

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition NO. 1107 OF 2017

Minoti Subhash Anand ...Petitioner
Versus
Subhash Manoharlal Anand And Anr ...Respondents

....
Mr.Rohaam Cama i/b. Sapana Rachure, Advocate for the
Petitioner.

Mr. Pandit Kasar, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 04th MAY, 2017

P.C.

1. Heard Mr.Rohaam Cama, learned counsel for the petitioner and Mr.Pandit Kasar, learned counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 9.5.2016 in Criminal Misc. Application No.9/2016 as also the judgment and order dated 18.1.2017 in Criminal Misc. Application No.24/2016 passed by the learned Judge, Family Court No.2, Mumbai. By order dated 9.5.2016, the learned trial Judge dismissed

Criminal Misc. Application No.9/2016 filed by the petitioner as she did not appear for further cross-examination. There was no application for adjournment on her behalf. Respondent No.1 and his Counsel were present and were ready to cross-examine the petitioner. In the absence of the petitioner, the cross-examination cannot be done. In such circumstances and in view of the time limit given by the High Court, the learned trial Judge dismissed the application.

3. The petitioner filed Criminal Misc. Application No.24/2016 *inter alia* praying for setting aside the order dated 9.5.2016 thereby restoring Criminal Misc. Application No.9/2016. By order dated 18.1.2017, the learned trial Judge rejected the application. It is against these two orders, the petitioner has instituted the present Petition.

4. Rule. Mr.Kasar waives service on behalf of respondent No.1. Mr. Cama orally applies for deleting respondent No.2 on the ground that respondent No.2, State of Maharashtra is a formal party and no relief is claimed against it. In view thereof, leave to delete respondent No.2 is granted. Having regard to the narrow controversy raised in this Petition as also at the request

and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing. The relevant and material facts giving rise to filing of the present Petition, briefly stated, are as under :

5. Petitioner and respondent No.1 hereinafter referred to as the 'respondent' were married on 5.11.1972 at Sumiyoshi Temple, Osaka, Japan under the traditional Japanese (Shinto) ceremony. The marriage was registered under the provisions of the Foreign Marriage Act, 1969. Two sons are born out of said wedlock, by names, Gogi and Subal. It is not necessary to make reference to other proceedings. Suffice it to refer to application No.155/SS/2009 instituted by the petitioner in July, 2009 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act') before the Additional Chief Metropolitan Magistrate, 40th Court at Girgaon. The respondent instituted Petition No.B-31/2011 on 1.4.2011 before the Family Court, Bandra under Section 7(1)(c)&(d) of the Family Courts Act, 1984 (for short, 'F.C. Act') read with Sections 34, 36 and 38 of the Specific Relief Act, 1963 read with Transfer of Property Act, 1882. The respondent also instituted Petition No.A-1215/2011 on 19.5.2011 before the Family Court at Bandra

under the Foreign Marriage Act, 1969 read with Sections 27(1)(b) and 27(1)(d) of the Special Marriage Act, 1954 for divorce and other reliefs as regards matrimonial home.

6. The petitioner instituted Misc. Civil Application No.255/2015 in this Court for transferring Case No.155/SS/2009 from the Court of Metropolitan Magistrate to Family Court and for trying the same with Petition No.A-1215/2011 and Petition No.B-31/2011 pending before the Family Court. By order dated 10.12.2015, this Court allowed the application and transferred D.V. Proceedings to the Family Court. Operative part of the order dated 10.12.2015 reads thus:

“(a) Misc.Civil Application No.255 of 2015 is made absolute in terms of prayer clause (a). Parties are at liberty to lead common evidence in all the three proceedings.

(b) It would for the Family Court to decide in what sequence the proceedings filed by both the parties shall be heard. Hearing before the Family court is expedited. Both the parties are directed to co-operate with each other and with the Family Court in expeditious disposal of the entire proceeding. It is made clear that the evidence of the applicant which has commenced before the Metropolitan Magistrate in her complaint filed before under the provisions of Domestic Violence Act can be continued from the stage it was before the learned Metropolitan Magistrate.

