Section 29 of the DV Act.

5.2 The earlier decision in ***Rajeev Preenja*** (supra), apart from the decision in ***Nitin Gupta v. Ruchika Gupta***, 2012 (3) Crimes 227 (Del), (which follows ***Rajeev Preenja*** (supra)) were relied upon by the respondent wife. The attention of the learned Single Judge was drawn to the decision of the Supreme Court in ***Shalu Ojha v. Prashant Ojha***, (2015) 2 SCC 99, holding that in proceedings under the DV Act, the Courts should be slow to grant interim orders. Her submission was that Section 125 Cr PC is akin to the provisions for grant of maintenance under the DV Act, and the special enactment (DV Act) had been brought to protect women and children from neglect.

5.3 The learned Single Judge, however, observed that "***there cannot be an absolute rider that the entire maintenance amount, as granted by the trial Court, should be deposited prior to hearing of the statutory***

appeal because it would otherwise leave the remedy of statutory appeal illusory". The learned Single Judge, in the peculiar facts and circumstances of the case, directed the petitioner to deposit 50% of the maintenance amount from the date of the application after deducting from the said amount, the amount already paid by the petitioner.

5.4 Thus, the view taken by this Court in ***Brijesh Kumar Gupta*** (supra) was in disregard of the view taken in ***Rajeev Preenja*** (supra), on the fundamental premise that this Court could not have placed a limitation on the statutory remedy of appeal under Section 29 of the DV Act (and the same principle would be applicable to the statutory remedy of revision under Section 399 of the Cr PC), by laying down that the entire arrears of interim maintenance should first be deposited, before the statutory appeal is heard, as this would make the statutory remedy of appeal illusory.

6. The submission of Mr. Banerjee, learned counsel for the petitioner wife is that Section 29 of the DV Act, while providing for an appeal against the order passed by a Magistrate (which would include an order passed under Section 23 of the DV Act i.e. an interim order on maintenance), does not, in terms, authorize the Appellate Court i.e. Court of Sessions to stay the order passed by the Magistrate. He places reliance on the observations made by the Supreme Court in ***Super Cassettes Industries Limited v. Music Broadcast Private Limited***, (2012) 5 SCC 488 in para 62 and 65. The Supreme Court observed that a tribunal is a creature of statute and can exercise only such powers that are vested in it by the statute. The Supreme

Court referred to ***Bindeshwari Prasad Singh v. Kali Singh***, (1977) AIR SC 2432, wherein it was held that in the absence of any specific power in the Code, the Magistrate is not entitled to exercise the power of review or recall of his order.

7. Mr. Banerjee further drew our attention to Rule 6(5) of the Protection of Women from Domestic Violence Rules, 2006 (DV Rules), which provides that an application under Section 12 of the DV Act shall be dealt with, and the orders enforced, in the same manner as laid down in Section 125 of the Code. Section 28 of the DV Act states that save as otherwise provided in the said Act, all proceedings, inter alia, under Sections 12, 20 (which deals with monetary reliefs including maintenance for the aggrieved person as well as the children), and 23 (power to grant interim and ex-parte orders, inter alia, under Section 20) shall be governed by the provisions of the Code.

8. Mr. Banerjee has also placed reliance on ***Shalu Ojha*** (supra). He submits that in ***Shalu Ojha*** (supra), the Supreme Court has observed that no further appeal or revision is provided to the High Court, or any other Court, against the order of Sessions Court under Section 29 of the DV Act. In respect of the jurisdiction of the Sessions Court under Section 29 of the DV Act, the Supreme Court, inter alia, observed:

> "*20. .... Whether the Sessions Court in exercise of its jurisdiction under Section 29 of the Act has any power to pass interim orders staying the execution of the order appealed before it is a matter to be examined in an appropriate case. We only note that there is no express grant of power conferred on the Sessions Court while such power is expressly conferred on*

the Magistrate under Section 23. Apart from that, the power to grant interim orders is not always inherent in every court. Such powers are either expressly conferred or implied in certain circumstances. This Court in Super Cassettes Industries Ltd. v. Music Broadcast (P) Ltd. [(2012) 5 SCC 488 : (2012) 3 SCC (Civ) 1] , examined this question in detail. At any rate, we do not propose to decide whether the Sessions Court has the power to grant interim order such as the one sought by the respondent herein during the pendency of his appeal, for that issue has not been argued before us.

