

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.142 OF 2015

Shri Narayan Babi Salgaonkar
Major, Police Constable
R/o H. No.34-A, Muddawaddo,
Saligao, Bardez, Goa .. Petitioner

Vs

Smt. Jayshree alias Manasi
Narayan Salgaonkar
30 years of age, Housewife
R/o H.No.214, Mala,
Panaji, Goa .. Respondent

Mr. Joseph Vaz, Advocate for the petitioner.

Mr. Carlos. A. Ferreira, Amicus Curiae.

Coram :- M. S. SONAK, J.

Reserved on :- 25th April, 2017

Pronounced on :- 5th May, 2017

JUDGMENT :-

Heard Mr. Vaz for the petitioner and Mr. Carlos Ferreira, Amicus Curiae.

2. Taking into consideration the orders made by this Court on 04/12/2015, 04/02/2016 and 24/02/2016, the following questions arise in the present petition:-

(i) Whether an application under Section 26 of the

Protection of Women from Domestic Violence Act, 2005 (for short, D. V. Act) is maintainable in a suit for divorce, which is purely a civil proceeding ?

(ii) Whether an application under Section 26 of the D. V. Act can be made by the “aggrieved person”, as defined under Section 2(a) of the D. V. Act only in the proceedings, which are initiated by such “aggrieved person” against the “respondent”, as defined under Section 2(q) of the D. V. Act ?

(iii) Whether the need to establish a case of domestic violence, whether prima facie or otherwise, is dispensed with, when a civil Court or a Family Court entertains an application under Section 26 of the D. V. Act and considers grant of reliefs under Sections 18 to 22 of the D. V. Act ?

(iv) Whether an appeal under Section 29 of the D. V. Act will lie to the Court of Sessions against an order made by the Civil Court or Family Court on an application under Section 26 of the D. V. Act ?

(v) Whether in the facts and circumstances of the present case the impugned judgment and order dated 09/10/2015 made by the Additional Sessions Judge in appeal under Section 29 of the D. V. Act is liable to be set aside ?

3. Brief reference to the facts and circumstances, in which the aforesaid questions arise for determination, is necessary.

4. The petitioner - Narayan and the respondent - Jayashree were married on 02/12/2007. Out of the wedlock, a son was born to them on 08/01/2009. Differences arose between them, which led to Narayan instituting a suit for divorce on 02/07/2012 in the Court of Civil Judge, Senior Division, Mapusa (Civil Court), (Matrimonial Petition No.60/2012/A.) In the suit, Jayashree took out an application under Section 26 of the D. V. Act, seeking maintenance of Rs.15,000/- towards herself and her son and for a direction to provide her residence at Panaji or an additional amount of Rs.5,000/- towards acquisition of such residence at Panaji. (Exhibit D-9).

5. The Civil Court, by an order dated 11/12/2014, partly allowed Jayashree's application at Exhibit D-9. Narayan was directed to pay maintenance of Rs.3,000/- per month to the minor son with effect from December, 2014. However, the Civil Court, after recording a finding that Jayashree was not subjected to domestic violence by Narayan, denied Jayashree any maintenance

or residence order.

6. Jayashree, thereupon, instituted a Criminal Appeal No.5/2015 before the Additional Sessions Judge at Mapusa (ASJ) under Section 29 of the D. V. Act, in order to challenge the Civil Court's order dated 11/12/2014 to the extent such order had denied Jayashree maintenance and residence. The ASJ vide the impugned judgment and order dated 09/10/2015, has partly allowed Jayashree's appeal and directed Narayan to pay a sum of Rs.5,000/- by way of interim maintenance to Jayashree with effect from December 2014. By ad interim order dated 04/12/2015, the direction for payment of maintenance to Jayashree was stayed by this Court and such stay was confirmed at the stage of admission of this petition.

7. Mr. Joseph Vaz, the learned Counsel for Narayan has made a statement that Narayan shall continue to pay maintenance of Rs.3,000/- per month to the minor son notwithstanding his objection, to the jurisdiction of the Civil Court to make such an order. It is to be noted that Narayan had not even challenged the order dated 11/12/2014 made by the Civil Court, awarding maintenance of Rs.3,000/- per month to the minor son. Such maintenance, therefore, will have to be continued to be paid by

Narayan to the minor son during the pendency of the Matrimonial petition. Mr. Vaz very fairly has submitted that whatever the legal issues, as a father, Narayan has paid and will continue to pay maintenance to the minor son.

