

Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 41 of 2022

Date of Order: 01.03.2023

Shri Abhishek Agarwala & Anr.

Vs.

Smti Komal Poddar

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K.Ch. Gautam, Adv. with
Ms. C.B. Sawian, Adv.
For the Respondent(s) : Mr. S. Sen. Adv.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |

JUDGMENT

1. The petitioner has come before this Court with this petition under Section 482 Cr.PC with a prayer to quash the criminal proceedings in CR Case No. 110 (T) of 2021 under Section 12 of the Domestic Violence Act, (D V Act), 2005 pending before the Court of the learned Judicial Magistrate First Class at Shillong.

2. Heard Mr. K.Ch. Gautam, learned counsel for the petitioner who has submitted that the petitioner and the respondent were married in accordance with their personal law. However, after the marriage, the relationship between the two ran into rough waters and the marriage failed leading to them living separately. The respondent thereafter filed a petition for dissolution of marriage before the Court of the Deputy Commissioner (Judicial), Shillong registered as (Mat) Div. Case No. 45(T) 2018, which case is still pending. Another case has also been filed by the respondent being CR Case No. 330 (S) 2019 pending before the court of the learned Judicial Magistrate First Class, Shillong.

3. The learned counsel has also submitted that the respondent, two years after filing of the said complaint case against the petitioner has approached the court of the Judicial Magistrate First Class, Shillong with an application under Section 12 of the Domestic Violence Act, claiming reliefs, provided under Section 18, 19, 20 & 23 of the said Act.

4. The learned counsel then submits that there is no substance in the allegation made by the respondent in the said petition under Section 12 and even on merits, the case of the respondent will surely fail as the same was filed without any factual or legal foundation.

5. However, the main ground raised by the petitioner while assailing the impugned proceedings is that the Trial Court has approached the case without any application of mind and has exercised criminal jurisdiction where none is required.

6. In this regard the learned counsel has submitted that proceedings under Section 12 of the Domestic Violence Act are civil in nature and the procedure to be adopted by the court on receipt of an application filed by the aggrieved party is firstly to cause issue of notice upon the respondent. However, the learned Magistrate has instead issued summons upon the petitioner to appear before the court and in course of proceedings, has also issued a bailable warrant of arrest.

7. The learned counsel has submitted that this is contrary to the procedure that is envisaged under the Domestic Violence Act and even if the said application is, according to the court, deemed to be a complaint, the learned Magistrate has failed to take recourse to the provisions of Section 202 Cr.PC to postpone the issue of process against the petitioner, who apparently is residing outside the jurisdiction of the court and as submitted above, has even caused issue of a bailable warrant of arrest against the petitioner on his being absent on the date fixed for the case.

8. This is clearly an abuse of the process of the court as the learned Magistrate has exercised powers without jurisdiction and accordingly, the proceedings is liable to be set aside and quashed by this Court on this ground alone.

9. In support of his case, the learned counsel has cited the following cases:-

(i) State of Haryana v. Bhajan Lal & Ors. (1992) Supp.(1) 335 para 102(7).

(ii) Davindra v. State of UP; (2009) 7 SCC 495, para 24.

(iii) Pepsi Food Ltd. v. Special Judicial Magistrate; (1998) 5 SCC 749, para 28.

10. Per contra, Mr. S. Sen, learned counsel for the respondent has submitted that in response to the argument raised by the petitioner, seeking quashing of the proceedings before the court of the learned Judicial Magistrate First Class, Shillong, on the ground that non-compliance of the provisions of Section 202 Cr.PC has vitiated the proceedings, the response of the respondent would be that the procedure laid down under chapter XV of the Criminal Procedure Code does not apply to proceedings under the Domestic Violence Act.

11. It is also submitted that the scheme of the DV Act only contemplates grant of civil reliefs to an aggrieved person under Sections 18 to 23 and an offence is contemplated only under section 31 when the directions issued under Sections 18 to 23 are violated. It is reiterated that an application under Section 12 does not seek to prosecute the respondent for any penal offences, rather it contemplates only civil reliefs such as prohibition order, residence orders, monetary orders and custody order for children etc.

