



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2021

CORAM

THE HONOURABLE MR. JUSTICE V.BHAVANI SUBBAROYAN

CRL.O.P.No.1706 of 2016
and Crl MP No.822 of 2016

1. Rajendran
2. Jayakodi
3. Vivek

...Petitioners

.Vs.

Divya @ selvanayagi

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records and quash the complaint in M.C.No.16 of 2015 pending on the file of Judicial Magistrate, Bhavani.

For Petitioner : Mr.S.Shankar
For Respondents : Mr.Suganathan
for N.Manokaran

O R D E R

This Criminal Original petition has been filed seeking to quash the M.C.No.16 of 2015 pending on the file of Judicial Magistrate, Bhavani.

2. This Court has already passed an order in Crl.OP Nos.28458, 16411, 33643 of 2019, Crl.OP.Nos.16389, 16450, 17156, 19918, 20434 of 2020 and Crl.OP.Nos.45,73, 138, 184, 191, 213, 216, 233, 243, 332 and 349 of 2021, dated 18.01.2021 and the guidelines given by this Court will equally apply in the present case also. The relevant portions of the order are extracted hereunder :-

46. A Division Bench of the Bombay High Court had reached the same conclusion in Sukumar Pawanlal Gandhi v Bhakti Sushil Gandhi, (2016) SCC Online Bom 12942. However, a Full Bench of the Bombay High Court in Prabhakar Mohite v State of Maharashtra, AIR 2018 Bom, overruled the decision in Sukumar Pawanlal Gandhi, (cited supra). The Full Bench correctly noticed that the character of a proceeding is not dependent upon



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

47. As a matter of fact, the conclusions of the Full Bench appear to be contradictory which is evident from the fact that, at paragraph 40, the Bench agrees that the proceedings under the D.V Act are predominantly civil in nature, and it is only when there is a breach under Section 31 or a failure or refusal by a Protection Officer as contemplated under Section 33, the proceedings assume the character of



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criminality. Having held so, the Full Bench, at paragraph 56, held that a petition under Section 482 of the Code would lie in view of the express applicability of the Cr.P.C under Section 28(1) of the Act following a Division Bench of the High Court of Gujarat in *Suo Motu v. Ushaben Kishorbhai Mistry*, 2016 2 RCR (Cri) 421.

48. Again, with all due respect, it must be pointed out that in view of the law laid down by the Supreme Court in *S.A.L Narayan Row* (cited supra) and *Ram Kishan Fauji* (cited supra), the nature of the Court or the procedure followed by such a Court cannot determine the character of the proceeding before it. The litmus test, in all cases, is focused on the nature of the right infringed and the relief sought for the vindication of such a right. This is precisely why the Full Bench of the Bombay High Court in *V.B. D'Monte* (cited supra), had ordered a revision to be listed on its civil side despite the order having been passed by a Court of Session.

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

"18. The maze needs to be immediately cleared. In the instant case, we are really not concerned with the nature of the post held by Lokayukta or Upa-Lokayukta. We are also not concerned how the recommendation of the said authorities is to be challenged and what will be the procedure therefor. As has been held by this Court, neither the Lokayukta nor Upa- Lokayukta can direct implementation of his report, but it investigates and after investigation, if it is found that a public servant has committed a criminal offence, prosecution can be initiated."

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

"In the case at hand, the writ petition was filed under Article 226 of the Constitution for quashing of the recommendation of the Lokayukta. The said recommendation would have led to launching of criminal prosecution, and, as the factual matrix reveals, FIR



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

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

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



The following directions are, therefore, issued:

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

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



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cases, the personal appearance of relatives and other third parties to the domestic relationship shall be insisted only upon compelling reasons being shown. (See *Siladitya Basak v State of West Bengal* (2009 SCC Online Cal 1903)).

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

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

vii. As there is no issuance of process as contemplated under Section 204, Cr.P.C in a proceeding under the D.V Act, the principle laid down in *Adalat Prasad v Rooplal Jindal* (2004 7 SCC 338) that a process, under Section 204, Cr.P.C, once issued cannot be reviewed or recalled, will not apply to a proceeding under the D.V Act. Consequently, it would be open to an aggrieved respondent(s) to approach the Magistrate and raise the issue of maintainability and other preliminary issues. Issues like the existence of a shared household/domestic relationship etc., which form the jurisdictional basis for entertaining an application under Section 12, can be determined as a preliminary issue, in appropriate cases. Any person aggrieved by such an order may also take recourse to an appeal under Section 29 of the D.V Act for effective redress (See *V.K Vijayalekshmi Amma v Bindu. V*, (2010) 87 AIC 367). This would stem the deluge of petitions challenging the maintainability of an application under Section 12 of the D.V Act, at the threshold before this Court under Article 227 of the Constitution.



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

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

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

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

xii. While recording evidence, the Magistrate may resort to chief examination of the witnesses to be furnished by affidavit (See Lakshman v Sangeetha, 2009 3 MWN (Cri) 257. The Magistrate shall generally follow the procedure set out in Section 254, Cr.P.C while recording evidence.



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

xiv. A petition under Article 227 of the Constitution may still be maintainable if it is shown that the proceedings before the Magistrate suffer from a patent lack of jurisdiction. The jurisdiction under Article 227 is one of superintendence and is visitorial in nature and will not be exercised unless there exists a clear jurisdictional error and that manifest or substantial injustice would be caused if the power is not exercised in favour of the petitioner. (See Abdul Razak v. Mangesh Rajaram Wagle (2010) 2 SCC 432, Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society, (2019) 9 SCC 538.) In normal circumstances, the power under Article 227 will not be exercised, as a measure of self-imposed restriction, in view of the corrective mechanism available to the aggrieved parties before the Magistrate, and then by way of an appeal under Section 29 of the Act.

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

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



3. In view of the above, this criminal original petition is disposed of. It is left open to the petitioners to work out their remedy accordingly. Consequently, the connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

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To

1. The Judicial Magistrate, Bhavani

+1 CC to Mr.M. Manokaran, Advocate sr 23896.

CRL.O.P.No.1706 of 2016

PCH(CO)

SP(26/07/2021)