(c) If the parties apply for leading any further evidence or for further reliefs and/or direction, the same shall be considered by the Family Court on its own merit and in accordance with law.

(d) The Family Court shall make an endeavour to dispose of all the three proceedings within 18 months from the date of commencement of the cross examination.”

7. A perusal of clause (b), extracted hereinabove, shows that the Family Court was to decide in what sequence the proceedings filed by both the parties shall be heard. It is common ground between the parties that Family Court has not passed any order deciding in what sequence the proceedings filed by both the parties shall be heard. This Court noted that before the Metropolitan Magistrate, the cross-examination of the petitioner has just begun and, therefore, the cross-examination of the petitioner can be continued before the Family Court from the stage as it was before the learned Metropolitan Magistrate.

8. Upon transfer of Case No.155/SS/2009 from the file of the Metropolitan Magistrate, 40th Court at Girgaon to Family Court, Bandra, same was numbered as Misc. Application No.9/2016. A perusal of the prayers made in the application

made under Section 12 of the D.V. Act shows that the petitioner has prayed for passing protection order under Section 18 prohibiting the respondent from interfering with the access of the petitioner to the matrimonial home; for residence order against the respondent under Section 19 of the D.V. Act restraining him from dispossessing the applicant in any manner whatsoever from Flat No.2301-B and 2401-B in Walkeshwar Om Vikas Co-operative Housing Society Ltd. (for short, 'suit property'); for monetary relief against the respondent under Section 20 of the D.V. Act directing him to pay Rs.50,000/- towards the loss suffered by the petitioner due to destruction and damage caused to the window ledge of the suit property; for order of compensation against the respondent under Section 22 of the D.V. Act directing him to pay compensation of Rs.1,00,000/- for the mental torture and emotional distress caused by him.

9. Mr. Cama submitted that on 19.1.2016, the respondent filed affidavit in examination-in-chief in Petition No.A-1215/2011. He submitted that all three matters were listed before the Family Court on 03.02.2016, 24.02.2016, 17.03.2016, 06.04.2016 and 03.05.2016. Though the petitioner was present on these dates,

she was not cross-examined as Petition No.A.1215/2011 was taken up. On 9.5.2016, all the matters were listed before the Family Court. As the Advocate for the petitioner was in some difficulty, the petitioner's son Gogi Anand was present in the Court. He was informed that Criminal Misc. Application No.9/2016 was dismissed. On 3.6.2016, application for restoration was made which was dismissed on 18.1.2017. Mr. Cama has taken me through the order dated 10.12.2015 passed by this Court in Misc. Civil Application No.255/2015 as also the order dated 9.5.2016 and paragraphs-4 to 9 of Criminal Misc. Application No.24/2016 filed for recalling order dated 9.5.2016 and restoring the proceedings under Section 12 of the D.V. Act. He submitted that basically as the evidence of the respondent in Petition No.A-1215/2011 was going on and not for cross-examination of the petitioner, there was no reason for the petitioner to remain present for D.V. Case. He, therefore, submitted that the impugned orders deserve to be set aside thereby restoring the proceedings filed by the petitioner under Section 12 of the D.V. Act. He submitted that the petitioner may be put to terms. The petitioner is ready and willing to give undertaking to the effect that she will appear before the Family

Court as and when her presence is required and will not seek undue adjournments. He further submits that cross-examination of the respondent in Petition No.A-1215/2011 is over and the petitioner has to file her examination-in-chief. He assures that the petitioner will tender her examination-in-chief on 9.5.2017 and serve copy on the other side on that date.