8. Mr. Vaz, the learned Counsel for the petitioner has made the following submissions in support of this petition :-

a) That an application under Section 26 of the D. V. Act is not maintainable in a civil proceeding instituted by the petitioner, seeking relief of divorce, which is again purely civil in nature. The Civil Court, therefore, exceeded its jurisdiction in entertaining the application under Section 26 of the D. V. Act;

b) In support of the aforesaid, Mr. Vaz refers to the scheme of the D. V. Act, and lays emphasis upon Section 27 to submit that it is only the Court of Judicial Magistrate, First Class or the Metropolitan Magistrate, as the case may be, who shall be competent to grant protection orders or other orders under the D. V. Act. Mr. Vaz also makes reference to Section 28 to submit that the procedure to be adopted for considering grant of reliefs under Sections 18 to 23 shall be governed by the Code of Criminal Procedure, 1973. On this basis, Mr. Vaz submits that the application under Section 26 was not maintainable and in case Jayashree was desirous of seeking any relief under the D. V. Act, it

was for her to institute proceedings before the concerned Judicial Magistrate, First Class under Section 12 of the D. V. Act.

c) In any case, Mr. Vaz submits that an application under Section 26 of the D. V. Act was not maintainable in legal proceedings not initiated by Jayashree, who claims to be “aggrieved person” in terms of Section 2(a). Mr. Vaz submits that upon a plain reading of the provisions of Section 26, it is clear that the reliefs as contemplated by Section 26 can be applied for in legal proceedings initiated by the aggrieved person against the respondent, as defined under Section 2(q). Since the suit for divorce before the Civil Court had not been initiated by Jayashree, she was not competent to maintain an application under Section 26 of the D. V. Act in the legal proceedings initiated by Narayan.

d) Mr. Vaz submits that the Civil Court has categorically ruled that Jayashree was never subjected to any domestic violence by Narayan or his family members. The ASJ has not even reversed this finding. There is no material on record to establish that Jayashree was ever subjected to domestic violence by Narayan or his family members. In the absence of any such finding, there was no question of entertaining Jayashree's application under Section 26 or in any case, granting Jayashree any reliefs under Sections 18 to 22 of the D. V. Act. Mr. Vaz submits that existence of some material to establish that the party seeking relief under Sections

18 to 22 of the D. V. Act was subjected to domestic violence, is *sine qua non* for entertaining an application under Section 26 or in any case granting relief under Sections 18 to 22 of the D. V. Act.

e) The appeal under Section 29 of the D. V. Act to the Sessions Judge lies only against an order made by the Magistrate under the provisions of D. V. Act. In this case, the order dated 11/12/2014, which was appealed to the ASJ, was made by the Civil Court and not a Magistrate. In such circumstances, no appeal lay to the Court of Sessions under Section 29 of the D. V. Act. The impugned judgment and order dated 09/10/2015 made by the ASJ, in his purported exercise of powers by Section 29 of the D. V. Act, is therefore, in excess of jurisdiction.

f) There is ample material on record, which establishes that Jayashree was never subjected to any domestic violence by Narayan or the members of his family. The Civil Court has recorded a prima facie finding that there was no material on record to hold that Jayashree was subjected to domestic violence by Narayan or the members of his family. In such circumstances, ASJ was not at all justified in awarding interim maintenance to Jayashree in terms of Section 20 of the D. V. Act.

9. In support of the aforesaid, Mr. Vaz relies upon the following decisions :-

- a) ***Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori***; 2014(10) SCC 736;
- b) ***Hiralal P. Harsora Vs. Kusum Harsora***; 2016(10) SCC 165 ;
- c) ***Bipin Bhat Vs. Union of India***; MANU/GJ/0593/2010.

10. Mr. Carlos Ferreira, the learned Amicus Curiae, after making a detailed reference to the Statement of objects and reasons for the enactment of D. V. Act as also the scheme of the D. V. Act, submits that the provisions have to be interpreted so as to advance remedy and suppress mischief. He submits that the proceedings under the D. V. Act are essentially “civil proceedings” and, therefore, the application under Section 26 of the D. V. Act is very much maintainable in any legal proceedings before a Civil Court, Family Court or a Criminal Court, affecting the aggrieved person or the respondent, whether such proceedings were initiated before or after commencement of the D. V. Act. He submits that the amplitude of the proceedings under Section 26 cannot be curtailed by reading into the provisions some additional requirement that the legal proceedings should be those, which have been initiated by the “aggrieved person” against the “respondent”. He submits that such an interpretation will be contrary to the express provisions as well as legislative intent. He