12. The learned counsel for the respondent has further submitted that under Section 13 of the DV Act, what is provided is that only a notice of the date of hearing is to be served upon the respondent in the prescribed form. Issuance of a summons under the provisions of the code of criminal procedure is not the proper procedure for proceedings under Section 12 of the DV Act and as such, there is no requirement on the part of the Magistrate to resort to the procedure laid down in Section 202 Cr.P.C.

13. To support this contention, the learned counsel has cited the case of ***Kamatchi v. Lakshmi Narayanan 2022 SCC Online SC 446, para 21,28,29 and 31.***

14. On the second aspect of the dispute between the parties, the learned counsel has submitted that admittedly, the respondent has indeed filed a suit for dissolution of her marriage with the petitioner, the second case is a

criminal case which arose as a consequence of an incident which occurred close to the court premises after a reconciliation proceedings between the parties and the third case is the one which is presently being pursued by the petitioner before this Court.

15. Briefly stated, the case under the Domestic Violence Act preferred by the respondent is an application under Section 12 of the said DV Act, primarily aimed at the failure of the petitioner to maintain the respondent and their minor child. Such allegation comes within the fold of 'economic abuse' as defined under Explanation I of clause (d) of Section 3 of the Act and the learned Magistrate may be allowed to dispose of the application as per the procedure laid down in the DV Act for which the exercise of the inherent power of this Court under Section 482 Cr.P.C. may not be called for at this juncture, submits the learned counsel.

16. This Court after giving considerable thought to the submission and contention of the parties, is of the opinion that the dispute in question is indeed of a two-fold nature, the first is with regard to the procedural aspect while the second deals with the merits of the application filed by the respondent under Section 12 of the DV Act.

17. As for the procedure to be adopted for proceedings under the DV Act, Section 28 provides as follows:

“28. Procedure.-

(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.”

18. The said section has emphasized that save as otherwise provided in the said Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences punishable under Section 31 of the D.V Act, 2005 shall be governed by the provisions of the Code of Criminal Procedure, 1973. It means that the provisions of the Code of Criminal Procedure are applicable to all proceedings under the aforesaid sections of the D.V Act, 2005 and wherever the Act itself provides a procedure then the same shall govern the proceedings under the said sections and wherever the Act is silent then the procedure with regard to the proceedings under the said sections shall be governed by the provisions of the Code of Criminal Procedure. Section 31 of the said Act provides that a breach of protection order or of an interim protection order is a criminal offence, which is cognisable and non-bailable and which will invite a penalty of imprisonment which may extend upto one year or a fine of ₹ 20,000/- or both. This is the only penal provision in the DV Act.

19. However, this Court is in agreement with the learned counsel for the respondent that a proceeding under Section 12 of the DV Act is not an offence coming within the purview of Section 31 of the said Act. The case of *Kamatchi*(supra) cited by the respondent though dealing with the issue of limitation, however as pointed out, at para 28 of the same, the Hon'ble Supreme Court has noticed the relevant point set out in the case of *Dr. P. Padmanathan* (Order passed by a Single Judge of the Hon'ble Madras High Court) at para 19 and 20 of the same, which is also relevant for the purpose of the discussion herein and which portion is reproduced herein as :

“ 28. The special features with regard to an application under Section 12 of the Act were noticed by a Single Judge of the High Court in Dr. P.Padmanathan as under:

“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.”

20. The Hon’ble Supreme Court at para 29 of the said *Kamatchi* case has then observed that the High Court has wrongly equated filing of an application under Section 12 of the Act to lodging of a complaint or initiation of prosecution.

21. On the authority of the decision cited above, this Court can also say that an application under Section 12 of the DV Act is not a complaint and the procedure and proceedings cannot be pursued by the parties or by the Magistrate under Sections 200, 202 and 204 of the Cr.P.C. respectively. On an application under Section 12 being filed, the Magistrate has to cause issue of Notice under Section 13 and to call for response from the respondent.

