



C.R.P. (MD) No.897 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **05.04.2024**

C O R A M

THE HONOURABLE MR.JUSTICE P.D.AUDIKEAVALU

C.R.P. (MD) No. 897 of 2024

and

C.M.P. (MD) No. 4963 & 4965 of 2024

1.P.Shanmugamuthu

2.V.Ponnambalam

... Petitioners

Vs.

1.S.Suriyagandhi

2.Shanmugaraja

3.V.P.Rajeshwari

... Respondents

PRAYER: Petition filed under Article 227 of the Constitution of India, to strike off the impugned petition in DVC No.12 of 2023 on the file of the Judicial Magistrate No.II, Kovilpatti in respect of the petitioners.

For Petitioners

: Mr. P.M.Vishnuvarthanan



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ORDER

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The Civil Revision Petition invoking under Article 227 of the Constitution of India has been filed to strike-off the petition in DVC No.12 of 2023 on the file of the Judicial Magistrate No.II, Kovilpatti (hereinafter referred to as the 'Trial Court' for short).

2. The parties are hereinafter referred to as by the description in the proceedings in DVC No.12 of 2023 before the Trial Court for the sake of clarity and convenience.

3. Heard Mr. P.M.Vishnuvarthanan, Learned Counsel for the Second and Third Respondents and perused the materials placed on record apart from the pleadings of the parties.

4. Before proceeding further, it must be recapitulated here that the Full Bench of this Court in *Arul Daniel -vs- Suganya* (Order dated 17.11.2022 in Crl. O. P. S.R. No. 31852 of 2022 and etc., batch) has examined on a reference the following questions of law:-



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- (i) Whether a proceeding under Section 12 of the D.V. Act can be challenged under Article 227 of the Constitution or under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C. for short') ?
- (ii) Whether the aforesaid remedy is available to an aggrieved person before approaching the learned Magistrate and, if necessary, the Court of Sessions by way of an appeal under Section 29 of the D.V. Act?

The said reference has been answered as follows:-

- “(i) A petition under Section 482 Cr.P.C. challenging a proceeding under Section 12 of the D.V. Act is not maintainable. A petition under Article 227 of the Constitution is maintainable on a limited ground of patent lack of jurisdiction, as indicated in paragraphs 40 and 41, supra.
- (ii) Except on the limited ground indicated, supra, jurisdiction under Article 227 of the Constitution will not be exercised, as a measure of self-imposed restriction, by-passing the statutory remedies under the D.V. Act in the light of the decision of the Supreme Court in ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai -vs- Tuticorin Educational Society*** [(2019) 9 SCC 538)].
- (iii) In the light of the aforesaid conclusions, we uphold the decision of N.



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Anand Venkatesh, J. in ***Dr. P. Pathmanathan -vs- V. Monica*** [(2021) 1 MLJ 311], including the directions set out, in paragraph 52 in their entirety, though, in our view, the reference to Section 483 Cr.P.C. therein, may not be appropriate. The decision of the Division Bench in ***P. Ganesan -vs- M. Revathy Prema Rubarani*** [C.R.P. (MD) Nos. 909 & 915 of 2021], to the extent that it is contrary to this opinion, shall stand overruled. *Ex consequenti*, the decisions of learned single judges in ***S. Gowrishankar -vs- Deepa*** [2014 SCC OnLine Mad 12443] , ***Sathiyaseelan -vs- Preethi*** [2018 SCC OnLine Mad 7641], ***G. Jayakumar -vs- Jayanthi*** [Crl.OP No. 17235 of 2016], ***Mohana Seshathri -vs- E. Anuja*** [(2021) 2 LW 509], and other cases following or adopting the line of reasoning therein, shall stand overruled, to the extent that they are contrary to the view taken herein.

- (iv) As a sequitur to the above, it must necessarily follow that the petitions in this batch are not maintainable. We, therefore, see no useful purpose in remitting the matter to the learned single judge to perform the obsequies. Accordingly, exercising power under Order I Rule 7 of the Appellate Side Rules, we hold that all the petitions filed under Section 482 Cr.P.C. shall stand dismissed at the SR stage itself, preserving all



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the rights and contentions of the parties and granting liberty to move the Magistrate to agitate their grievances, which shall be considered in consonance with the directions set out in paragraph 52 of the decision in ***Dr. P. Pathmanathan -vs- V. Monica*** [(2021) 1 MLJ 311].”