submits that such an interpretation will frustrate the very object of the D. V. Act, to make available to any woman, who is alleged to have been subjected to domestic violence, the benefit of cheap and quick remedy. Mr. Ferreira has relied upon the decisions in I) **Radhey Shyam Vs. Chabbi Nath**, (2015) 5 SCC 423; ii) **Raosaheb Pandharinath Kamble & Others Vs. Shaila Raosaheb Kamble & Others**, 2010 SCC Online BOM 1957; iii) **Ms. Nidhi Kaushik Vs. Union of India & Others**, 2014 SCC Online Del 3257 : (2014) 212 DLT 5 (DB); iv) **Kunapareddy alias Nookala Shankaa Balaji Vs. Kunapareddy Swarna Kumari & Another**, (2016) 11 SCC 774; v) **Rohit John Shenai & Others Vs. Crystal Rohit Shenai**, Writ Petition No. 647 of 2016; vi) **Sukumar Pawanlal Gandhi Vs. Bhakti Sushil Gandhi**, 2016 SCC Online Bom 12942; vii) **Amit Satish Shah Vs. Archana Amit Shah**, 2014(6) Mh.L.J. 707 : 2014 SCC Online Bom 1517; viii) **Juveria Abdul Majid Patni Vs. Atif Mansoori & Another**, (2014) 10 SCC 736; ix) **Abhijit Bhikaseth Auti Vs. State of Maharashtra & Another**, 2008 SCC Online SC. Bom 1388 : 2009 CriLJ 889; x) **Mammoo Vs. State of Kerala**, 1979 SCC Online Ker 110:1979 KLT 801:AIR 1980 Ker 18 (FB); xi) **Saman Ismail Vs. Rafiq Ahmad**, 2002 SCC Online All 1284:2002 CiLJ 3648.

11. Mr. Ferreira, by reference to the provisions under Section 31 of the D. V. Act, submits that an order made by a Civil Court, Family Court or Criminal Court by resort to provisions in Section 26 of the D. V. Act is to be regarded as an order made by the “Magistrate”, as defined in Section 2(i) of the D. V. Act. He submits that such an interpretation is necessary as otherwise, the orders made by the Civil Court, Family Court or Criminal Court may not be enforceable by resort to the penal provisions in Section 31 of the D. V. Act. In support of this submission, he relies upon the decision in ***Pramodini Fernandes Vs. Vijay Fernandes***; 2010(4) Mh. L. J. 341. On such basis, Mr. Ferreira submits that an appeal against the decision of Civil Court, Family Court, Criminal Court on an application under Section 26 of the D. V. Act will lie to the Sessions Judge in terms of Section 29 of the D. V. Act.

12. The first question to be determined is whether an application under Section 26 of the Protection of Women from Domestic Violence Act, 2005 (for short, D. V. Act) is maintainable in a suit for divorce, which is purely a civil proceeding ?

13. Section 26 of the D. V. Act reads thus :

“26. Relief in other suits and legal proceedings.—

(1) Any relief available under sections 18, 19, 20, 21

and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

14. From the plain reading of Section 26 of the D. V. Act, it is quite clear that any relief available under Sections 18 to 22 of the D. V. Act may also be sought in any legal proceedings before a Civil Court or Family Court, apart from a Criminal Court, as long as the legal proceedings before the Civil Court, Family Court or Criminal Court affect the aggrieved person and the respondent. The expressions "aggrieved person" and "respondent" have been defined under Section 2(a) and 2(q) of the D. V. Act. Subsection (2) of Section 26 provides that any relief under Sections 18 to 22 may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceedings before a Civil Court or Criminal Court. Subsection (3)

of Section 26 only provides that in case any relief has been obtained by the aggrieved person in any proceedings, other than the proceedings under the D. V. Act, she shall be bound to inform the Magistrate of the grant of such relief.

15. Provisions of Section 26, therefore, make it clear that the aggrieved person is entitled to seek reliefs as available under Sections 18 to 22 of the D. V. Act in any legal proceedings before a Civil Court, Family Court or a Criminal Court in addition to and along with other reliefs that may have been applied for in such a suit or legal proceedings. It is not necessary that an aggrieved person, in order to obtain reliefs under Sections 18 to 22, has to necessarily take out proceedings in Section 12 of the D. V. Act alone. If there are legal proceedings whether initiated before or after the commencement of the D. V. Act before a Civil Court, Family Court or Criminal Court, it is always open to the aggrieved person to apply for reliefs under Sections 18 to 22 of the D. V. Act, in such suit or legal proceedings. The provisions in subsection (3) of Section 26 make this position quite clear by requiring the aggrieved person to inform the Magistrate about the grant of reliefs in terms of Sections 18 to 22 of the D. V. Act *“in any proceedings other than the proceedings under this Act.”* Accordingly, first question can be answered by holding that

application under Section 26 of the D. V. Act is maintainable in a suit for divorce, which is purely a civil proceeding.

