IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : **11.01.2021**

PRONOUNCING ORDERS ON : **18.01.2021**

CORAM

THE HONOURABLE JUSTICE **MR.N.ANAND VENKATESH**

Crl.OP Nos.28458, 16411, 33643 of 2019, Crl.OP.Nos.16389, 16450, 17156, 19918, 20434 of 2020 and Crl.OP.Nos.45, 73, 138, 184, 191, 213, 216 , 233, 243, 332 and 349 of 2021
and
Crl.MP.Nos.8239,8240,18568,18569,15188,15189 of 2019, 6300, 6302, 6345, 6344, 6641 8174 8562 of 2020, 31, 32, 38, 39, 57,70, 74,99, 76, 78, 96, 95, 97, 98, 110,113,114,171 and 172 of 2021

Crl OP No.28458 of 2019

1.Dr.P.Pathmanathan
2.Dr.P.Jayagandhi
3.Dr.P.Mukil Sakthi

....Petitioners
in Crl OP No.28458 of 2019

Vs.

1. Tmt.V.Monica
2.Minor R.Saithanya Krishna
Rep.by his mother V.Monica
ETR Nagar, Veeramani Complex,
Bargur Post & Taluk,
Krishnagiri District.

.. Respondents
in Crl.OP.No.28458 of 2019

Prayer in Crl OP No.28458 of 2019 : Criminal Original Petition filed under Section 482 of Cr.PC., to call for the records in D.V.No.71 of 2019 on the file of the Additional Mahila Court at Krisnnagiri, quash the proceedings therein in fas far as the petitioners herein are concerned.

Amicus Curiae: Mr.A.Ramesh, Senior Counsel
Mr.Srinivasan, Counsel
Mr.G.R.Hari, Counsel
Mr.M.Mohamed Riyaz
Additional Public Prosecutor

For Petitioners in

Crl.OP.No.28458 of 2029 : Mr.C.S.Dhanasekaran
Crl.OP.No.33643 of 2019 : Mr.P.K.Naarayanan
Crl.OP.No.16411 of 2019 : Mr.K.P.Chandrasekaran
Crl.O.P.No.16389 of 2020 : Mr.S.Sithirai Anandam
Crl.OP.No.16450 of 2020 : M/s.KV Law Firm
Crl.OP.No.17156 of 2020 : Mr.V.Paarthiban
Crl.OP.No.19918 of 2020 : Mr.M.Prabhakar
Crl.OP.No.20434 of 2020 : Mr.N.A.Nissar Ahmed
Crl.OP.No.45 of 2021 : Mr.W.Camyles Gandhi
Crl.OP.No.73 of 2021 : Mr.P.Ravi Shankar Rao
Crl.OP.No.138 of 2021 : Mr.R.Surya Prakash
Crl.OP.No.184 of 2021 : Mr.J.Deliban
Crl.OP.No.191 of 2021 : Mr.S.Sathyaraj

Crl.OP.No.213 of 2021 : Mr.S.Saranraj

Crl.OP.No.216 of 2021 : Mr.P.Veeraraghavan

Crl.OP.No.233 of 2021 : Mr.M.Sankar

Crl.OP.No.243 of 2021 : Mr.Rameshkumar Chopra

Crl.OP.No.332 of 2021 : Mr.S.T.Varadarajalu

Crl.OP.No.349 of 2021 : M/s.Chennai Law Associates

For Respondents in

Crl.OP.Nos.28458 of 2029

& Crl.OP.No.33643 of 2019 : Mr.L.Mahendran

Crl.OP.No.16411 of 2019 : Mr.A.Satha Sivam

Crl.O.P.No.16389 of 2020 : M/s.Udaya PS Menon

COMMON ORDER

The issue that falls for consideration in these batch of cases relates to the jurisdiction of the High Court to quash a complaint under Section 12 of the Domestic Violence Act, 2005 (hereinafter referred to as "D.V. Act" or "the Act") in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C." or "the Code").

2. This Court had directed the Registry to put up a number of

cases filed between 2017 and 2020, and pending, for quashing applications under Section 12 of the D.V Act. This Court was surprised to learn that over 1000 such cases were pending. The D.V Act endeavors the Magistrate to dispose an application filed under Section 12 (1) within 60 days from the date of its first hearing. However, here is a distressing scenario where the proceedings, in a majority of the cases, have come to a grinding halt without any progress for more than 3 years on account of the pendency of the petitions on the file of this Court.

3. Upon a close reading of the D.V Act, this Court found that the nature of rights that were protected and enforced under the Act were purely civil in nature. However, considering the forum which was dealing with such applications, and the procedure adopted, a criminal color has been unwittingly given to these proceedings. Like a chameleon changing its colour depending on the situation, the proceedings under the D.V Act were also camouflaged due to the nature of the forum provided under the Act.

4. On the flip side, this faulty understanding of the nature of the proceedings has also given rise to a tendency to misuse these proceedings

as a weapon of harassment against parties who are unrelated to the proceedings by making them stand before a Magistrate like accused persons. It is mainly on account of this abuse of process that a deluge of petitions came to be filed for quashing the proceedings under Section 12 of the D.V. Act. This sorry state of affairs was a clear clarion call that impelled this Court to undertake this exercise to bring the situation under control by laying down certain guidelines for the disposal of the applications under Section 12 of the D.V Act.

5. Considering the importance of the issue involved, this Court sought for and obtained the assistance of the counsel appearing on behalf of the petitioners, and the senior members of the Bar who have made their respective submissions. This Court was provided with able assistance by the respective learned counsel in order to enable this Court to fully answer the various issues that have cropped up in these cases.

6. A brief excurse into the provisions of the D.V. Act is necessary to set the discussion in context. Domestic violence against women is a human rights and social rights issue that has engaged the attention of law and policy makers at global and national levels. The

genesis of the D.V Act can be traced to the General Recommendation XII (1989) passed by the U.N Committee on the Elimination of Discrimination against Women. Taking note of Articles 2, 5, 11, 12 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it was unanimously resolved by the Committee that State parties must put in place appropriate legislations to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life. India ratified the CEDAW in 1993. However, a legislation to implement General Recommendation XII had to await another 12 years.