21. We presume (we emphasise that we only presume for the purpose of this appeal) that the Sessions Court does have such power. If such a power exists then it can certainly be exercised by the Sessions Court on such terms and conditions which in the opinion of the Sessions Court are justified in the facts and circumstances of a given case. In the alternative, if the Sessions Court does not have the power to grant interim orders during the pendency of the appeal, the Sessions Court ought not to have stayed the execution of the maintenance order passed by the Magistrate. … …"

9. Thus, Mr. Banerjee submits that the Supreme Court has doubted the existence of power in the Sessions Court to stay the execution of the order appealed against under Section 29 of the DV Act.

10. On the other hand, Mr. Bahl, learned counsel for the respondent-husband has supported the view taken by this Court in ***Brijesh Kumar Gupta*** (supra). Mr. Bahl submits that a perusal of ***Rajeev Preenja*** (supra) shows that the concern of the Court was that mere filing of a revision petition by the husband against an order granting interim maintenance to the wife and/ or child is construed as an implied stay of that order. Consequently, the wife has to wait for an even longer period in the implementation of the order in her favour. He submits that the learned

Single Judge evolved a method to overcome this hurdle by directing that the revisional Court should insist that the husband's revision petition will not be entertained, till such time he deposits the entire arrears of interim maintenance upto date in terms of the order passed by the learned MM. Otherwise, the husband would be able to indefinitely postpone the implementation of orders of interim maintenance by driving the wife from one Court to another, without her receiving any payment whatsoever.

11. Mr. Bahl submits that the mechanism evolved by the learned Single Judge in ***Rajeev Preenja*** (supra) is not the only mechanism which could be devised by the revisional Court to deal with the concerns expressed by the learned Judge. He submits that in a given case, the order on maintenance – against which a revisional proceeding (or an appeal under Section 29 of the DV Act) is preferred before the Sessions Court, may be so harsh and so unreasonable, that to require its compliance even before entertainment of the revision petition (or an appeal under Section 29 of the DV Act), may make it impossible for the husband to pursue his legal remedy by way of revision/ appeal, which may lead to grave miscarriage of justice. He submits that it should be left to the revisional/ appellate Court – as the case may be, to ensure that a balanced approach is taken so as to safeguard the interests of the wife/ aggrieved person/ complainant, as well as the husband respondent.

12. Mr. Bahl submits that the learned Single Judge in ***Brijesh Kumar Gupta*** (supra) has correctly observed that there cannot be an absolute rule that the entire maintenance amount, as granted by the Trial Court, should be first deposited prior to entertainment of the statutory appeal, because that would make the remedy of statutory appeal illusory. He submits that by

directing that a revision petition filed by the husband (in the context of an order passed under Section 125 Cr PC) in the Sessions Court, against an order of interim maintenance passed by the MM in favour of the wife, "*will not be entertained by the learned ASJ till the entire amount of interim maintenance due under the order of the learned MM upto date of filing of revision petition is first deposited in the Court of learned ASJ*", the learned Single Judge in ***Rajeev Preenja*** (supra) has, in fact, taken upon himself to curtail the statutory remedy of revision (under Section 399 Cr PC) and, similarly, the statutory remedy of appeal under Section 29 of the DV Act, and thereby curtailed the scope of the legislation. He submits that the same is not permissible and, in this regard, he places reliance on ***Union of India & Anr. v. Deoki Nandan Aggarwal***, 1992 AIR SC 96; ***Association for Development v. Union of India***, (2010) 115 DRJ 277 (DB).