16. The answer will be same if the matter is examined from yet another perspective. Although normally the procedure for obtaining reliefs under the D. V. Act is to institute the proceedings before a Magistrate, as defined under Section 2(i) of the D. V. Act and further, in terms of Section 28 of the D. V. Act, the proceedings under Sections 12, 18 to 23 and 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973, yet, the proceedings under the D. V. Act are essentially civil in nature. Therefore, there is no question of any anomaly, if it is held that an application under Section 26 of the D. V. Act is maintainable in a suit for divorce, which is purely a civil proceeding.

17. The Statement of objects and reasons makes reference to Vienna Accord of (1994) and the Beijing Declaration and the Platform for Action (1995), United Nations Committee on Conventions on Elimination of All Forms of Discrimination Against Women (CEDAW- 1989) and notices that phenomenon of Domestic Violence is widely prevalent but has remained invisible in the public domain. Where a woman is subjected to cruelty by her

husband or his relatives, it is an offence under Section 498-A of Indian Penal Code. The Civil Law does not, however, address this phenomenon in its entirety. The Statement of objects and reasons, therefore, states that it is proposed to enact a law keeping in view the rights guaranteed under Article 14, 15 and 21 of the Constitution of India to provide remedy under the Civil Law, which is intended to protect the woman from being victims of domestic violence and to prevent occurrence of domestic violence in the society.

18. In ***Rao Saheb Kamble*** (supra), the learned Single Judge of this Court has held that the proceedings under Section 12 of the D. V. Act are “*quasi civil in nature*” and, therefore, the Magistrate has power to allow amendment of an application under Section 12 of the D. V. Act and the Written Statement filed in response to such application.

19. In ***Kunapareddy*** (supra), the Hon'ble Supreme Court, again in the context of permissibility to amend an application made under the provisions of the D. V. Act, has held that the proceedings under the D. V. Act are essentially of civil nature. The observations in paragraphs 13 and 14 clarifying this position read thus :

*“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 authorizes 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.

14. In the aforesaid scenario, merely because Section 28 of the DV Act provides for that the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature. We may take some aid and assistance from the nature of the proceedings filed under Section 125 of the Code. Under the said provision as well, a woman and children can claim maintenance. At the same time these proceedings are treated essentially as of civil nature.”

[Emphasis supplied]

20. The Division Bench of Delhi High Court in ***Ms. Nidhi Kaushik*** (supra), after detailed analysis of the provisions of the D. V. Act, has held that the proceedings under the D. V. Act are essentially of civil nature. To the same effect are the observations of the Division Bench of this Court in ***Sukumar Gandhi*** (supra), where it was held that Section 482 of Cr.P.C. cannot be invoked for quashing the proceedings under Section 12 of the D. V. Act, *inter alia*, because the proceedings under the D. V. Act are

essentially of civil nature.

21. In **Rohit Shenai** (supra), the learned Single Judge of this Court, upon consideration of the scheme of the D. V. Act, has, at paragraphs 57 and 58, made following observations, which again establish that the object of the legislature in enacting D. V. Act was to enable the “aggrieved person” to seek remedies before Civil Courts, Family Courts and Criminal Courts, where the aggrieved person has been a victim of domestic violence :-

*“57. Moreover, in the present case, proceedings before the Family Court are initiated by the Petitioner No.1 husband subsequent to Respondent No.1 filing of this application under the D.V. Act. It is not that Respondent No.1, the wife, has initiated two simultaneous proceedings at two different forums situate at two different places and the States, only with an intention to harass the Petitioners. Proceedings for divorce are filed by the Petitioner husband in Family Court at Hyderabad, whereas, Respondent No.1 is residing at maternal house in Pune with her daughter of one and half year. Hence, calling upon her to go to Hyderabad to seek redressal of her grievances and to get amount of maintenance, will act against the very object of the D.V. Act. **The object of the Legislature behind granting jurisdiction to Magistrate is to ensure that the said Court is available at every small Taluka place,***

where woman resides so as to provide her easy access to Courts, unlike Family Courts which are presently at the district places only. The object of Legislature also in granting concurrent jurisdictions to all the three Courts - Civil Court, Family Court and Magistrate Court was to enable her to seek remedy in the pending proceedings and not to confine her to one forum, which may not be convenient to her and which husband has chosen or to drive her away from the forum chosen by her to the one chosen by her husband subsequently and which may not be convenient to her at all, as in the instant case. It is as good as taking away the rights given to her by the Legislature.

58. It is pertinent to note that, despite the availability of existing forums like Family Courts and Civil Courts for an aggrieved woman to seek the reliefs of injunction or maintenance, the Legislature has taken a conscious decision in its wisdom to provide her one more forum of the Court of the Magistrate so as to provide her efficacious and quick remedy. The Court cannot take away by its decision what is given to her by the Legislature."