7. On account of the collective efforts of several national and international women's organisations and the National Commission for Women, the Protection from Domestic Violence Bill, 2002 was tabled in the Lok Sabha and referred to a Department Standing Committee of the Ministry of Human Resource Development in the Rajya Sabha. The Committee submitted its 124th Report on the Bill (2002) which aimed *at "providing a remedy under the civil law which is intended to preserve the family and at the same time provide protection to victims of domestic violence."* The object of the Act was to bridge the gap between the

existing procedures in civil and criminal law by providing a civil remedy

for a complaint of domestic violence without disrupting the harmony in the family. This is clear from the following statement made by the Secretary, Department of Women and Child Development which has been alluded to in the Report of the Standing Committee:

> "*Outlining the basic features of the Bill, he stated that the existing civil, personal or criminal laws leave certain gaps in addressing the issue of Domestic Violence. Under criminal law, if a husband perpetrates violence on his wife, she may file a complaint under Section-498 A of IPC. Similarly, under the civil law, if there is disharmony in a family and the husband and wife cannot live together, any one of them may file a suit for separation followed by divorce. However, the present Bill addresses such situation where there is some disharmony in the family but the situation has not yet reached a stage where either separation or divorce proceeding has become inevitable and the aggrieved woman also for some reasons does not want to initiate criminal proceedings against her perpetrator. Therefore, the Bill seeks to give the aggrieved woman an alternative avenue whereby she can insulate herself from violence without being deprived of the basic necessities of life and without disintegrating her family.*"

8. The D.V Act was eventually passed into law as Act 43 of 2005 and came into force on 26.10.2006. The following passage from the Statement of Objects and Reasons appended to the D.V. Act unambiguously brings out the civil nature of the remedies contemplated under the Act :

> *"3. 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."*

9. Section 2(a) of the D.V. Act defines an "*aggrieved person*" to mean a woman who is, or has been, in a domestic relationship with the respondent who alleges to have been subjected to any act of domestic violence by the respondent. It is crucial to notice that the grievance of the "*aggrieved person*" is directed against a "*respondent*" as defined under Section 2(q) of the Act. Therefore, the relief sought for under Chapter IV of the D.V. Act is not in the nature of a formal accusation like in a criminal case, and the person against whom such a relief is sought for, is, therefore, not an accused before the Magistrate.

10. In ***Hiral P Harsora v. Kusum Narottamdas Harsora,*** (2016) 10 SCC 165, the definition of a "respondent" in Section 2(q) was found to contravene Article 14 of the Constitution and was, therefore, read down. Section 2(q) as it now stands post the aforesaid decision will have to be read without the words "*adult male*" and without the proviso which has been deleted by the judgment of the Hon'ble Supreme Court.

11. Section 12 of the D.V. Act confers a right on i) the aggrieved person or ii) the protection officer (as appointed under Section 8) or iii) any other person on behalf of the accused person to present an application to the Magistrate for one or more reliefs under this Act. A Magistrate is defined in Section 2(i) as under:

> "*Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973(2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place"*

12. The various reliefs that the Magistrate can grant is set out

in Chapter IV of the Act. Broadly speaking, these are

1. Protection Orders (Section 18)
2. Residence Orders (Section 19)
3. Monetary Reliefs (Section 20)
4. Custody Orders (Section 21)
5. Compensation Orders (Section 22)

13. Of all of the aforesaid reliefs, the breach of a protection order or an interim protection order alone is a cognizable and non-bailable offence vide Sections 31 and 32(1) of the Act. At first blush, this duality may seem perplexing. However, on a closer reading of the Act, the reason becomes clear if one notices Section 31(2) which states that the offence under Section 32(1) shall, as far as practicable, be tried by the same Magistrate who passed the order, the breach of which has been alleged to have been caused by the accused. The proceedings before the Magistrate would, therefore, partake the character of a civil proceeding while deciding an application under Chapter IV which may transform into a criminal proceeding while trying an offence under Chapter V of the Act. The amalgamation of civil and criminal jurisdictions in the Magistrate does not, however, destroy the nature and identity of these two separate

and distinct jurisdictions.

14. From the aforesaid, it is clear that the respondent before the Magistrate is not an accused when they appear before him in response to a complaint under Section 12 of the Act. Section 31(2) of the Act expressly alludes to the term "accused" only when an offence i.e., a breach of a protection or interim protection order is alleged to have been committed by the respondent under Section 31(1). Secondly, criminality attaches under Section 31 only to a breach of a protection order under Section 18 or to an interim protection order under Section 23, or under Section 33 for failure of a Protection Officer to discharge their duties without sufficient cause.

15. The legal position that all of the reliefs contemplated under Chapter IV of the D.V Act are civil in nature is no longer *res-integra* in view of the decision of the Hon'ble Supreme Court in ***Kunapareddy v. Kunapareddy Swarna Kumari*, (2016) 11 SCC 774,** wherein it was opined as under:

> "***12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person.*** *Intention was to protect women against*

violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality. In order to demonstrate it, we may reproduce the introduction as well as relevant portions of the Statement of Objects and Reasons of the said Act, as follows:

"*Introduction*

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained

invisible in the public domain. The civil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Penal Code, 1860. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society the Protection of Women from Domestic Violence Bill was introduced in Parliament.

Statement of Objects and Reasons

***1**. 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.*

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***3**. 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 women from being victims of domestic violence and to prevent the*

occurrence of domestic violence in the society.

***4**. The Bill, inter alia, seeks to provide for the following—*

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(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

***13.** Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises*

Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person. The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorises the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides, etc. Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act includes giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any. Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. ***All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex parte orders. It is, thus,***

clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. *At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence."*

16. Even prior to the aforesaid decision, in ***Vijaya Baskar v. Suganya Devi,*** (2010) SCC Online Mad 5446, a learned single judge of this Court had come to the same conclusion and opined as under:

"12. The term 'civil law' twice used therein is not an empty formality and that would exemplify and demonstrate, display and convey that the proceedings at the first instance should be civil in nature. The legislators were conscious of the fact that all of a sudden if criminal law is enforced on the husband and his relatives, certainly that might boomerang and have deliterious effect in the matrimonial relationship between the husband and wife. The object of the Act is that the victim lady should be enabled by law to live in the matrimonial family atmosphere in her husband/in-laws' house. ***It is not the intention of the said enactment to enable the lady to get snapped once and for all her relationship with her husband or the husband's family and for that, civil law and civil remedies are most efficacious and appropriate and keeping that in mind alone in the Act, the initiation of action is given the trappings of civil proceedings which the authorities including the Magistrate***

responsible to enforce the said Act should not loose sight of"

17. This takes us to the next question: whether the proceedings before a Magistrate for reliefs under Chapter IV of the D.V Act are proceedings before a criminal court?

18. Before examining this issue, it is necessary to notice the nature of the jurisdiction exercised by the Magistrate under the D.V Act. The procedure to be followed by a Magistrate in dealing with an application for reliefs under Chapter IV is set out in Section 28 of the Act. A close reading of Section 28 would show that it draws a distinction between "*proceedings*" (Section 12, 18 to 23) and "*offences"* (Sections 31 & 33) and states that they will be governed by Cr.P.C. This general rule is subject to two exceptions. The first exception is contained in the opening words of Section 28(1) of the Act which begins with the expression "*save as otherwise provided by this Act*", the effect of which is to exclude the application of the Code in areas where the procedure has been expressly set out in the D.V Act or the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as "D.V Rules" or "the Rules"). The second exception is found in Section 28(2) of the Act which is in the nature of a non-obstante clause expressly authorizing the Court to

deviate from the procedure set out in Section 28(1) and lay down its own procedure for disposal of an application under Section 12 or a proceeding under Section 23(2) of the Act.