10. On the other hand, Mr. Kasar raised preliminary objection about the maintainability of the Writ Petition on the ground that by order dated 9.5.2016 the proceedings filed by the petitioner under Section 12 of the D.V. Act is dismissed. Application for restoration is dismissed on 18.1.2017. He submitted that the petitioner has an equally efficacious alternate statutory remedy of filing appeal under Section 19 of the F.C. Act before the Division Bench of this Court. He submitted that the impugned orders are the final orders. They are neither interlocutory nor intermediate orders. The petition is, therefore, liable to be rejected on the ground of maintainability.

11. Mr. Kasar invited my attention to Sections 28 and 29 of the D.V.Act. Section 28 deals with the procedure in proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and lays down that

these proceedings shall be governed by the provisions of Code of Criminal Procedure, 1973 (for short, Cr.P.C.). Section 29 lays down that an appeal shall lie to the Court of Sessions within 30 days from the date on which the order passed by the Magistrate is served on the aggrieved person or the respondent, as the case may be, which ever is later. He submitted that dismissal of the proceedings filed by the petitioner under Section 12 of the D.V. Act amounts to acquittal of the respondent/accused. He further submitted that the petitioner has filed several applications only with a view to harassing the respondent who is 74 years old. The petitioner is trying to delay the proceedings which in fact is accepted by this Court.

12. Mr. Kasar alternatively submitted that even if it is held that this is interlocutory order, no case is made out for interfering with the impugned orders. He invited my attention to the order dated 10.12.2015 passed by this Court in Misc. Civil Application No.255/2015. In paragraph-14, this Court recorded submission of the respondent to the effect that cross-examination of the petitioner before the Metropolitan Magistrate has already commenced. In paragraph-21 this Court observed that the cross-examination of the petitioner can be continued

before the Family Court from the stage as it was before the Metropolitan Magistrate. He submitted that the matter was kept before the Family court on 3.2.2016, 24.2.2016, 17.3.2016, 6.4.2016 and 3.5.2016 for cross-examination of the petitioner. The petitioner has not disputed the correctness of the rozanama of the Family Court. The petitioner was not present for cross-examination of all these dates and ultimately the learned Judge of the Family Court was constrained to dismiss application under Section 12 of the D.V. Act. He, therefore, submitted that even otherwise no case is made out for interfering with the impugned orders.

13. In support of his submissions, Mr. Kasar relied upon following decisions:

- i. *Madhu Limaye v. The State of Maharashtra, (1977) 4 SCC 551*
- ii. *Maj. Genl. A.S. Gauraya and another v. S.N. Thakur and another, (1986) 2 SCC 709.*
- iii. *Narayandas Gulabchand Agrawal v Rakesh Kumar Nem Kumar Porwal and another, 1996 2 Mh.L.J. 463.*
- iv. *Adalat Prasad v. Rooplal Jindal and others, (2004) 7 SCC*

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- v. *Ravindra Harshad Parmal v Dimple Ravindra Parmal, Civil Writ Petition No.8317/2013 decided by this Court (Coram:Smt. R.P Sondurbaldota,J.) on 20.12.2013.*

14. On the other hand, Mr. Cama relied upon the decision of this Court in *Sunil Hansraj Gupta v Payal Sunil Gupta, AIR 1991 Bombay 423* and in particular paragraphs-10 and 11 thereof. He also relied upon decision in *Madhu Limaye's* case.

15. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Before I deal with the merits of the case, it is necessary to deal with the preliminary objection raised by Mr.Kasar. As noted earlier, the petitioner has instituted proceedings under Section 12 of the D.V. Act. By order dated 10.12.2015, said proceeding is transferred to Family Court, Bandra, Mumbai. Mr. Kasar relied upon Sections 28 and 29 of D.V. Act, which read thus :

“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.

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.”

16. Admittedly the proceedings under D.V. Act are transferred to the Family Court. Section 10 of F.C. Act deals with procedure generally and reads thus:

“10. Procedure generally.-- (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit

or proceedings or at the truth of the facts alleged by one party and denied by the other.”