[Emphasis supplied]

22. Therefore, upon consideration of the provisions under Section 26 of the D. V. Act and the principles in the aforesaid

decisions, it will have to be held that an application under Section 26 of the D. V. Act is very much maintainable in a suit for divorce, which is purely a civil proceeding. The first question stands answered accordingly.

23. The second question, which arises for determination is whether the “legal proceedings” as contemplated by Section 26 of the D. V. Act must necessarily be legal proceedings, which may have been initiated by the aggrieved person, as defined under Section 2(a) of the D. V. Act against the respondent, as defined under Section 2(q) of the D. V. Act ?

24. Upon plain reading of the provisions in Section 26 of the D.V. Act and further taking into consideration the purpose or the object of the enactment, there appears to be no necessity to restrict the scope and import of the provisions in Section 26 by holding that the application under Section 26(1) can be taken out by an aggrieved person only where the suit or legal proceedings have been initiated or instituted by the aggrieved person against the respondent.

25. Section 26 nowhere provides for any such construction. Such construction will unduly restrict the scope of

Section 26 when in fact, the object or the purpose for the enactment of D. V. Act was to provide the woman, who may have been subjected to domestic violence, an efficacious, quick and convenient remedy.

26. In a suit or legal proceedings initiated by the husband before a Civil Court or Family Court, there is no serious dispute that the respondent wife is entitled to apply for an order for maintenance. The suit or legal proceedings for divorce, whether initiated by the husband or the wife, qualify to be included in the expression "*legal proceedings before a Civil Court or Family Court.*" Such suit or legal proceedings obviously affect the "aggrieved person" and the "respondent". These are the two predicates specified in Section 26(1) of the D. V. Act. The provisions nowhere state that reliefs by resort to Section 26 can be claimed only in a suit or legal proceeding, which is initiated by the aggrieved person against the respondent.

27. The interpretation suggested by Mr. Vaz will only contribute multiplicity of the proceedings, a situation where the aggrieved person i.e. a woman subjected to domestic violence, can ill afford. The interpretation will frustrate the object and purpose for enacting the D. V. Act i.e. quick, convenient and efficacious

remedy to such aggrieved person. In a situation, where the plain language of the provision does not support such a construction, there is no necessity to stretch the language or to add words to the Statute, particularly when such a construction will hardly further the intention of the legislature in enacting the provision in question.

28. The position in the case of ***Hira Lal Harsora*** (supra) does not support the construction proposed by Mr. Vaz to the provisions of Section 26(1) of the D. V. Act. The observations in paragraph 25, where the Hon'ble Supreme Court has considered the scope of Section 26 of the D. V. Act do not suggest that the application under Section 26(1) will be maintainable only in a suit or legal proceedings, which have been initiated by an aggrieved person against the respondent. Similarly, the position in the case of ***Bipin Bhat*** (supra) is also of no assistance to Mr. Vaz because the said case mainly deals with the challenge to the constitutional validity of Section 26 of the D. V. Act, which was ultimately negated by the Court.

29. In ***Juveria Abdul Majid Patni*** (supra), the issue involved was whether divorced woman can seek for reliefs from her ex-husband under Sections 18 to 23 of the D. V. Act. It is in

this context that the provisions of Section 26 were considered by the Hon'ble Supreme Court. Merely because in the facts of the said case, relief was applied for by the aggrieved person by resorting to the provisions of Section 26 before a Criminal Court in the proceedings under Section 498-A initiated by the aggrieved person, it cannot be said that relief by resort to the provisions under Section 26 of the D. V. Act can be applied for only in a suit or legal proceedings, which may have been initiated or instituted by such aggrieved person.

30. In **Amit Satish Shah** (supra), this Court, again in the context of the provisions of Section 26 of the D. V. Act has made the following observations at paragraph 7 :

7. From the aforesaid, it is evident that any relief which is available under Sections 18 to 22 of the D.V. Act from the Magistrate may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent, whether such proceedings were initiated before or after commencement of the Act. Sub Section (3) of Section 26 only provides that in case any relief has been obtained by the aggrieved person in any proceedings other than the proceedings under the D.V. Act, then she should be bound to inform the Magistrate of the grant of such relief or

perhaps so that such relief is not obtained twice over. In the present case, as noted earlier, relief in terms of section 19 of the D.V. Act was claimed by the respondent in the proceedings before the Family Court under the Hindu Marriage Act, which is clearly permissible in the light of provisions contained in Section 26 of the D.V. Act. Section 24 of the Hindu Marriage Act, 1955 specifically empowers the parties to claim maintenance pendente lite and expenses of the proceedings. The Family Court, by virtue of Section 26 of the D.V. Act is empowered to grant reliefs, inter alia under Section 19 of the D.V. Act. In such a situation, there is no question of either making any application under Section 12 of the D.V. Act or awaiting the disposal thereof. There is no question of awaiting the disposal of the main proceedings under the Hindu Marriage Act, 1955 and only at that stage making a residence order in terms of Section 19 of the D.V. Act. If such a strained interpretation is permitted to prevail, then the very object of enabling the court to make residence orders, is likely to be frustrated. Therefore, there is no jurisdictional error in making of the impugned order.”