19. In the first instance, it is, therefore, necessary to examine the areas where the D.V. Act or the D.V. Rules have specifically set out the procedure thereby excluding the operation of Cr.P.C as contemplated under Section 28(1) of the Act. This takes us to the D.V Rules. At the outset, it may be noticed that a "*complaint*" as contemplated under the D.V. Act and the D.V Rules is not the same as a "*complaint*" under Cr.P.C. A complaint under Rule 2(b) of the D.V Rules is defined as an allegation made orally or in writing by any person to a Protection Officer. On the other hand, a complaint, under Section 2(d) of the Cr.P.C. is any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence. However, the Magistrate dealing with an application under Section 12 of the Act is not called upon to take action for the commission of an offence. Hence, what is contemplated is not a complaint but an application to a Magistrate as set out in Rule 6(1) of the D.V Rules. A complaint under the D.V Rules is made only to a Protection

Officer as contemplated under Rule 4(1) of the D.V Rules.

20. Rule 6(1) sets out that an application under Section 12 of the Act shall be as per Form II appended to the Act. Thus, an application under Section 12 not being a complaint as defined under Section 2(d) of the Cr.P.C, the procedure for cognizance set out under Section 190(1)(a) of the Code followed by the procedure set out in Chapter XV of the Code for taking cognizance will have no application to a proceeding under the D.V. Act. To reiterate, Section 190(1)(a) of the Code and the procedure set out in the subsequent Chapter XV of the Code will apply only in cases of complaints, under Section 2(d) of Cr.P.C, given to a Magistrate and not to an application under Section 12 of the Act.

21. Consequently, the stage for issuance of process contemplated under Section 204, Cr.P.C has no application to a proceeding under the D.V Act as the Magistrate, in an application under Section 12 of the D.V Act, is not taking cognizance of any offence, but is only dealing with an application for civil reliefs. Furthermore, as has already been pointed out, the respondent before the Court in an application under Section 12 of the Act is not an accused. Hence, the requirement of

framing a charge does not arise either. (See V. ***Palaniammal v. Thenmozhi*** (2010) 1 MWN Cri 217).

22. In fact, Section 13 of the Act and Rule 12 of the Rules expressly provide that the Magistrate shall issue "*a notice*" fixing a date of hearing as prescribed in Form VII appended to the D.V Rules. The D.V Act and the Rules do not contemplate the issuance of a summons under Section 61, Cr.P.C. in an application under Section 12, although Rule 12(2)(c) enables resort to Chapter VI of the Cr.P.C as far as practicable for effective service of notices. In ***Vijaya Baskar v. Suganya Devi,*** (2010) SCC Online Mad 5446, a learned single judge of this Court expressly disapproved the practice of issuing summons in Domestic Violence cases, observing as under:

> "*9. A mere reading of Section 13 of the said Act would amply make the point clear that at the initial stage, the Magistrate was not justified in treating the respondents in this case as accused and as such, hereafter relating to applications under Section 12 of the Protection of Women from Domestic Violence Act, the Magistrate should not issue summons under Section 61 Cr.P.C. treating the respondents as accused. What is contemplated under Section 13 of the Act is a notice specifying the date etc., The endeavour should be on the part of the officer*

concerned is to deal with the matter gently and treating the respondents in a gentle manner and that should not be lost sight of. Unless the appearance of the respondents are absolutely necessary on a particular date, they should not be simply harassed by compelling them to appear as though they are offenders. The Magistrate should not loose sight of the fact that so long as the case is anterior to the protection order being passed, they should be treated only as respondents. However, after the order under Section 18 of the Act is passed and if there is violation, then the proceedings might get changed and become criminal proceedings. As such, the Magistrates hereafter would scrupulously adhere to the mandates contained in the Act itself."

23. The procedure for dealing with an application under Section 12 has been set out in Rule 6(5). This rule states that an application under Section 12 shall be dealt with and the orders enforced in the same manner laid down in Section 125 of the Code. Section 125, Cr.P.C does not, however, contain the procedure and the mechanism for enforcement of maintenance orders. These are set out in Sections 126 and 128 of the Code, respectively. Section 126 (2) of the Code states that evidence in a proceeding under Section 125, Cr.P.C shall be recorded in the manner prescribed for summons cases i.e., in the manner prescribed in Chapter XX

of the Code. Here again, Chapter XX, in the context of proceedings under the D.V Act, would apply with necessary modifications as the respondent before the Court is not an accused. The mode and manner of taking evidence alone is relevant and the provision in this regard is found in Section 254, Cr.P.C. Even here, the Court is given a wide degree of latitude and it may, in appropriate cases, depart from the aforesaid procedure. This is expressly made permissible by Section 28(2) of the Act. In fact, in ***Lakshmanan v. Sangeetha***, 2009 (3) MWN Cri 257, a learned single judge held that it is open to the Magistrate to allow chief examination of the witnesses by an affidavit although no such procedure is prescribed in Chapter XX of the Code.

24. A close reading of the aforesaid provisions would show that the procedure set out in the D.V Act and the Rules makes a conscious deviation from the traditional modes of a criminal court taking cognizance, issuing process and then trying the accused under the provisions of the Cr.P.C. save in the case of offences under Section 31 & 33 of the Act. Thus, the application of the Cr.P.C. to an application under Section 12 is residuary in nature by virtue of the mandate of Section 28(1) of the D.V Act.

25. In the aforesaid backdrop we may now turn to the issue of whether the Court of Magistrate acts as a criminal court while exercising powers under the Act and the Rules. It has already been pointed out that all the reliefs contemplated under Chapter IV are civil in nature. The term "*criminal court*" has not been defined under the Code. Section 6 sets out the classes of Criminal Courts, and the Court of a Magistrate is undoubtedly a Court falling within that class. However, it is well settled that to constitute a Criminal Court, it is not sufficient that it is one of the Courts mentioned under Section 6, Cr.P.C. It must also be acting as a Criminal Court. (*See* ***R. Subramanian v. Commissioner of Police****, AIR 1964 Madras 185*).

26. The conferment of civil jurisdiction on Magistrates is not a new phenomenon. In ***V.B D'Monte v. Bandra Borough Municipal Corporation,*** AIR 1950 Bom 397, the question before the Full Bench of the Hon'ble Bombay High Court was whether a determination of the rate of tax by a Magistrate under the Bombay Municipal Boroughs Act was revisable by the High Court on its criminal side. The Full Bench held that a Magistrate in dealing with rates and taxes was not dealing with any

criminal matter and hence was not an inferior Criminal Court. Holding that an order passed by a Sessions Judge exercising civil jurisdiction was amenable to a revision on the civil side of the High Court, Chief Justice Chagla opined as under:

> "*The better view seems to be that a criminal Court may be constituted as a Court designata and civil jurisdiction may be conferred upon that Court. If a criminal Court exercises that jurisdiction, then it is not necessarily an inferior criminal Court within the meaning of the Criminal Procedure Code; and if a right of revision is given from a decision of such a Court, then that revisional application is civil in its character and not criminal. That is the only limited question that we have to consider in this case. As I stated before, we are not considering whether a revisional application lies under s. 435 of the Criminal Procedure Code or under s. 115 of the Civil Procedure Code. All that we are considering is whether a special jurisdiction conferred upon us is of a civil or of a criminal character; and on that question there can be no dispute that it is of a civil nature.*"

The test, formulated by Chagla, CJ in the aforesaid case, focuses on the nature of the proceeding before the Criminal Court and holds that where a criminal Court exercises civil jurisdiction, it is not necessarily an inferior

Criminal Court within the meaning of Cr.P.C.