17. A perusal of Section 10, extracted hereinabove, shows that subject to other provisions of the F.C. Act and Rules, the provisions of C.P.C. and of any other law for the time being in force are applicable to the suits and proceedings (other than the proceedings under Chapter IX of Cr.P.C.), before a Family Court. For the purpose of provisions of C.P.C., Family Court is deemed to be a Civil Court and has all the powers of such Court. In view thereof, reliance placed by Mr.Kasar on the provisions of Sections 28 and 29 of the D.V. Act, is misplaced. Said provisions would have been relevant if the proceedings instituted by the petitioner under D.V. Act were to continue in the Court of Metropolitan Magistrate. Once the proceeding is transferred to the Family Court, it will be governed by the provisions of F.C. Act and in particular the procedure laid down in Section 10 of F.C. Act. The petitioner cannot file appeal under Section 29 of D.V. Act in the Sessions Court.

18. The next question is whether the impugned orders are interlocutory or intermediate or final orders. If it is held that the

impugned orders are not interlocutory, obviously the petitioner will have to file appeal under Section 19 of F.C. Act before the Division Bench of this Court. But, if it is held that the impugned orders are interlocutory then surely the petition would be maintainable. The meaning of the expression 'interlocutory order' has been considered in detail in *Madhu Limaye's* case (supra). In paragraphs-12 & 13, Apex Court observed thus :

“12. Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the term final order'. In volume 22 of the third edition of Halsbury's Laws of England at page 742, however, it has been stated in para 1606:

...a Judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of two words must therefore be considered separately in relation to the particular purpose for which it is required.

In para 1607 it is said:

In general a Judgment or order which determines the principal matter in question is termed "final".

In para 1608 at pages 744 and 745 we find the words:

An order which does not deal with the final rights of the parties, but either (1) is

made before Judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after Judgment and merely directs how the declarations of right already given in the final Judgment are to be worked out, is termed "interlocutory". An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

13. In *S. Kuppuswami Rao v. The King* [1947] FCR, 180, Kania C. J., delivering the Judgment of the Court has referred to some English decisions at pages 185 and 186. Lord Esher M. R. said in *Salaman v. Warner* (1891) 1 QB 734:

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

To the same effect are the observations quoted from the Judgments of Fry L. J. and Lopes L. J. Applying the said test, almost on facts similar to the ones in the instant case, it was held that the order in revision passed by the High Court (at that time there was no bar like Section 397(2) was not a "final order" within the meaning of Section 205(1) of the Government of India Act, 1935. It is to be noticed that the test laid down therein was that if the objection of the accused succeeded, the proceeding could have ended but not vice versa. The order can be said to be a final order only if, in

either event, the action will be determined. In our opinion if this strict test were to be applied in interpreting the words 'interlocutory order' occurring in Section 397(2), then the order taking cognizance of an offence by a Court, whether it is so done illegally or without jurisdiction, will not be a final order and hence will be an interlocutory one. Even so, as we have said above, the inherent power of the High Court can be invoked for quashing such a criminal proceeding. But in our Judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code. In what cases then the High Court will examine the legality or the propriety of an order or the legality of any proceeding of an inferior Criminal court ? Is it circumscribed to examine only such proceeding which is brought for its examination after the final determination and wherein no appeal lies ? Such cases will be very few and far between. It has been pointed out repeatedly, vide, for example, *The River Wear Commissioners v. William Adamson*(1) and *R. M. D. Chamarbaugwalla v. The Union of India* [1957] 1 SCR 930 that although the word occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the legislature. On the one hand, the legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that

power in relation to any interlocutory order. In such a situation it appears to us that the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final in the sense noticed in Kuppuswami's case (*supra*), but, yet it may not be an interlocutory order-pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in Sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purposes of Article 134 of the Constitution, yet it would not be correct to characterise them as merely interlocutory orders within the meaning of Section 397(2). It is neither advisable, nor possible, to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be filial and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well-known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of Sub-section (2) of Section 397. In our opinion it must be taken to be an order of the type falling in the middle course.”