31. Upon cumulative consideration of the aforesaid even answer to the second question will have to be that an application under Section 26 of the D. V. Act is maintainable in a suit or a legal proceedings before Civil Court, Family Court or a Criminal

Court irrespective of whether such suit or legal proceedings being or not being initiated by the “aggrieved person”, as defined under Section 2(a) of the D. V. Act against the “respondent”, as defined under Section 2(q) of the D. V. Act. As long as the suit or the legal proceeding affects the aggrieved person and the respondent, an aggrieved person can always maintain an application under Section 26((1) and apply for reliefs under Sections 18 to 22 of the D. V. Act before a Civil Court, Family Court or Criminal Court.

32. The third question, which arises for determination is whether there is need to establish a case of domestic violence, prima facie or otherwise, as a prerequisite to the grant of reliefs under Sections 18 to 22 of the D. V. Act in an application under Section 26 of the D. V. Act ?

33. Section 26 of the D. V. Act only provides that “*any relief available*” under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceedings before a Civil Court, Family Court or Criminal Court”. This means that in addition to empowering the Magistrate to grant such reliefs on an application under Section 12, the Legislature has conferred powers upon the Civil Court, Family Court and a Criminal Court to also grant such reliefs in any legal proceedings affecting the aggrieved person and the

respondent. In order that the Civil Court, Family Court or Criminal Court considers whether such relief is required to be granted to the aggrieved person, naturally, the Civil Court, Family Court or Criminal Court will have to record a satisfaction that the applicant has been subjected to any domestic violence as defined under Section 3 of the D. V. Act. If interim relief is purported to be granted, then record of prima facie satisfaction may suffice.

34. Subsections of Section 26 of the D. V. Act make specific reference to the expression “aggrieved person”. This expression is defined under Section 2(a) of the D. V. Act to mean any woman, who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. This is also an indication that Civil Courts, Family Courts or the Criminal Courts, before they grant any relief in Sections 18, 19, 20, 21 and 22 of the D. V. Act to the aggrieved person, must be at least prima facie satisfied that the applicant is an “aggrieved person” as defined under Section 2(a) of the D. V. Act. This, in turn, would require the record of satisfaction that applicant is a woman, who is or has been in a domestic relationship with the respondent, alleges to have been subjected to any act of domestic violence by such respondent. Thus, it cannot be said that the Civil Court, Family

Court or the Criminal Court when it entertains an application under Section 26 of the D. V. Act and proceeds to grant reliefs under Sections 18, 19, 20, 21 and 22 of the D. V. Act, can dispense with the need to establish a case of domestic violence, prima facie or otherwise, as a prerequisite for the grant of such reliefs.

35. Accordingly, it will have to be held that the Civil Court or a Family Court entertaining an application under Section 26 of the D. V. Act will have to consider whether the case of domestic violence, prima facie or otherwise, has been made out before any reliefs in terms of Sections 18 to 22 of the D. V. Act is actually granted to the aggrieved person. If it is proposed to grant interim relief or ad interim relief, then, a prima facie case may suffice.

36. The next question, which arises, is whether an appeal under Section 29 of the D. V. Act will lie against an order made by the Civil Court or a Family Court granting reliefs under Sections 18, 19, 20, 21 and 22 of the D. V. Act by resort to the provisions contained in Section 26 of the D. V. Act.

37. Section 29 of the D. V. Act reads thus :

“29. Appeal.—There shall lie an appeal to the Court

of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."

38. The expression 'Magistrate' has been defined under Section 2(i) of the D. V. Act and the same reads thus :

"2 (i) — "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;"

39. Section 26 of the D. V. Act merely provides that the Civil Court or the Family Court is also empowered to grant reliefs under Sections 18, 19, 20, 21 and 22 of the D. V. Act in any legal proceedings before it, affecting the aggrieved person and the respondent whether such proceedings were initiated before or after the commencement of the D. V. Act. This means that the Civil Court or the Family Court when it considers whether or not to grant reliefs under Sections 18, 19, 20, 21 and 22 of the D. V. Act does not lose its essential character as Civil Court or a Family Court as the case may be. By granting relief or for that matter, by refusing relief under Sections 18, 19, 20, 21 and 22 of the D. V.