27. The aforesaid test, in the context of a civil proceeding, was reiterated by a Division Bench of the Hon'ble Allahabad High Court in ***State of Uttar Pradesh v. Mukhtar Singh*, AIR 1957 All 505,** wherein it was observed thus:

> "***128.*** *Whether a proceeding is civil or not depends, in my opinion, on the nature of the subject-matter of the proceeding and its object, and not on the mode adopted or the forum provided for the enforcement of the right. The expression "civil rights" in a broad sense comprises the entire bundle of private rights that a human being or any person recognises by law as a juristic entity might, as such, possess under law and for the recognition, declaration or enforcement of which law makes a provision."*

28. The distinction between a "*civil*" and "*criminal*" proceeding was explained by a Constitution Bench of the Hon'ble Supreme Court in ***S.A.L Narayan Row and Another v. Ishwarlal Bhagwandas,*** AIR 1965 SC 1818, wherein it was observed thus:

> "*The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right*

conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed."

The Supreme Court eventually formulated the following test for examining the character of a proceeding before a Court or authority:

"*The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed.* ***A civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State****, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."*

The true test, therefore, depends on the character of the proceeding i.e., the nature of the right violated and the relief claimed thereon, and not the nature of the Tribunal adjudicating such a proceeding. Merely because a Magistrate is called upon to adjudicate and enforce civil rights in an application under Chapter IV of the D.V Act, it does not follow that the proceeding before it is of a criminal character. A Court of Magistrate not exercising functions or determining cases of a criminal character cannot be said to be a Criminal Court. (See also ***Mammoo v. State of Kerala,*** AIR 1980 Ker 18 (FB)).

29. In ***Dargah Committee, Ajmer v State of Rajasthan***, AIR 1962 SC 574, the Ajmer Municipal Committee had issued a notice for recovery of tax, and had followed it up with an application before the Magistrate under Regulation 234 of the Ajmer-Merwara Municipalities Regulation. The Magistrate passed an order directing the payment of dues. This order was carried on appeal to the Sessions Judge, and then to the High Court by way of a revision all of which were unsuccessful. Dismissing the appeals the Hon'ble Supreme Court held:

> "*In any event it is difficult to hold that the Magistrate who entertains the application is an inferior criminal court. The claim made before him is for the recovery of a tax and*

the order prayed for is for the recovery of the tax by distress and sale of the movable property of the defaulter. If at all, this would at best be a proceeding of a civil nature and not criminal. That is why, we think, whatever may be the character of the proceedings, whether it is purely ministerial or judicial or quasi-judicial, the Magistrate who entertains the application and holds the enquiry does so because he is designated in that behalf and so he must be treated as a persona designata and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure. He cannot therefore be regarded as an inferior criminal court. That is the view taken by the High Court and we see no reason to differ from it. In the present appeal it is unnecessary to consider what would be the character of the proceedings before a competent civil court contemplated by the proviso. Prima facie such proceedings can be no more than execution proceedings."

The Supreme Court affirmed the view that a Magistrate exercising jurisdiction to grant reliefs of a civil nature does not function as a Magistrate exercising authority under Cr.P.C., and consequently was not an inferior criminal court.

30.To the same effect is the decision of the Privy Council in ***Annie Besant v. Advocate General of Madras,*** AIR 1919 PC 31, where

the Board examined the nature of the jurisdiction exercised by the Magistrate under the Press and Registration of Books Act, 1867, and opined as follows:

> *"It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the Appellant as charged with an offence. They are at the utmost proceedings which rendered the Appellant if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty."*

The Privy Council concluded that the order passed under the Press and Registration of Books Act, 1867 was, therefore, not amenable to a revision under the Cr.P.C.

31.The fact that a Magistrate may, at a subsequent stage under Chapter V try an offence under Section 31 of the Act for breach of an order under Sections 18 or 23 of the Act does not render a proceeding under Chapter IV of the Act as one before a criminal court. A Division Bench of the Allahabad High Court in, ***Mt Mithan v. Municipal Board of Oral and State of U.P.***, AIR 1956 All 351, has clarified this aspect and pointed out as under:

> *"**63.** If once an authority acts as an inferior*

criminal Court, a subsequent proceeding before it may also be said to be one before an inferior criminal Court, but it does not follow that because a subsequent proceeding is before an inferior criminal Court, the earlier proceeding also is, especially when the two proceedings are entirely distinct from each other though one follows the other."

In view of the above, the stage of deciding an application under Section 12 is entirely different from the stage where the Magistrate tries an offence under Section 31 or 33 of the Act. Merely because the Court of Magistrate is a criminal court in the latter stage, it does not follow that it is a criminal court in the former stage as well.

32. In view of the decision in ***Kunapareddy v. Kunapareddy Swarna Kumari*, (2016) 11 SCC 774,** it is beyond any cavil that an application before a Magistrate for one or more reliefs under Chapter IV, all of which, are civil in nature, are proceedings to vindicate the civil rights of an aggrieved person. Applying the test laid down in ***S.A.L Narayan Row's case*** (cited *supra*), it is clear that the nature of proceeding before the Magistrate under Chapter IV of the D.V Act is purely civil in nature. As the jurisdiction exercised by the Magistrate does not partake the

character of a criminal proceeding the result is that a Magistrate cannot be said to be exercising criminal jurisdiction as a Criminal Court while exercising jurisdiction under Chapter IV of the D.V Act.

33. This precise question was examined by the Kerala High Court in ***Baiju v. Latha*, (2011) 3 KLJ 331,** wherein it was observed as under:

> ***16.*** *No doubt, the reliefs which the Magistrate is required and authorised to grant under certain provisions of the Act are of a civil nature. But, it cannot be said that the Magistrate while exercising those functions is not acting as a criminal court. The Magistrate while exercising power under the Act acts as a criminal court, though the proceeding, or the nature of relief that may be granted under certain provisions are of a civil nature. Jurisdiction is conferred under the Act on the 'Magistrate' and the expression 'Magistrate' is defined in Sec. 2(i) of the Act as meaning the Judicial Magistrate of first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place. It is also apposite to refer to Sec. 28 of the Act which states that except as otherwise provided in the Act, all proceedings under Secs. 12, 18, 19, 20, 21,*

22 and 23 and offence under Sec. 31 of the Act are to be governed by the provisions of the Code. Even as regards proceedings other than mentioned above, I do not find anything in the Act which excludes the procedure laid down in the Code. Atleast for proceedings under Secs. 12, 18 to 23 and 31 of the Act the procedure before learned Magistrate is governed by the provisions of the Code."