13. Mr. Bahl submits that the statutory intendment in Section 29 of the DV Act is unambiguous and clear, namely, to provide a statutory remedy of appeal to the Court of Sessions against an order made by the Magistrate. The said right of statutory appeal is not circumscribed by any limitations or conditions of pre-deposit of any amount. He submits that where the language of the statute is unambiguous, in interpreting the same, it is not necessary to look into the legislative intent, or the object of the Act. In this regard, he places reliance on ***Arul Nadar v. Authorised Officer, Land Reforms***, AIR 1998 SC 3288. Similar would be the position qua the statutory remedy of revision under Section 399 of the Cr PC.

14. Mr. Bahl has, lastly, placed reliance on the judgment of a Division Bench of this Court in ***Gagan Makkar & Anr. v. Union of India & Anr.***,

192 (2012) DLT (DB). The Division Bench examined the challenge to the amended Section 169 of the DMC Act, 1957. The first contention raised before it was that the proviso to Section 169(1) of the DMC Act makes the remedy of appeal to the Municipal Taxation Tribunal illusory inasmuch, as, it requires that the full amount of the property tax be paid before the filing of an appeal. The Division Bench found that Section 169(1) gave a conditional right of appeal – the condition being that before the filing of appeal, the full amount of property tax amount is required to be paid. There was no provision for dispensation of this condition in full, or in part, by the appellate authority on the appellant showing and establishing hardship. The Division Bench distinguished this statutory scheme from that considered in ***Anant Mills Company Limited v. State of Gujarat & Ors.***, (1975) 2 SCC 175; ***Vijay Prakash D. Mehta & Anr. v. Collector of Customs (Preventive), Bombay***, (1988) 4 SCC 402, and; ***Gujarat Agro Industries Company Limited v. Municipal Corporation of the City of Ahmedabad, IV***, (1999) SLT 204. The Division Bench held that the said cases "*to some degree, involved provisions which had a "safety valve" clause, as it were, for dispensation of the pre-deposit amount*". The statutory scheme considered by the Supreme Court in ***Seth Nand Lal & Anr. v. State of Haryana & Ors.***, 1980 (Supp.) SCC 574 had a peremptory provision without such a clause/ safety valve. However, the Supreme Court upheld the said provision to be valid, because pre-deposit amount was a "meagre" amount. The Constitution Bench of the Supreme Court held that the conditions were not so unreasonable or onerous, as to render the right illusory. It found that the requirement of pre-deposit of a meagre amount was neither unreasonable, nor onerous. The Division Bench went on to observe as follows:

> "*27. Here, the property tax amount may run into lakhs of rupees and, therefore, cannot be regarded as meagre. As such, we are of the opinion that the proviso to Section 169(1) of the DMC Act imposes an onerous and unreasonable condition of paying the full amount of the property tax before the filing of an appeal. Such a provision renders the right of appeal illusory. It is true that the legislature need not have given a right of appeal at all. But, the legislature, having decided, in its wisdom, to give a right of appeal cannot make it illusory by imposing such an onerous or unreasonable condition as to amount to a deprivation of that very right which it intends to give. Neither can the possible property tax amounts be considered meagre nor is there any provision for dispensation, whether full or partial, so as to ease the harshness of the proviso to Section 169(1) of the DMC Act. Therefore, we have no alternative but to hold that the said proviso is an onerous condition and to strike it down as being violative of Article 14 of the Constitution of India*".

15. The submission of Mr. Bahl is that by imposing a condition that a revision against an order granting interim maintenance would not be entertained by the Sessions Court, unless the entire arrears are deposited, the learned Single Judge in ***Rajeev Preenja*** (supra) has laid down an onerous condition. Even if such a condition were to be statutorily incorporated, the same would fall foul of Article 14 of Constitution of India in the light of the judgment in ***Gagan Makkar*** (supra).