Act, the Civil Court or the Family Court is not converted into a Magistrate as defined under Section 2(i) of the D. V. Act. At least for the purpose of Section 29 of the D. V. Act, it cannot, therefore, be said that the orders made by the Civil Court or the Family Court either granting or refusing reliefs under Sections 18, 19, 20, 21 and 22 of the D. V. Act can be regarded as orders made by the Magistrate as defined under Section 2(i) of the D. V. Act. Therefore, against such orders, an appeal will not lie to the Court of Sessions under Section 29 of the D. V. Act. The remedy against such orders will be the remedy, which is otherwise available against orders made by the Civil Court or the Family Court.

40. In **Abhijit Auti** (supra), the learned Single Judge of this Court (A. S. Oka, J.) at paragraph 23, in the precise context whether an appeal will lie under Section 29 of the D. V. Act, where relief under the provisions of Sections 18, 19, 20, 21 and 22 of the D. V. Act is granted by a Civil Court or Family Court, has observed thus :

“23. My attention was also invited to Section 26 of the said Act. If relief under the provision of sections 18 to 22 of the said Act is granted by a Civil Court or Family Court, an appeal will not lie under section 29 in as much as an appeal under section 29 will lie only against an order of the

learned Magistrate.”

[Emphasis supplied]

41. The Civil Court or the Family Court, in a given case, may grant reliefs under Sections 18 to 22 of the D. V. Act at the stage of final disposal of the suit or legal proceedings before it. In a given case, the order disposing of the suit or legal proceedings may be a comprehensive order. To hold that appeal will lie to the Sessions Court against the portion of the order, which grants or refuses reliefs under Sections 18 to 22 of the D. V. Act and appeal or other remedy will be available against the balance portion of such order, will create an anomalous situation. Rather, if it is held that appeal or further recourse shall lie to the same Court or authority, where otherwise an appeal or other recourse is available against the orders or decrees of the Civil Court or the Family Court, such a view will enable such Court or authority to comprehensively examine the matter.

42. In ***Pramodini Fernandes*** (supra), the learned Single Judge of this Court (Smt. Roshan Dalvi, J.) was not concerned with the issue of appeal under Section 29 of the D. V. Act, but rather was concerned with the enforcement of the orders made by the Civil Court or Family Court granting reliefs under Sections 18, 19,

20, 21 and 22 of the D. V. Act by resort to the provisions of Section 26 of the D. V. Act. It is in this context that certain observations were made to the effect that the expression "*Magistrate who had passed the order*" under Section 31(2) must be read as "*Magistrate or a Civil or Criminal Court or Family Court, which had passed the order.*" In the present case, since we are not concerned with the interpretation of Section 31 of the D. V. Act, suffice to observe that the decision in the case of **Pramodini Fernandes** (supra), is not of any assistance in determining the issue, which arises in the present petition.

43. Upon cumulative consideration of the aforesaid, it will have to be held that as against the orders made by the Civil Court or the Family Court in an application under Section 26 of the D. V. Act, granting or refusing reliefs under Sections 18 to 22 of the D. V. Act, an appeal will not lie under Section 29 of the D. V. Act to the Court of Sessions.

44. In the present case, therefore, against the order dated 11/12/2014, made by the Civil Court, no appeal lay to the ASJ under Section 29 of the D. V. Act. Consequently, the impugned judgment and order dated 09/10/2015 is without jurisdiction and is required to be set aside.

45. Mr. Ferreira, however, submitted that invariably, the District Judge is vested with the powers of a Sessions Judge and vice-versa. Therefore, the appeal against the order dated 11/12/2014 may be construed as an appeal to the District Judge and not Sessions Judge. Mr. Ferreira also submitted that since the impugned judgment and order promotes substantial justice, the same may not be interfered with in the exercise of extraordinary jurisdiction under Article 227 of the Constitution of India.

46. The Hon'ble Supreme Court in the case of **Mohammad Swalleh Vs. IIIrd ADJ, Meerut**; (1988)1 SCC 40, in the context of principle of substantial justice, has made the following observations :

"It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though no appeal lay before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned

District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under [Article 226](#) of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under [Article 226](#) of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, on objection can be taken.”

47. Normally, therefore, if the impugned judgment advances substantial justice, then, this Court exercising its extraordinary jurisdiction under Article 227 of the Constitution of India, would be loath to set aside the same and restore the parties to an inequitable and unjust *status-quo ante*. However, from the perusal of the impugned judgment and order, it appears that the ASJ has not at all adverted to the issue as to whether Jayashree was indeed subjected to any domestic violence even *prima facie*.