19. This aspect was considered in detail by the Division Bench of this Court in *Sunil Hansraj Gupta* (*supra*) in paragraphs-10 and 11. In the case of *Madhu Limaye* (*supra*), Apex Court reproduced the observations made in *S. Kuppuswami Rao v. The King*, AIR 1949 FC 1. In that case, the decision in

Salaman v Warner, (1891) 1 QB 734 was dealt with. In that case, Lord Esher M.R. observed that “if their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”

20. In the present case, the learned Judge on 9.5.2016 dismissed the application made by the petitioner under Section 12 of the Act in default. Application for restoration made by the petitioner was rejected on 18.1.2017. Now if the application for restoration made by the petitioner were to be allowed, surely the proceedings filed by her under Section 12 of the D.V. Act will go on. Applying the tests laid down in *Salaman* (supra), extracted hereinabove, in my opinion, the impugned orders are interlocutory and not final. In view thereof, the submission of Mr. Kasar that the petitioner has to file appeal under Section 19 of the F.C. Act before the Division Bench of this Court cannot be accepted.

21. Mr. Kasar relied upon the decision of *A.S. Gauraya* (supra) as also the decision of this Court in *Narayandas Agrawal* (supra). The question that fell for consideration to the Apex Court in *A.S. Gauraya's* case was whether the sub-ordinate Court has inherent jurisdiction outside the provisions of Cr.P.C. In that case, first respondent had filed complaint in the Court of J.M.F.C., New Delhi for offence punishable under Sections 67 and 72-C(1)(a) of the Mines Act, 1952 read with Regulation 106 of the Metalliferous Mines Regulation, 1961. The learned Magistrate issued summons to the appellant/accused to appear on 6.1.1972. On 6.1.1972 neither the complainant nor the accused were present. The learned Magistrate accordingly dismissed the complaint in default and for want of prosecution. On 13.1.1972, the complainant filed an application for restoration of the complaint. On 20.1.1972, the learned Magistrate restored the complaint and issued summons returnable on 21.2.1972. On 21.2.1972, the accused moved application on the ground that the order dated 20.1.1972 was without jurisdiction since the Magistrate had become *functus officio* by his order dated 6.1.1972. The learned Magistrate rejected the application on 8.5.1972 on the ground that he had inherent power under

Cr.P.C. to review and recall his earlier orders. Aggrieved by that order, Revision was preferred before the Additional Chief Judicial Magistrate, New Delhi, which was dismissed on 6.7.1973. This was followed by another revision before the High Court of Delhi which was dismissed on 10.1.1975. Apex Court delivered its judgment in *Bindeshwari Prasad Singh v Kali Singh*, AIR 1977 SC 2432 holding that no criminal Court had any inherent jurisdiction, not provided for in Cr.P.C. After this decision, the petitioners moved application before the Metropolitan Magistrate on 22.12.1976. The learned Magistrate dropped the proceedings by order dated 16.7.1977. Aggrieved by this order, the respondent filed revision application before the Sessions Judge, New Delhi. By order dated 7.7.1978, the learned Sessions Judge reversed the order of the learned Magistrate. Aggrieved by that decision, petition under Article 227 of the Constitution of India read with Section 482 of Cr.P.C. was filed which was summarily rejected on 9.8.1978. That order was challenged before the Apex Court. It is in that context, in paragraph-9 Apex Court held that Cr.P.C. does not contain any provision enabling the criminal Court to exercise such an inherent power. In paragraph-11, Apex Court referred to the decision in *Bindeshwari Singh's* case,

wherein it was held that there is absolutely no provision in the Code of Criminal Procedure, 1898 (which applied to that case) empowering a Magistrate to review or recall an order passed by him. Cr.P.C. does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. In other words, the question that fell before the Apex Court was whether the subordinate Court has inherent jurisdiction outside the provisions of Cr.P.C. In my opinion, said decision is not applicable to the facts of the present case.