16. We have given our thoughtful consideration to the submission of Ld. counsels. We have also considered the decisions in ***Rajeev Preenja*** (supra) and ***Brijesh Kumar Gupta*** (supra), as well as the other cases relied upon by the parties.

17. The learned Single Judge has observed in his order dated 07.03.2018 that while deciding ***Brijesh Kumar Gupta*** (supra), the Court could not have disregarded the earlier decision in ***Rajeev Preenja*** (supra) in view of the decision of the Supreme Court in ***Central Board of Dawoodi Bohra Community*** (supra). That may, or may not, be so. The answer to this issue would depend on the determination of the question whether the direction in question constitutes the *ratio decidendi* of the decision in ***Rajeev Preenja*** (supra). Because, if the said direction does not constitute the *ratio decidendi* of that decision, it would not constitute a binding precedent. This issue, however, is not the one referred to us, and therefore, we need not dwell on it any further, except to state that the direction in question does not appear to us to constitute the ratio of the decision in ***Rajeev Preenja*** (supra). We will comment on that aspect a little later. Even if we take it for the sake of argument that the learned Single Judge – while dealing with ***Brijesh Kumar Gupta*** (supra) could not have disregarded ***Rajeev Preenja*** (supra) that, by itself, would not resolve the issue raised in the reference order, since there are two conflicting views of two learned Single Judge's of this Court on the aspect, whether, the statutory remedy of revision under Section 399 of Cr.PC., and the statutory remedy of appeal under Section 29 of the DV Act, could be curtailed and made subject to pre-deposit of the entire arrears of interim maintenance fixed by the ld. Magistrate under Section 125 of the Cr.P.C., or under Section 23 of the DV act, as the case may be.

18. The direction in question issued in ***Rajeev Preenja*** (supra), undoubtedly limits the statutory remedy of revision under Section 399 of the Cr.P.C. against an order granting interim maintenance in favour of the wife/

child, passed by the Ld. Magistrate, since it diverts that the revision would not be entertained by the Sessions Court, till such time the husband - against whom the order of interim maintenance has been passed, deposits the entire arrears of interim maintenance up to date. Thus, unless the revisionist first deposits the arrears of interim maintenance, his revision would not be entertained and heard.

19. The Supreme Court in ***Deoki Nandan Aggarwal*** (supra), inter alia observed:

> "***It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there.*** *Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency.* ***Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.*** *Vide P.K. Unni v. Nirmala Industries [(1990) 2 SCC 378, 383-84 : (1990) 1 SCR 482, 488] , Mangilal v. Suganchand Rathi [(1964) 5 SCR 239 : AIR 1965 SC 101] , Sri Ram Ram Narain Medhi v. State of Bombay [1959 Supp 1 SCR 489 : AIR 1959 SC 459], Hira Devi (Smt) v. District Board, Shahjahanpur [1952 SCR 1122, 1131 : AIR 1952 SC 362] , Nalinakhya Bysack v. Shyam Sunder Haldar [1953 SCR 533, 545 : AIR 1953 SC 148] , Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] , G. Narayanaswami v. G.*

Pannerselvam [(1972) 3 SCC 717 : (1973) 1 SCR 172, 182] , N.S. Vardachari v. G. Vasantha Pai [(1972) 2 SCC 594 : (1973) 1 SCR 886] , Union of India v. Sankal Chand Himatlal Sheth [(1977) 4 SCC 193 : 1977 SCC (L&S) 435 : (1978) 1 SCR 423] and CST v. Auriaya Chamber of Commerce, Allahabad [(1986) 3 SCC 50, 55 : 1986 SCC (Tax) 449 : (1986) 2 SCR 430, 438] . Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. ***If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power****".* (emphasis supplied)

20. In ***Association for Development v. Union of India*** (supra), a Division Bench of this Court noticed the English judgment in ***Duport Steels Ltd. v. Sirs*** (1980) 1 All ER 529, which was quoted with approval by the Supreme Court in ***Mandvi Co-op. Bank Ltd V. Nimesh B. Thakore***, (2010) 3 SCC 83. In ***Mandvi Co-op. Bank Ltd*** (supra), the Supreme Court observed:

