

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.04.2021

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Cr1.O.P.No.20979 of 2015
and M.P.No.1 of 2015

1.C.P.Govindaraj
S/o.Palanisamy

2.P.Rajeswari
W/o.Palanisamy

3.V.Karthigadevi
W/o.Varadharajan

All are residing at
No.8/43, Mechralei Vedhi
Vellalur, Coimbatore

..Petitioners/Respondents
Vs.

D.Deepa
D/o.R.Duraisamy
No.25, Panchayat Office Street
Pothanur
Coimbatore - 641 023

..Respondent/ Defacto Complainant

Criminal Original Petition filed under Section 482
Cr.P.C. to call for the records pertaining to the pending
proceedings in D.V.A.No.54 of 2013 on the file of the Judicial
Magistrate Court No.VII, Coimbatore and quash the same.

For Petitioners : Mr.C.D.Johnson
For Respondent : Service awaited

O R D E R

This criminal original petition has been filed seeking to
call for the records pertaining to the proceedings in
D.V.A.No.54 of 2013 pending on the file of the Judicial
Magistrate Court No.VII, Coimbatore and quash the same.

2. It is the case of the first petitioner/husband that he
got married to the respondent/wife on 03.09.2008 as per Hindu
rites and customs in the presence of friends and relatives.
Disputes arose between the parties regarding the behaviour of
the respondent/wife, who started visiting church and had made

friends there and was not cooperating to have a proper matrimonial life and there were attempts made by the respondent/wife to commit suicide on 28.01.2008 and so, mediation held; on 21.12.2010, they entered into an unregistered agreement, wherein, she gave an undertaking that she will not claim any maintenance as money or things or any residential place for living and left the matrimonial home on 21.12.2010 itself.

3. Thereafter, the first petitioner/husband filed a divorce petition in H.M.O.P.No.538 of 2011 before the Family Court, Coimbatore, in which, the respondent/wife filed her counter.

4. While that being so, respondent/wife filed a maintenance petition in M.C.No.21 of 2013 before the Family Court, Coimbatore. After filing the same, the respondent/wife filed a petition in D.V.A.No.54 of 2013 under Sections 12, 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005 (for brevity "the DV Act"), against the petitioners herein, in which, the first petitioner/husband filed his counter.

5. When the matter stood thus, the respondent/wife has prayed for the following in D.V.A. proceedings:

- 8 ½ sovereigns of gold (given as Sthri Dhana)
- Rs.35,000/- towards marriage expenses
- Rs.25,000/- towards medical expenses
- Rs.7,000/- towards monthly maintenance
- Rs.7,00,000/- as compensation

and that the first petitioner/husband should not sell the ancestral property, which was inherited by him.

6. The petitioners have filed this petition to quash the D.V.A. proceedings denying all the allegations on the ground that the respondent/wife has not made out any case in the D.V.A. proceedings.

7. Heard Mr.C.D.Johnson, learned counsel for the petitioners and perused the records.

8. The learned counsel for the petitioners submitted that the first petitioner/husband and respondent/wife were living separately from 21.02.2010 i.e., after the execution of the unregistered agreement in the presence of witnesses, whereas, the complaint under the DV Act was filed on 09.10.2013. When there was no relationship between the parties from 21.02.2010, the Court should not have considered the said allegations. In the absence of any such domestic relationship, the petitioners cannot be prosecuted under the DV Act and the reliefs sought for by the respondent/wife cannot be granted as there was no violence committed by the petitioners. It is also further submitted that in the unregistered agreement dated 21.02.2010,

the respondent/wife has given an undertaking that she will not proceed against the first petitioner/husband, but, contrarily, she has filed the D.V.A. proceedings after three years, which would show that it is only a false case foisted on the petitioners to tarnish their reputation. He further submitted that the third petitioner is living elsewhere and she has not committed any violence against the respondent/wife, but, the respondent/wife has made her a party to the proceedings only to harass her.

9. The learned counsel for the petitioners further submitted that as a counter blast to H.M.O.P.No.538 of 2011 filed by the petitioner/husband, the respondent/wife has filed M.C.No.21 of 2013 and D.V.A.No.54 of 2013.

10. The dispute is between the husband and wife and the Court below has to consider the matter and dispose of the same within the prescribed period of 60 days from the date of its first hearing. Further it is seen that the persons, who are not even related to the proceedings have been made as parties to the proceedings in order to harass them. In this petition, it is seen that the first petitioner/husband, who had severed the relationship with the respondent/wife on 21.02.2010 by executing an unregistered agreement, filed the petition for divorce before the competent Court in H.M.O.P.No.538 of 2011. As a counter blast, the respondent/wife has filed M.C.No.538 of 2011 and D.V.A.No.54 of 2013. All the issues in the said petitions have to be gone into by the Court below by way of letting in evidence by the parties concerned.