34. Unfortunately, in concluding as above, the attention of the Kerala High Court was not drawn to the D.V Rules, 2006 which prescribes an entirely different procedure from that prescribed in the Code. It has already been pointed out that the application before the Magistrate is not a complaint under Section 2(d) of the Cr.P.C with the result that the procedure set out in Sections 190(1)(a) and 200 -204, Cr.P.C has no application to such cases. The Kerala High Court, after alluding to the provisions of the Act observes:

"*These provisions also indicate that the court of Magistrate or Metropolitan Magistrate acts as a criminal court while discharging functions under the Act though some of the reliefs it could grant under the Act are of a civil nature."*

As pointed out *supra*, after the decision in ***Kunapareddy***, there is no room

for doubt that all, and not merely some, of the reliefs under Chapter IV are civil in nature. The Kerala High Court in ***Baiju*** (cited *supra*), has also opined as under:

> *"Sec. 29 of the Act provides that from any order that the Magistrate may pass, an appeal shall lie to the 'Court of Sessions'. It is relevant to note that the Act does not say what procedure the Court of Sessions is to follow while entertaining and hearing an appeal preferred under Sec. 29 of the Act. The provisions in the Code regarding admission, hearing and disposal of the appeals must apply to an appeal preferred to the Court of Sessions under Sec. 29 of the Act. Under Sec. 29, appeal lies to the 'Court of Sessions' and not to the Sessions Judge. An appeal is provided to the Court of Sessions under Sec. 29 since the court of the Magistrate whose order is under challenge is a criminal court inferior to the Court of Sessions. I therefore hold that the Magistrate exercising functions under the Act acts as a criminal court inferior to the Court of Sessions and the High Court."*

35. An appeal under Section 29 of the D.V Act is distinct from an appeal under Chapter XXIX of Cr.P.C. An appeal to a Court of Session from an order of the Magistrate exercising civil jurisdiction is not novel. The nature of the jurisdiction exercised by the appellate court in appeals

arising out of orders passed by Magistrates exercising civil jurisdiction was expressly considered by the Full Bench of the Bombay High Court in ***V.B. D'Monte*** (cited *supra*), wherein it was observed thus:

> "*Various decisions were cited at the bar, and I shall briefly consider them. But as I shall point out these decisions were more concerned with deciding whether a matter lay in revision under s. 435 of the Criminal Procedure Code or under s. 115 of the Civil Procedure Code. In all these cases no special jurisdiction was conferred upon the High Court, and therefore the High Court had to determine the nature and extent of its revisional jurisdiction; and in order to determine that the learned Judges who decided those cases had to consider whether the applications lay under s. 435 of the Criminal Procedure Code or under s. 115 of the Civil Procedure Code. The decision which has been now accepted as laying down the correct principle and which had been followed in several decisions of this Court is to be found in Lokmanya Mills Ltd. v. Municipal Borough, Barsi. [(1939) 41 Bom. L.R. 937.] In that case the decision under s. 110 was given by the First Class Magistrate, Barsi, and a revision under s. 111 lay to the Sessions Court. The question then arose as to whether any revisional application lay from the decision of the Sessions Court, and Sir John Beaumont, sitting with Mr. Justice N.J. Wadia, held that a revisional application lay under s. 115*

of the Civil Procedure Code; and in coming to that conclusion the learned Chief Justice observed that "the question of liability to tax is a purely civil matter, and the Magistrate hearing an appeal against a demand notice is a criminal Court, so that an appeal lies from him to the Sessions Court, and not to the District Court, and revision lies from the Sessions Court to the High Court as a civil revisional application. The learned Chief Justice approved of the earlier decision in Ahmedabad Municipality v. Vadilal [(1928) 30 Bom. L.R. 1084.] which lays down that the Sessions Judge in a case of that sort was exercising powers of a civil Court and not of a criminal Court and therefore no revision lay under the Criminal Procedure Code. Therefore the clear view taken by the learned Judges who decided that case was that even a criminal Court may exercise civil jurisdiction and may dispose of civil matters if so authorised by a statute."

36. Thus, it is obvious that the proceedings before the Sessions Court, in an appeal under Section 29 from an order passed under Chapter IV of the D.V Act, does not lose its character as a civil proceeding. It is a settled legal position that an appeal is a continuation of the original proceeding. It follows that a Sessions Judge exercising powers under Section 29 of the D.V Act would have the same powers as a Magistrate while dealing with an application under Section 12 of the Act. When the

original proceeding partakes the character of a civil proceeding, it is difficult to appreciate how an appeal under Section 29, arising out of such an original proceeding, could metamorphosize into a criminal proceeding before the Court of Sessions. Thus, the aforesaid decision of the Kerala High Court in ***Baiju*** (cited *supra*)**,** with all due respect, cannot be said to have laid down the correct law.

37. The matter can be examined from another angle. The very incorporation of Section 29 in the D.V Act is a pointer that the remedy of a statutory appeal is a separate and independent remedy conferred exclusively by the D.V Act, for if the proceeding were to be governed by the Code, the right of appeal would be regulated exclusively by Chapter XXIX Cr.P.C. Broadly speaking, the scheme of appeals under Chapter XXIX are wholly inapplicable as the orders passed by the Magistrate under Chapter IV of the D.V Act do not deal with any acquittal or conviction of an accused. Similarly, the powers enumerated under Section 386 Cr.P.C. deal with the powers of an appellate court in an appeal against conviction/acquittal and does not have any application to an appeal under Section 29 of the D.V Act.

38. The Hon'ble Supreme Court in ***Satish Chander Ahuja v. Sneha Ahuja,*** *Civil Appeal 2483 of 2020 decided on 15.10.2020,* has proceeded on the basis that a proceeding under Section 19 of the D.V Act is a "criminal proceeding". The eight questions framed for consideration in ***Satish Chander Ahuja*** (cited *supra*), have been set out in paragraph 27 of the said judgment and none of those questions were concerned with the character of the proceedings under the D.V Act. It is well settled that the ratio of a judgment cannot be decided by picking out words or sentences from the judgment averse to the context under question. When the nature of proceedings before the Magistrate under the D.V Act did not consciously engage the attention of the Hon'ble Supreme Court, it cannot be said to be a part of the ratio thereby constituting a binding precedent under Article 141 of the Constitution of India, (See ***Nevada Properties Private Limited v State of Maharashtra,*** (2019) 20 SCC 119).

39. In fact, the litmus test as to whether a proceeding is civil or criminal in nature has been authoritatively settled by a three judge bench of the Hon'ble Supreme Court in ***Ram Kishan Fauji v. State of Haryana,*** (2017) 5 SCC 533. The Hon'ble Supreme Court reiterated the test laid down in ***S.A.L Narayan Row*** (cited *supra*), and opined as under:

> "***31.*** *The aforesaid authority makes a clear distinction between a civil proceeding and a criminal proceeding. As far as criminal proceeding is concerned, it clearly stipulates that a criminal proceeding is ordinarily one which, if carried to its conclusion, may result in imposition of (i) sentence, and (ii) it can take within its ambit the larger interest of the State, orders to prevent apprehended breach of peace and orders to bind down persons who are a danger to the maintenance of peace and order. The Court has ruled that the character of the proceeding does not depend upon the nature of the tribunal which is invested with the authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed."*

The Hon'ble Supreme Court eventually concluded that it is conceptually fallacious to determine the nature of the proceeding with reference to the nature of the Court, since the litmus test is the nature of the proceeding, nothing more nothing less. Applying the aforesaid test, it is beyond a pale of controversy that all of the reliefs claimed under Chapter IV of the Act are civil in nature for the enforcement of civil rights, as was held by the Supreme Court in ***Kunapareddy*** (cited *supra*) and a proceeding before the Magistrate would, therefore, partake the character of a civil and not a criminal proceeding.