*"****But in the field of statute law the Judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and unmakes, the law: the Judge's duty is to interpret and to apply the law, not to change it to meet the Judge's idea of what justice requires.*** *Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the Judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute."* (emphasis supplied)

21. The Division Bench after taking notice of the aforesaid decisions observed as follows:

> "*15.* ***It is not the duty of the Court to enlarge the scope of the legislation when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The Court cannot add words to a statute or read words into it which are not there.*** *Though, of course a proceeding even at the instance of a busy body for issuance of writ of quo warranto questioning any particular appointment would be maintainable*". (emphasis supplied)

22. Neither the language used by the Legislature in Section 399 read with Section 401 of the Cr.P.C., nor the language used in Section 29 of the DV Act even remotely suggest that the Legislature intended to impose pre-conditions to the availment of the said remedies, of the kind evolved in ***Rajeev Preenja*** (supra).

23. A perusal of ***Rajeev Preenja*** (supra) shows that the learned Single Judge did not base the general direction issued by him – which is under examination, on an interpretation of Section 399 read with Section 401IPC.

24. A perusal of ***Rajeev Preenja*** (supra) shows that the learned Single Judge, after dismissing the husband's petition on account of non-compliance of the interim maintenance, proceeded to issue general directions, including the one under consideration, *suo moto* with a view to remedy the plight suffered by the wife on account of the reluctance shown by the husband in complying with orders granting interim maintenance. The direction in question was not issued after due deliberation of the issues: whether such a general direction could, at all, be issued by the Court, and; whether such a general direction would work justly and fairly in all circumstances. The learned Single Judge was not seized of these issues as they did not arise for

consideration in ***Rajeev Preenja*** (supra). The *suo moto* directions issued by the Court in ***Rajeev Preenja*** (supra), therefore, in any event, cannot be treated as a binding precedent, as the said direction does not constitute the *ratio decidendi* of the case.

25. Laudable as the object of the learned Single Judge may have been, the question is, whether in the light of the settled law taken note of hereinabove, the learned Single Judge while deciding ***Rajeev Preenja*** (supra) could have issued a general direction barring entertainment of criminal revisions under Section 399 read with Section 401 Cr.P.C. against orders granting interim maintenance to the wife/ child under Section 125 Cr.P.C., unless the entire arrears of maintenance up to date were first deposited? In our view, with due respect to the learned Single Judge, the answer is clearly in the negative. As to what should be the policy of the law is a matter which squarely falls within the preserve of the Legislature, and it is not a matter which the Courts can dictate, or evolve. It is one thing to interpret an existing law and, while doing so, to adopt an interpretation which is purposive, i.e. one which advances the objective of the enactment. However, it is quite a different thing to evolve a statutory scheme which, even the Legislature did not provide for.

26. Reliance placed by Mr. Banerjee on ***Shalu Ojha*** (supra) is of no avail, since in ***Shalu Ojha*** (supra), the Supreme Court made observations with regard to the power of the Sessions Court in exercise of its jurisdiction under Section 29 of the DV Act, to pass interim orders staying the execution of the orders appealed before it. The Supreme Court did not return a definite finding, one way or another, with regard to the existence of such power to

grant interim stay of execution. The Supreme Court has not held in ***Shalu Ojha*** (supra) that the appeal under Section 29 of the DV Act itself would not be maintainable, or that the same would not be entertained or heard, till up to date arrears of the interim maintenance are first deposited by the appellant.