That apart, it would be useful to extract the following observations in that authoritative pronouncement, which is now holding the field:-

“40. The next question is whether the proceedings under Chapter IV of the D.V. Act can be assailed by way of a petition under Article 227 of the Constitution. Indubitably, the power of judicial review under the said provision is a part of the basic structure of the Constitution. After the decision of the Constitution Bench in ***L.Chandra Kumar v Union of India*** [(1997) 3 SCC 261], it is no longer open to doubt that the power of judicial review under Articles 226/227 cannot be taken away even by a constitutional amendment, let alone by a statute. Nevertheless, the existence of power is one thing and the exercise of power is quite another. Though the power of superintendence under Article 227 over the proceedings of the Magistrate under



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the D.V. Act exists, its exercise would, no doubt, be conditioned on certain very salutary principles one of which is that a High Court will not exercise its power of superintendence if there exists an efficacious alternative remedy.

41. As has been adverted to, supra, the legislature has very thoughtfully provided an appellate remedy, under Section 29 of the D.V. Act, before the Court of Session against an order of the Magistrate. The existence of an appellate remedy would almost always be a “near total bar” for exercising power under Article 227, as has been pointed out by the Supreme Court in *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society* [(2019) 9 SCC 538]. An exception to the aforesaid rule is where the proceedings before the Court below are patently lacking in jurisdiction. An illustrative instance of such a case is where a Magistrate, who does not possess jurisdiction under Section 27, entertains an application under the D.V. Act or where the reliefs sought



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are outside the scope of the Act, etc. Such instances would, no doubt, be few and far between. We only reiterate that the policy of the D.V. Act is expedition, which cannot be achieved if all and sundry orders are called into question before the High Court. This aspect must necessarily weigh with the learned single judges while exercising jurisdiction under Article 227 in a challenge to proceedings under the D.V. Act.

...

76. Before bringing the curtains down, for the sake of convenience and clarity, we reiterate the following directions passed by the learned single judge in ***Dr. P. Pathmanathan -vs- V. Monica*** [(2021) 1 MLJ 311], which shall now govern the disposal of applications under the D.V. Act:

- (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.



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- (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 -vs- 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 -vs- 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



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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 -vs- 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 -vs- Kunapareddy Swarna Kumar* [(2016) 11 SCC 774], the Hon'ble Supreme Court upheld the order of a Magistrate purportedly exercising powers under Order VI, Rule 17 of The Civil Procedure Code, 1908 (hereinafter referred to as “C.P.C.”), to permit



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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 -vs- Sneha Ahuja*** [(2021) 1 SCC 414], the



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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. Act 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 -vs- 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 -vs- Muhammad Yar Khan***, [ILR (1888) 11 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



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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 -vs- 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.”

5. Having due regard to that settled legal position, it has not been demonstrated before this Court that the Second and Third Respondents in DVC No. 12 of 2023 have been impeded from canvassing what is sought to be agitated in this Civil Revision Petition by availing remedies before the Trial Court itself as explicated in the aforesaid binding decision of this Court and the Memorandum of Grounds of Revision is also bereft of any details in that regard.



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6. In that backdrop, Learned Counsel for the Second and Third Respondents seeks permission of the Court to withdraw the Civil Revision Petition reserving the right of the Respondents to resort to aforesaid procedure. He has also made an endorsement to that effect in the court record.

In view of the same, the Civil Revision Petition is dismissed as withdrawn with the clarifications that no view has been expressed by this Court on merits of controversy involved, and all contentions are left open to be raised before the Trial Court in accordance with law. Consequently, connected Miscellaneous Petitions are closed. No costs.

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Index : Yes/No
NCC : Yes/No
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To

1. The Judicial Magistrate No.II, Kovilpatti.

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Copy to:-

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P.D.AUDIKESAVALU,J.

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