40. As the proceedings before a Magistrate exercising jurisdiction under Chapter IV is not a criminal proceeding before a Criminal Court, the next question is whether a petition under Section 482 of the Code would lie to quash an application under Section 12 of the D.V. Act. It is settled law that a petition under Section 482, Cr.P.C would lie only against an order of a criminal court. In ***State of W.B. v. Sujit Kumar Rana*****,** (2004) 4 SCC 129, the Supreme Court has opined as under:

> "***33.*** *From a bare perusal of the aforementioned provision, it would be evident that the inherent power of the High Court is saved only in a case where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court amounts to abuse of the process of court. It is, therefore, evident that power under Section 482 of the Code can be exercised by the High Court in relation to a matter pending before a court; which in the context of the Code of Criminal Procedure would mean "a criminal court" or whence a power is exercised by the court under the Code of Criminal Procedure."*

41. As pointed out by a Division Bench of this Court in ***Rajamanickam v State of Tamil Nadu,*** 2015 (3) MWN Cri 379, Section 482 Cr.P.C preserves only the inherent criminal jurisdiction of the High

Court. Thus, a petition under Section 482, Cr.P.C would be maintainable only if the order complained of is passed by a criminal Court or by a Court in exercise of powers under the Cr.P.C. Quashing an application under Section 12 of the D.V Act does not fall in either category, as what the Court is called upon to do at that stage is to interdict the exercise of civil jurisdiction by the Magistrate at the threshold. As indicated *supra*, since the Magistrate is exercising only a civil jurisdiction in granting reliefs under Chapter IV of the Act, it follows that a Magistrate is not a criminal court for the purposes of proceedings under Chapter IV of the Act. It follows that an application under Section 482, Cr.P.C does not lie to quash an application under Section 12 of the D.V Act.

42. This does not, however, mean that an aggrieved respondent is remediless. The Magistrate exercising jurisdiction under Chapter IV of the D.V Act, is certainly a subordinate Court for the purposes of Article 227, and a petition under Article 227 of the Constitution would still be available challenging the proceedings under Chapter IV of the D.V Act, in an appropriate case.

43. As a matter of fact, in ***M. Muruganandam v. M. Megala*****,**

(2011) 1 CTC 841, this Court had entertained a challenge under Article 227 of the Constitution to an application under Section 12 of the D.V. Act. V. Ramasubramanian, J (as he then was) opined as under:

> "***11.*** *At the outset, a preliminary issue was raised as to whether the Revisional Jurisdiction of this Court under Article 227 of the Constitution can be invoked against the orders of the Magistrate, passed under the provisions of the Protection of Women from Domestic Violence Act, 2005. But the issue was settled by the Supreme Court in State of Haryana v. Bhajan Lal, AIR 1992 SC 604. In paragraph-108 of the said decision, the Supreme Court gave an illustrative list of cases where this Court could exercise either the extraordinary jurisdiction under Article 226 or the inherent powers under Section 482, Cr.P.C. The said decision was followed in P.S. Rajya v. State of Bihar, JT 1996 (6) SC 480 and in Pepsi Foods Ltd v. Special Judicial Magistrate, 1998 (5) SCC 749. In Pepsi Foods case, the Apex Court held that the nomenclature under which a Petition is filed is not quite relevant and that it would not debar the Court from exercising its jurisdiction. In paragraph 29 of its decision in Pepsi Foods case, the Supreme Court stated as follows:*
>
> "*No doubt a Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless. But that does not mean that the accused cannot approach the High Court under Section 482 of the*

Code or Article 227 of the Constitution to have the proceeding quashed against him when the Complaint does not make out any case against him……"

12. *Again in State of Orissa v. Debendra Nath Padhi, 2005 (1) CTC 134, the principles laid down in Bhajan Lal were reiterated and the Apex Court referred both to Section 482, Cr.P.C., and to Article 226 of the Constitution.*

13. *Therefore, it is clear that this Court can exercise its Revisional powers under Article 227 of the Constitution, in respect of the orders passed under the Protection of Women from Domestic Violence Act, 2005. However, it will always be subject to the restrictions, subject to which the power has to be exercised. As a matter of fact, it is stated by the learned Counsel for the Petitioners that the Petitioners actually filed a Petition under Section 482, Cr.P.C., but a doubt was raised about the maintainability of the same on the ground that the proceedings under the Act, are not purely Criminal proceedings. Therefore, the Petitioner has come up with the above Revision under Article 227 of the Constitution and the doors of this Court, cannot be shut on all sides to the Petitioners."*

44. It is entirely true that the nomenclature of the petition is not decisive of the jurisdiction of the Court. Section 482, Cr.P.C merely saves

the inherent power of the High Court to make such orders as may be necessary to a) give effect to an order under this Code; or b) prevent abuse of process of any Court; or c) otherwise secure the ends of justice. It is well settled that this section has not given any new power to the High Court but has merely preserved the power inherently possessed by every High Court as a superior Court of record. As a highest Court of Justice in the State, the High Court exercises a visitorial or supervisory jurisdiction over all Courts in the State. However, the plenitude of the inherent power under Section 482, Cr.P.C does not extend to annul proceedings which are not before a Criminal Court. As pointed out *supra*, to constitute a criminal court, it is not sufficient that the Court is one of the Courts enumerated under Section 6 Cr.P.C, it is also necessary that the proceedings before it are criminal in character. If the proceeding before the Court is civil in nature, then it cannot be said that the Court is a Criminal Court exercising criminal jurisdiction for the purposes of Section 482, Cr.P.C.

45. The decision in ***Muruganandam*** (cited *supra*) is, therefore, an authority for the proposition that a petition under Article 227 of the Constitution would lie to quash an application under the D.V Act in an appropriate case. This being a judgment of a bench of co-ordinate

strength, is also binding on this Court. The Kerala High Court has also taken the same view in two of its later decisions in ***Santhosh v. Ambika.R***, (2015) SCC Online Ker 26542 and ***T. Rajan v Vani.P,*** (2020) SCC Online Ker 25170. In a recent decision, ***Latha P.C v State of Kerala***, 2020 (6) KLT 496, the Kerala High Court held that an application under Section 482 Cr.P.C is not maintainable to quash a complaint under Section 12 of the D.V. Act.