22. The decision in *A.S. Gauraya (supra)* was considered by this Court in *Narayandas Agrawal (supra)*. After considering Apex Court decision, it was observed that no doubt is left and rather law has been settled that dismissal of a complaint for non-appearance of the complainant in the warrant case would result in discharge and that would be final order and similarly the dismissal of the complaint for non-appearance of the complainant in the summons case would result in acquittal and the same would be final order in the absence of any specific provision in Cr.P.C., the Magistrate cannot revive the said order. In view thereof, I do not find that said decision is applicable to

the facts of the present case.

23. Mr. Kasar relied upon the decision of *Adalat Prasad* (supra). In that case, the learned Magistrate had issued process on 26.5.1992. Aggrieved by that order, the appellant and some of the accused moved High Court. High Court directed the petitioners therein to move trial Court against the order of summoning. In pursuance thereof, the appellant filed application purported to be under Section 203 of Cr.P.C. on 10.3.1993. By order dated 28.1.1995, the learned trial Judge recalled the summons. Said order was challenged before the High Court on the ground that the Magistrate had in pursuance to recalling summons issued under Section 204 of Cr.P.C. By order dated 5.12.1999, High Court allowed Revision Application which was impugned before the Apex Court. In paragraph-15, Apex Court observed that in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Cr.P.C. In my opinion, said decision is also not applicable to the facts of the present case.

24. Even if for the time being, argument of Mr. Kasar that the Family Court having dismissed the case filed by the

petitioner under Section 12 of D.V. Act has no power to allow restoration application is accepted, nonetheless the petitioner has challenged the order dated 9.5.2016 dismissing the complaint in default as also order dated 18.1.2017 dismissing the application for restoration in the present petition instituted under Article 227 of the Constitution of India. Section 482 of Cr.P.C. lays down that nothing in Cr.P.C. shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give any effect to order to prevent abuse of the process of any Court or **otherwise to secure the ends of justice.** (emphasis supplied)

25. In *Madhu Limaye's* case (supra), Apex Court held that in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) of Cr.P.C. can limit or affect the exercise of the inherent power by the High Court. Applying the tests laid down by Apex Court in *Madhu Limaye's* case to the facts of the present case, I am of the opinion that this is a fit case for exercising inherent powers under Section 482 of Cr.P.C.

26. Apart from that in the case of *Surya Dev Rai Vs. Ram Chander Rai*, (2003) 6 SCC 675 the Apex Court has dealt with powers of High Court under Articles 226 and 227 of the Constitution of India. It is also held that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. **The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein.** The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. Supervisory jurisdiction under Article 227 of the

Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have **or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned.** The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly **and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.** (emphasis supplied)

27. In the light of the aforesaid discussion, I do not find any merit in the preliminary objection raised by Mr. Kasar that the impugned orders are final orders and, therefore, the petitioner has to institute an appeal under Section 19 of the F.C.Act before Division Bench of this Court and that Writ Petition under Article 227 of the Constitution of India is not maintainable. Equally there is no force in the submission of Mr.Kasar that the effect of the order dated 9.5.2016 dismissing the complaint in default amounts to discharge of the respondent and, therefore, the Family Court had no power to allow the

restoration application. As noted earlier, the petitioner has challenged the orders dated 9.5.2016 dismissing the complaint in default as also the order dated 18.1.2017 dismissing the application for restoration in the present petition instituted under Article 227 of the Constitution of India. In exercise of powers under Article 227 of the Constitution of India and Section 482 of Cr.P.C., this Court, in appropriate case, would be justified in interfering with the orders passed by the subordinate Courts.

28. Now turning to the merits of the case, as noted earlier the learned trial Judge has not fixed the sequence of proceedings filed by the parties. It is a matter of record and is not disputed that the respondent has filed his examination-in-chief in Petition No.A-1215/2011 on 19.1.2016. A perusal of the Rozanama of Petition No.A-1215/2011 shows that said petition was listed for cross-examination of the respondent on 19.1.2016, 3.2.2016, 24.2.2016 and 17.3.2016.