The ASJ has not set aside the finding recorded by the Civil Court to the effect that Jayashree has failed to establish that she was prima facie subjected to domestic violence by Narayan. Without advertent to this aspect, the ASJ was not justified in making an order under Section 20 of the D. V. Act and awarding maintenance to Jayashree. That apart, the Agreement of Understanding dated 04/06/2007, which was produced on record by Narayan, if authentic, may also have some impact upon a grant of relief of maintenance. This has also not been considered by ASJ. At this stage, however, it is not necessary to foreclose the issues because parameters for grant of maintenance differ, depending upon the jurisdiction invoked and in any case, all such aspects have to be considered comprehensively.

48. Section 20 of the D. V. Act, *inter alia*, provides for monetary relief of maintenance for the aggrieved person as well as her children if any, including an order made, in addition to an order of maintenance under Section 125 of the Cr.P.C. or any other law for the time being in force. In the facts and circumstances of the present case, the impugned judgment and order dated 09/10/2015 will have to be set aside with liberty to Jayashree to take out appropriate proceedings before the appropriate forum for claiming maintenance or for instituting

proceedings before the appropriate authority to question the order dated 11/12/2014 made by the Civil Court, denying her maintenance. Such liberty, is therefore, expressly granted to Jayashree. Besides, it is clarified that the observations in this order as to her entitlement for maintenance are only for seeking answers to the questions which arise and, therefore, the same need not be considered by any authority whilst deciding the issue of maintenance.

49. Further, it is required to be noted that Narayan had not questioned the order dated 11/12/2014 made by the Civil Court awarding the maintenance to his minor son. Accordingly, ASJ, in the impugned judgment and order, was not required even to confirm such award of maintenance in favour of the minor son. The issue of maintenance to the minor son was not even the issue before ASJ, except perhaps to the extent of some enhancement in the maintenance amount. Now that the impugned judgment and order dated 09/10/2015 made by the ASJ is being set aside, it should not be construed as to setting aside the order for payment of maintenance @ Rs.3,000/- per month in favour of minor son. Mr. Vaz has fairly assured this Court that the maintenance towards the minor son has been paid and will be continued to be paid as directed by the Civil Court in her order dated 11/12/2014.

50. Accordingly, this petition is disposed of with the following order :-

(a) An application under Section 26 of the D. V. Act is held maintainable in a suit for divorce, which is purely a civil proceeding. Accordingly, the application at Exhibit D-9 made by Jayashree was maintainable before the Civil Court in the present case.

(b) An application under Section 26 of the D. V. Act is held maintainable before a Civil Court, Family Court or Criminal Court, irrespective whether or not, the original suit or the legal proceeding was initiated by the "aggrieved person", as defined under Section 2(a) of the D. V. Act as long as such suit or legal proceeding affected the aggrieved person and respondent. Accordingly, the application under Section 26 made by Jayashree was maintainable before the Civil Court in the present case.

(c) The Civil Court, Family Court or the Criminal Court, whilst dealing with an application under Section 26 of the D. V. Act, are required to record a satisfaction, whether prima facie or otherwise, that the applicant has been subjected to domestic violence

as defined under Section 3 of the D. V. Act, before grant of reliefs as contemplated by Sections 18 to 22 of the D. V. Act.

(d) As against this order made by the Civil Court or Family Court in an application under Section 26 of the D. V. Act, granting or refusing reliefs under Sections 18 to 22 of the D. V. Act, an appeal will not lie under Section 29 of the D. V. Act to the Court of Sessions.

(e) Accordingly, the impugned judgment and order dated 09/10/2015 made by the learned Additional Sessions Judge in Criminal Appeal No.5/2015 is hereby set aside.

(f) It is clarified that the setting aside of the impugned judgment and order dated 09/10/2015, as aforesaid, will however, not foreclose any other remedy available to Jayashree to either impugn the Civil Court's order dated 11/12/2014 or to otherwise apply for reliefs of maintenance, residence, etc., by instituting appropriate proceedings before the appropriate forum.

(g) The statement of Narayan as articulated by his learned Counsel Mr. Vaz, that Narayan has paid and will continue to pay the maintenance amount to his

minor son, as directed by the learned Civil Court, in her order dated 11/12/2014, is accepted as a statement to this Court and Narayan is directed to comply with the same unless the maintenance amount is suitably enhanced in future.

(h) The reasonable approach of Mr. Joseph Vaz, the learned Counsel for the petitioner and the assistance rendered by Mr. C. A. Ferreira, Amicus Curiae is greatly appreciated.

(i) Rule is disposed of in the aforesaid terms.

SMA

M. S. SONAK, J.