11. It may be pertinent to state here that this Court has discussed this issue elaborately and formed certain guidelines in Dr.P.Pathmanathan and Others Vs. V.Monica and Others¹, which reads as follows:

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

1 Cr1.O.P.Nos.28458 of 2019 etc., batch decided on 18.01.2021

The following directions are, therefore, issued:

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

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

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

iv. Personal appearance of the respondent(s) shall not be ordinarily insisted upon, if the parties are effectively represented through a counsel. Form VII of the D.V Rules, 2006, makes it clear that the parties can appear before the Magistrate either in person or through a duly authorized counsel. In all cases, the personal appearance of relatives and other third parties to the domestic relationship shall be insisted only upon compelling reasons being shown. (See *Siladitya Basak v State of West Bengal* (2009 SCC Online Cal 1903)).

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

vi. It is not mandatory for the Magistrate to issue notices to all parties arrayed as respondents in an application under Section 12 of the Act. As pointed out by this Court in *Vijaya Baskar* (cited supra), there should be some application of mind on the part of the Magistrate in deciding the respondents

upon whom notices should be issued. In all cases involving relatives and other third parties to the matrimonial relationship, the Magistrate must set out reasons that have impelled them to issue notice to such parties. To a large extent, this would curtail the pernicious practice of roping in all and sundry into the proceedings before the Magistrate.

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

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

ix. In *Kunapareddy* (cited supra), the Hon'ble Supreme Court upheld the order of a Magistrate purportedly exercising powers under Order VI, Rule 17 of The Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C."), to permit the amendment of an application under Section 12 of the D.V Act. Taking a cue therefrom, it would be open to any of the respondent(s), at any stage of the proceeding, to apply to the Magistrate to have their names deleted from the array of respondents if they have been improperly joined as parties. For

this purpose, the Magistrate can draw sustenance from the power under Order I Rule 10(2) of the C.P.C. A judicious use of this power would ensure that the proceedings under the D.V Act do not generate into a weapon of harassment and would prevent the process of Court from being abused by joining all and sundry as parties to the lis.

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

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

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

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

xiv. A petition under Article 227 of the Constitution may still be maintainable if it is shown that the proceedings before the Magistrate

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

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

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

This criminal original petition is dismissed on the above terms. Connected M.P. is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

nsd

To

1. The Judicial Magistrate No.VII, Coimbatore.

2.Do Thro The Chief Judicial Magistrate,
Coimbatore.

3.The Public Prosecutor,
High Court, Madras.

Copy To

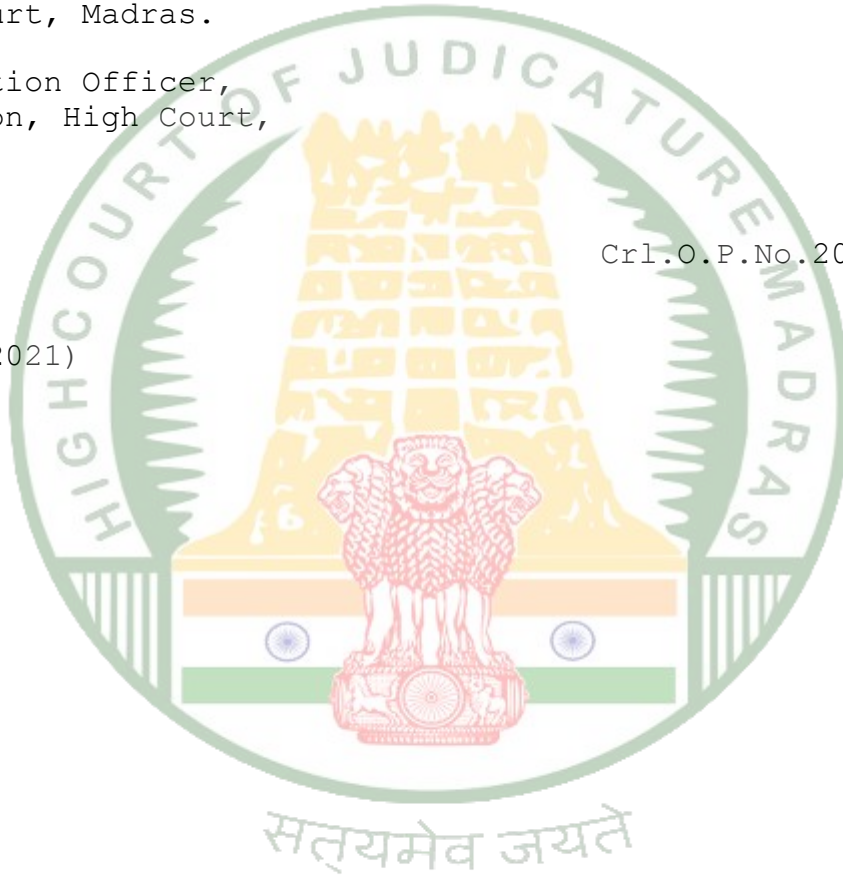
1.The Registrar General,
High Court, Madras 104.

2.The Registrar Judicial,
High Court, Madras.

3.The Section Officer,
F Section, High Court,
Madras.

Crl.O.P.No.20979 of 2015

PVS (CO)
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