46. A Division Bench of the Bombay High Court had reached the same conclusion in ***Sukumar Pawanlal Gandhi v Bhakti Sushil Gandhi***, (2016) SCC Online Bom 12942. However, a Full Bench of the Bombay High Court in ***Prabhakar Mohite v State of Maharashtra***, AIR 2018 Bom, overruled the decision in ***Sukumar Pawanlal Gandhi***, (cited *supra*). The Full Bench correctly noticed that the character of a proceeding is not dependent upon the nature of the Tribunal but on the nature of the right violated. The Full Bench held, and rightly so, that the nature of the right in a proceeding under the D.V Act is purely civil in nature. Having held so, the Full Bench, nevertheless, found that an application under Section 482 Cr.P.C would lie and opined thus:

"***53.*** *This would mean that generally the provisions of Criminal Procedure Code would be*

applicable, to all proceedings taken under sections 12 to 23 and also in respect of the offence under section 31 of the D.V. Act, subject to the exceptions provided for in the Act including the one under sub-section (2) of section 28. It would then follow that it is not the nature of the proceeding that would be determinative of the general applicability of Criminal Procedure Code to the proceedings referred to in section 28(1) of the D.V. Act, but the intention of the Parliament as expressed by plain and clear language of the section, which would have its last word"

In other words, according to the Full Bench, even though the nature of remedies under the D.V Act are civil in nature, the principle that a nature of the proceeding would determine its character would not apply in view of the intention of Parliament expressed through Section 28, making the Cr.P.C applicable. With all due respect, these observations may not be accurate. There is a presumption that the legislature is presumed to know the law when it enacts a piece of legislation. (See ***CWT v Bangalore Club,*** (2020) 9 SCC 599). Parliament must, therefore, be presumed to be aware of the law laid down by the Constitution Bench in ***S.A.L Narayan Row*** (cited *supra*), wherein it was held that the true test of the nature of a proceeding must be ascertained with reference to the character of the right violated and reliefs sought thereon and not by the nature of the Court

adjudicating such a proceeding. Section 28 of the D.V Act does not and cannot displace this principle. As has already been pointed out, the application of Cr.P.C to a proceeding under Section 12, by virtue of Section 28(1), is residuary in nature.

47. As a matter of fact, the conclusions of the Full Bench appear to be contradictory which is evident from the fact that, at paragraph 40, the Bench agrees that the proceedings under the D.V Act are predominantly civil in nature, and it is only when there is a breach under Section 31 or a failure or refusal by a Protection Officer as contemplated under Section 33, the proceedings assume the character of criminality. Having held so, the Full Bench, at paragraph 56, held that a petition under Section 482 of the Code would lie in view of the express applicability of the Cr.P.C under Section 28(1) of the Act following a Division Bench of the High Court of Gujarat in ***Suo Motu v. Ushaben Kishorbhai Mistry,*** 2016 2 RCR (Cri) 421.

48. Again, with all due respect, it must be pointed out that in view of the law laid down by the Supreme Court in ***S.A.L Narayan Row*** (cited *supra*) and ***Ram Kishan Fauji*** (cited *supra*), the nature of the Court

or the procedure followed by such a Court cannot determine the character of the proceeding before it. The litmus test, in all cases, is focused on the nature of the right infringed and the relief sought for the vindication of such a right. This is precisely why the Full Bench of the Bombay High Court in ***V.B. D'Monte*** (cited *supra*), had ordered a revision to be listed on its civil side despite the order having been passed by a Court of Session.

49. In ***Ram Kishan Fauji*** (cited *supra*), it was sought to be contended that the Lokayukta is a quasi-judicial body, and an enquiry at its instance would come within the ambit and scope of civil and not criminal jurisdiction. Repelling this contention, the Supreme Court categorically held that the procedure followed by the Lokayukta was of no consequence in determining the character of the proceeding before the Court. The Hon'ble Supreme Court said:

> *"18. The maze needs to be immediately cleared. In the instant case, we are really not concerned with the nature of the post held by Lokayukta or Upa-Lokayukta. We are also not concerned how the recommendation of the said authorities is to be challenged and what will be the procedure therefor. As has been held by this Court, neither the Lokayukta nor Upa- Lokayukta can direct*

implementation of his report, but it investigates and after investigation, if it is found that a public servant has committed a criminal offence, prosecution can be initiated."

The position is unambiguously set out in the following passage in ***Ram Kishan Fauji,*** (cited *supra*)

"*In the case at hand, the writ petition was filed under Article 226 of the Constitution for quashing of the recommendation of the Lokayukta. The said recommendation would have led to launching of criminal prosecution, and, as the factual matrix reveals, FIR was registered and criminal investigation was initiated. The learned Single Judge analysed the report and the ultimate recommendation of the statutory authority and thought it seemly to quash the same and after quashing the same, as he found that FIR had been registered, he annulled it treating the same as a natural consequence. Thus, the effort of the writ petitioner was to avoid a criminal investigation and the final order of the writ court is quashment of the registration of FIR and the subsequent investigation. In such a situation, to hold that the learned Single Judge, in exercise of jurisdiction under Article 226 of the Constitution, has passed an order in a civil proceeding as the order that was challenged was that of the quasi- judicial authority, that is, the Lokayukta, would be conceptually fallacious.* ***It is because what matters is***

the nature of the proceeding, and that is the litmus test."

50. It follows that in view of the law laid down in ***Narayan Row*** (cited *supra*) and ***Ram Kishan Fauji*** (cited *supra*), that the character of a proceeding under the D.V Act, in so far is it relates to the reliefs under Sections 18 to 23, does not become criminal in character merely on account of the procedure under the Cr.P.C adopted by the Magistrate. In view of the foregoing discussion, the inevitable conclusion is that a petition to quash an application under Section 12 of the D.V. Act is maintainable only by way of a petition under Article 227 of the Constitution and not under Section 482, Cr.P.C.

51. It has been brought to the notice of this Court that in several cases, Magistrates continue to mechanically follow the drill of the procedure set out in Sections 190(1)(a), 200 to 204, Cr.P.C and issue summons as if the respondents before it are accused of offences. To compound the confusion, in most of these cases all and sundry are roped in as respondents before the Magistrate. These respondents, upon being summoned, file petitions under Section 205, Cr.P.C to dispense with their personal attendance and thereafter file petitions under Section 482, Cr.P.C to obtain a stay of all further proceedings in the case, and in most cases their personal appearance before the Magistrate is also dispensed with, and

the case is then thrown into the backburner. All of this, it appears, is on account a perceptible lack of clarity in the procedure followed by the Magistrates while deciding applications under the Act.

52.While it is no doubt true that the Court of Magistrate is invested with a great deal of flexibility under Section 28(2) of the Act to devise its own procedure for disposal of an application under Section 12 of the Act, the twin principles of consistency and clarity dictate that this Court must now lay down some broad guidelines, in exercise of its power of superintendence under Article 227 of the Constitution & in respect of Judicial Magistrates under Section 483 of the Cr.P.C, for the proper disposal of applications under Section 12 of the D.V Act. A corrective mechanism is available in the D.V Act itself for aggrieved parties to agitate their grievances and obtain redress.