27. We agree with the submission of Mr. Bahl that the concerns expressed by the learned Single Judge in paragraphs 15 and 20 of the judgment in ***Rajeev Preenja*** (supra), can be addressed by the Court dealing with the revision under Section 399 Cr.P.C., or with the appeal under Section 29 of the DV Act on a case to case basis, depending upon the facts and circumstances of each case. We may also make it clear, that there is no basis to conclude that mere filing of a revision against an order granting interim maintenance tantamount to a stay of the order under revision. The order passed by the learned MM granting interim maintenance would be enforceable, despite pendency of the Revision/ Appeal, unless the operation of the same is stayed by the Revisional or Appellate Court, as the case may be. While considering any such application for stay of operation of the order granting interim maintenance, the appellate Court would, apart from examining the merits of the case, prima facie, also take into consideration the decisions binding on it, including the decision in ***Shalu Ojha*** (supra), however the maintainability of the statutory remedy of revision/ appeal, and the right to pursue the same, cannot be curtailed by imposing a condition of pre-deposit of the arrears of interim maintenance. By the Revisional/ Appellate cannot be converted into an executing Court in respect of the order granting interim maintenance.

28. We may observe that even in respect of a money decree passed by a Civil Court, the judgment debtor is entitled to maintain a first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) without any requirement of pre-deposit, or pre-compliance with the decree appealed against. Same is the position with regard to the maintainability of an appeal against orders, under Section 104 of the CPC. Maintainability of a statutory remedy like revision, or appeal, should not be confused with the aspect of stay of the impugned order or decree.

29. As rightly pointed out by Mr. Bahl, imposition of a limitation on the statutory remedy of revision/ appeal under Section 399 of the Cr.P.C. or Section 29 of the DV Act– as the case may be, also falls foul of Article 14 of the Constitution of India for the reasons noticed by the Division Bench in ***Gagan Makkar*** (supra). Even if the condition in question – of the nature directed by the learned Single Judge in ***Rajeev Preenja*** (supra), were to exist in the statutory framework, the same may fail the test of reasonableness under Article 14 of the Constitution of India. This is for the reason that, in a given case, the order granting interim maintenance passed by the Ld. Magistrate either under Section 125 Cr.P.C or under Section 29 of the DV Act, may be so harsh and so unreasonable, as to make it impossible for the opposite party/ husband to comply with the same. Experience shows that in a large number of cases, the arrears of interim maintenance- which may be granted from the date of moving of the application before the Ld. Magistrate, may accumulate to a very large amount running into lakhs of rupees. The arrears of interim maintenance may not necessarily be a meager

amount in all cases. It would be most unjust and unreasonable to bar his statutory remedy of revision/ appeal as the case may be, merely because he may not be in a position to deposit the entire arrears of interim maintenance.

30. Thus, we answer the reference by holding that the general direction issued in ***Rajeev Preenja*** (supra) in paragraphs 15, 16 and 20 are not sustainable. The said directions could not have been issued by the learned Single Judge as they seek to curtail the statutory remedy of revision available under Section 399 read with Section 401 of the Cr.P.C, and of appeal under Section 29 of the DV Act, against orders granting interim maintenance under Section 125 Cr.P.C. and Section 23 of the DV Act respectively. The direction in question over steps into the legislative field, which was impermissible for the Court to do. We agree with the view taken by the learned Single Judge in ***Brijesh Kumar Gupta*** (supra), that there cannot be an absolute rider that the entire maintenance amount, as granted by the Trial Court, should be deposited prior to the entertainment of the statutory remedy, because it would leave the remedy of statutory revision/ appeal illusory. Accordingly, we hold that a revision under Section 399 read with Section 401 Cr.P.C. and an appeal under Section 29 of the DV Act, against the order granting maintenance under Section 125 Cr.P.C. and under Section 23 of the DV Act respectively, would be maintainable, and would be entertained and heard without any pre-condition of deposit of the arrears of maintenance as ordered by the Ld. MM. We further hold that the pendency of such a Revision or Appeal- as the case may be, shall not operate as a stay of the operation of the order granting interim maintenance. The reference is answered accordingly.

31. List the petition before the learned Single Judge as per roster on 16.07.2018.

(VIPIN SANGHI)
JUDGE

(P.S. TEJI)
JUDGE

JULY 09, 2018