22. Under the circumstances, the contention of the petitioner that Section 202 Cr.P.C. was not taken recourse to by the Magistrate becomes unnecessary. It is however noticed that the petitioner has appeared before

the learned Magistrate and has taken part in the proceedings. Similarly, the action of the learned Magistrate in the issuance of a warrant against the petitioner/respondent is also uncalled for, though the same was cancelled on the same day itself on appearance of the counsel for the petitioner/respondent later in the day.

23. The prayer of the petitioner for quashing of the proceedings under the DV Act pending before the learned Magistrate at Shillong on this ground therefore cannot be allowed simply for the fact that an application under Section 12 of the DV Act is not a 'complaint' as defined under Section 2(d) of the Cr.P.C., but an 'application' and as such, proceedings under Section 200 Cr.P.C. and other relevant provisions of the Cr.P.C. are not to be followed.

24. The petitioner has contended that there is no substance in the allegations made in the said complaint filed by the respondent before the learned Magistrate, as no offence under Section 12 of the DV Act is even remotely attracted and the complaint was filed only to harass the petitioner herein.

25. The learned counsel for the petitioner has also submitted that even if the submission of the learned counsel for the respondent is accepted that an application under Section 12 before the Magistrate is civil in nature, the fact that the learned Magistrate has caused issuance of summons and in

course of the proceedings has issued aailable warrant of arrest against the petitioner has clearly exhibited the abuse of the process of the court committed by the learned Magistrate for which on an application under Section 482 Cr.P.C, the whole proceedings ought to be quashed. The authority of the case of *State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 para 102* has been cited in this regard to bring home this point.

26. The learned counsel for the respondent has however submitted that, notwithstanding the other two proceedings initiated by the respondent before the competent court, the application under Section 12 of the DV Act, was filed inter alia, on the ground that the petitioner has failed to provide maintenance to the respondent and their minor child which comes within the fold of 'economic abuse' as defined under Explanation I of clause (d) of Section 3 of the DV Act and as such, the proceedings before the learned Magistrate must be allowed to come to its logical end.

27. Without looking into the other authorities cited by the parties, an observation as was held in the case of *Bhajan Lal*(supra) at para 102 and 103 would be sufficient to understand whether the petitioner has made out a case of interference by this Court under Section 482 Cr.P.C. the paras reads as follows:

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions

relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer

without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

28. The allegation of non-payment of maintenance for the upkeep of the respondent and their minor child is certainly a matter to be looked into by the Trial court and for this, the parties have to prove their respective case. This would thus not qualify as satisfaction of any of the guidelines laid down at para 102 of the *Bhajan Lal* case. It is also not one of the rarest of rare cases for this Court to take notice and invoke the powers under Section 482. The petitioner on this front too, cannot convince this Court to decide in his favour.

29. For the reasons stated above, this petition lacks merits and the same is hereby dismissed.

30. However, before parting, this Court is made to understand that the petitioner is willing to continue in the proceedings before the learned Magistrate provided that he is not made to appear personally before the court on each and every date the matter is fixed, but to cause appearance only through counsel and that steps like issuance of a warrant of arrest may not be taken against him. The learned counsel for the respondent has fairly conceded to this and has even submitted that though the manner in which the Magistrate proceeds is not in within the control of the respondent, time and again, the learned counsel has impressed upon such courts to take proper recourse in such cases.

31. Accordingly, the learned Magistrate(s) dealing with cases under the Protection of Women from Domestic Violence, Act, 2005 would take note that proceedings initiated under Section 12 seeking reliefs under Sections 18 to 23 are civil in nature.

32. When an application seeking one or more reliefs that are found under Sections 18 to 23 of the DV Act, upon service of notice as required under Section 13 of the said Act and upon making appearance by the respondent either in person or through his counsel is filed, the court shall not insist for their personal appearance for each and every adjournment.

33. With the above, this petition is hereby disposed of. No costs.



Judge

Meghalaya
01.03.2023
"N.Swer, Stenographer"