The following directions are, therefore, issued:

i. An application under Section 12 of the D.V. Act, is not a complaint under Section 2(d) of the Cr.P.C. Consequently, the procedure set out in Section 190(1)(a) & 200 to 204, Cr.P.C as regards cases instituted on a complaint has no application to a proceeding under the D.V Act. The

Magistrate cannot, therefore, treat an application under the D.V Act as though it is a complaint case under the Cr.P.C.

ii.An application under Section 12 of the Act shall be as set out in Form II of the D.V Rules, 2006, or as nearly as possible thereto. In case interim *ex-parte* orders are sought for by the aggrieved person under Section 23(2) of the Act, an affidavit, as contemplated under Form III, shall be sworn to.

iii. The Magistrate shall not issue a summon under Section 61, Cr.P.C to a respondent(s) in a proceeding under Chapter IV of the D.V Act. Instead, the Magistrate shall issue a notice for appearance which shall be as set out in Form VII appended to the D.V Rules, 2006. Service of such notice shall be in the manner prescribed under Section 13 of the Act and Rule 12 (2) of the D.V Rules, and shall be accompanied by a copy of the petition and affidavit, if any.

iv. Personal appearance of the respondent(s) shall not be ordinarily insisted upon, if the parties are effectively represented through a counsel. Form VII of the D.V Rules, 2006, makes it clear that the parties can appear before the

Magistrate either in person or through a duly authorized counsel. In all cases, the personal appearance of relatives and other third parties to the domestic relationship shall be insisted only upon compelling reasons being shown. (See ***Siladitya Basak v State of West Bengal*** (2009 SCC Online Cal 1903).

v. If the respondent(s) does not appear either in person or through a counsel in answer to a notice under Section 13, the Magistrate may proceed to determine the application *ex-parte*.

vi. It is not mandatory for the Magistrate to issue notices to all parties arrayed as respondents in an application under Section 12 of the Act. As pointed out by this Court in ***Vijaya Baskar*** (cited *supra*), there should be some application of mind on the part of the Magistrate in deciding the respondents upon whom notices should be issued. In all cases involving relatives and other third parties to the matrimonial relationship, the Magistrate must set out reasons that have impelled them to issue notice to such parties. To a large

extent, this would curtail the pernicious practice of roping in all and sundry into the proceedings before the Magistrate.

vii. As there is no issuance of process as contemplated under Section 204, Cr.P.C in a proceeding under the D.V Act, the principle laid down in ***Adalat Prasad v Rooplal Jindal*** (2004 7 SCC 338) that a process, under Section 204, Cr.P.C, once issued cannot be reviewed or recalled, will not apply to a proceeding under the D.V Act. Consequently, it would be open to an aggrieved respondent(s) to approach the Magistrate and raise the issue of maintainability and other preliminary issues. Issues like the existence of a shared household/domestic relationship etc., which form the jurisdictional basis for entertaining an application under Section 12, can be determined as a preliminary issue, in appropriate cases. Any person aggrieved by such an order may also take recourse to an appeal under Section 29 of the D.V Act for effective redress (See ***V.K Vijayalekshmi Amma v Bindu. V***, (2010) 87 AIC 367). This would stem the deluge of petitions challenging the maintainability of an application under Section 12 of the D.V Act, at the threshold before this

Court under Article 227 of the Constitution.

viii. Similarly, any party aggrieved may also take recourse to Section 25 which expressly authorises the Magistrate to alter, modify or revoke any order under the Act upon showing change of circumstances.

ix. In ***Kunapareddy*** (cited *supra*), the Hon'ble Supreme Court upheld the order of a Magistrate purportedly exercising powers under Order VI, Rule 17 of The Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C."), to permit the amendment of an application under Section 12 of the D.V Act. Taking a cue therefrom, it would be open to any of the respondent(s), at any stage of the proceeding, to apply to the Magistrate to have their names deleted from the array of respondents if they have been improperly joined as parties. For this purpose, the Magistrate can draw sustenance from the power under Order I Rule 10(2) of the C.P.C. A judicious use of this power would ensure that the proceedings under the D.V Act do not generate into a weapon of harassment and would prevent the process of Court from being abused by

joining all and sundry as parties to the *lis*.

x. The Magistrates must take note that the practice of mechanically issuing notices to the respondents named in the application has been deprecated by this Court nearly a decade ago in ***Vijaya Baskar*** (cited *supra*). Precedents are meant to be followed and not forgotten, and the Magistrates would, therefore, do well to examine the applications at the threshold and confine the inquiry only to those persons whose presence before it is proper and necessary for the grant of reliefs under Chapter IV of the D.V Act.

xi. In ***Satish Chandra Ahuja*** (cited *supra*), the Hon'ble Supreme Court has pointed out the importance of the enabling provisions under Section 26 of the D.V Act to avoid multiplicity of proceedings. Hence, the reliefs under Chapter IV of the D.V can also be claimed in a pending proceeding before a civil, criminal or family court as a counter claim.

xii. While recording evidence, the Magistrate may resort to chief examination of the witnesses to be furnished by

affidavit (See ***Lakshman v Sangeetha,*** 2009 3 MWN (Cri) 257. The Magistrate shall generally follow the procedure set out in Section 254, Cr.P.C while recording evidence.

xiii. Section 28(2) of the Act is an enabling provision permitting the Magistrate to deviate from the procedure prescribed under Section 28(1), if the facts and circumstances of the case warrants such a course, keeping in mind that in the realm of procedure, everything is taken to be permitted unless prohibited (See ***Muhammad Sulaiman Khan v Muhammad Yar Khan,*** 1888 11 ILR All 267).

xiv. A petition under Article 227 of the Constitution may still be maintainable if it is shown that the proceedings before the Magistrate suffer from a patent lack of jurisdiction. The jurisdiction under Article 227 is one of superintendence and is visitorial in nature and will not be exercised unless there exists a clear jurisdictional error and that manifest or substantial injustice would be caused if the power is not exercised in favour of the petitioner. (See *Abdul Razak v. Mangesh Rajaram Wagle (2010) 2 SCC 432, Virudhunagar*

Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society, (2019) 9 SCC 538.) In normal circumstances, the power under Article 227 will not be exercised, as a measure of self-imposed restriction, in view of the corrective mechanism available to the aggrieved parties before the Magistrate, and then by way of an appeal under Section 29 of the Act.

53. In the result, these petitions under Section 482, Cr.P.C., are not maintainable, and will accordingly stand dismissed. The petitioners will be at liberty to approach the Magistrate, and work out their remedies in accordance with the directions laid down, supra. The Magistrates shall endeavour to complete the proceedings within a period of three months from the date of receipt of a copy of this order.

54. The Registry is directed to circulate a copy of this order to the Principal District and Sessions Judges in the State, who in turn, will do the needful to bring the directions laid down in this order to the notice of the Judicial Magistrates, in their respective Sessions Divisions, for proper disposal of the applications filed under Section 12 of the D.V. Act.

55.Before drawing the curtains, this Court will be failing in its duty if it does not acknowledge the assistance rendered by all the learned counsel. A special mention is also due to my interns for their thorough research on the various questions arising in this case.

18.01.2021

Index : Yes
Internet : Yes
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KP

To

All Principal District and

Sessions Judges in the State.

N.ANAND VENKATESH.J.,

KP

Pre Delivery Common Order in
Crl.OP.Nos.28458, 16411, 33643 of 2019,
Crl.OP.Nos.16389, 16450, 17156, 19918,
20434 of 2020 and Crl.OP.Nos.45,73, 138, 184,
191, 213, 216 , 233, 243, 332 and 349 of 2021

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