29. A perusal of the Rozanama of Petition No.B-31/2011 shows that it was listed on 19.1.2016, 3.2.2016, 24.2.2016, 17.3.2016, 6.4.2016, 3.5.2016 and 9.5.2016 under the caption of 'hearing without WS'. A perusal of Rozanama of the D.V. Case shows that after the order dated 10.12.2015 passed by this Court

transferring said proceedings from the Court of Metropolitan Magistrate to the Family Court, the first date of hearing shown was 3.2.2016. The matter was listed on 3.2.2016, 24.2.2016, 17.3.2016, 6.4.2016, 3.5.2016 and 9.5.2016 under the caption 'cross of the petitioner'. A perusal of the application for recalling order dated 9.5.2016 and for restoration of D.V. proceedings and particularly paragraphs-4 and 5 shows that the petitioner contended that though this Court gave liberty to lead common evidence in all the proceedings, the respondent expressed that he is not interested to lead common evidence but the separate evidence in every matter. A perusal of paragraph-6 shows that the petitioner contended that as per the direction of this Court sequence was to be decided by the Family Court and it was never contemplated to record the evidence in all three matters simultaneously. By not fixing the sequence in which the proceedings will go on by the Family Court, it has created confusion. In my opinion, the learned trial Judge should have decided in what sequence the proceedings filed by both the parties should be heard. If at all the learned trial Judge was of the opinion that the petitioner is not making herself available for cross-examination, several options could have been explored,

namely, the learned trial Judge (1) could have continued the cross of the respondent in Petition No.A-1215/2011, (2) could have imposed the costs on the petitioner for not remaining present for her cross-examination, (3) could have discarded her evidence in D.V. case, and (4) could have posted D.V. case under the caption 'for dismissal'. The learned trial Judge also did not consider that the prayers made in D.V. proceedings and the proceedings instituted by the respondent being Petition No.B-31/2011 are to some extent are identical. Merely because this Court in order dated 10.12.2015 recorded that the cross-examination of the petitioner can be continued before Family Court from the stage as it was before the learned Metropolitan Magistrate does not *ipso facto* mean that the learned trial Judge should have proceeded with the cross-examination of the petitioner in D.V. Case. In order to avoid confusion, the learned trial Judge should have fixed the sequence in which the proceedings are to be heard. In my opinion, the order dismissing D.V. proceedings has resulted into grave miscarriage of justice. Applying the tests laid down by the Apex Court in the case of **Surya Dev Rai** (supra) as also by invoking the powers under Section 482 of Cr.P.C., this is imminent case to set aside the

impugned orders thereby restoring D.V. proceedings instituted by the petitioner.

30. In the result, Petition is allowed in following terms:

- (i) Impugned orders dated 9.5.2016 and 18.1.2017 passed by the learned Judge, Family Court No.2, Mumbai are quashed and set aside. Criminal Misc. Application No.9/2016 is restored to the file of the Family Court.
- (ii) The learned trial Judge is requested to pass specific order as regards the sequence of the proceedings filed by the parties.
- (iii) As far as Petition No.A-1215/2011 is concerned, it is stated across the bar that cross-examination of the respondent herein is over and the petitioner has to file her examination-in-chief. Mr.Cama assures that the petitioner will tender her examination-in-chief on 9.5.2017 and serve copy on the other side on that date.
- (iv) The petitioner will appear before the Family Court on 9.5.2017. Respondent No.1 will proceed to cross-examine her on that date.

- (v) The petitioner undertakes that she will appear in the Court as and when her presence is required and will not seek undue adjournment.
- (vi) Liberty is reserved to the parties to apply for expeditious disposal of all the proceedings. While passing order on such application, the learned trial Judge will bear in mind the directions given by this Court in the order dated 10.12.2015 in Misc. Civil Application No.255/2015 directing the Family Court to endeavor to dispose of all the petitions within 18 months from the date of commencement of the cross-examination.
- (vii) Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)