



CrI.O.P.SR.No.31852 of 2022 etc batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: **12.08.2022**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

CrI.O.P.SR.Nos.31852, 28394, 29208, 29745, 32249, 32612, 32966, 33350, 33623, 33780, 33937, 34048, 34753, 35061, 35431, 35555, 35838, 35983, 36564, 36570, 36636, 36648, 36683, 36948, 36956, 37007, 37218, 37713, 37872, 37980, 38281 and 38330 of 2022

CrI.O.P.SR.No.31852 of 2022

1. Arul Daniel
2. Gurupatham
3. Vasuki
4. Emimal
5. Gocheeyal

.. Petitioners

Vs.

Suganya

.. Respondent

Prayer in CrI.O.P.SR.No.31852 of 2022: Criminal Original Petition filed under Section 482 of Cr.P.C., seeking to call for the records in D.V.C.No.74 of 2022, on the file of the learned Additional Mahila Court, Thiruvallur and quash the same.

For Petitioners in : Mr.P.Chandrasekar
CrI.O.P.SR.No.31852/2020



COMMON ORDER

WEB COPY These petitions have been filed seeking to quash the complaint filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'D.V.Act') by invoking the provisions under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.')

2. As this Court entertained doubt about invoking Section 482 Cr.P.C. to quash the complaint filed under Section 12 of the D.V.Act, these petition have been listed under the caption "For Maintainability".

3. Till recently, in pursuance to the judgment of a learned Single Judge (*Hon'ble Mr.Justice N.Anand Venkatesh*) of this Court in ***Dr.P.Pathamnathan Vs. V.Monica*** reported in **(2021) 2 CTC 570**, petitions under Section 482 Cr.P.C., challenging the proceedings initiated under the D.V.Act has not been entertained.

4. However, in view of the latest judgment of a Division Bench of this Court in ***P.Ganesan Vs. M.Revathy Prema Rubarani*** in C.R.P.PD(MD)Nos.909 of 2021 etc., batch dated 12.07.2022, several



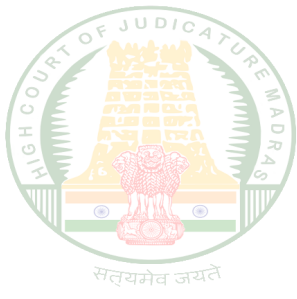
petitions started flooding invoking the jurisdiction of this Court under Section 482 Cr.P.C. to quash the proceedings initiated under Section 12 of the D.V.Act.

5. The background on which the Hon'ble Division Bench has passed the said order is relevant for addressing the issue. A reference was placed before the Hon'ble The Chief Justice by two learned Single Judges of this Court viz., *Hon'ble Mr.Justice R.Subramanian* and *Hon'ble Mr.Justice K.Murali Shankar*.

6. *Hon'ble Mr.Justice K.Murali Shankar* by order dated 27.09.2021, in C.R.P.PD(MD) Nos.909 and 915 of 2021 has raised the following questions to be answered on reference:

“(i) Whether the proceedings initiated under the provisions of the Protection of Women from Domestic Violence Act before the Magistrate Courts are Civil proceedings or Criminal proceedings?”

“(ii) Assuming that the proceedings are civil in nature, whether the High Court can exercise its



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power under Section 482 of Cr.P.C, in respect of the said proceedings?

(iii) Whether the provisions of Section 468 of Cr.P.C, are applicable for the proceedings initiated under the Domestic Violence Act?

(iv) Assuming that Section 468 Cr.P.C, is not applicable, what is the period of limitation for initiating the proceedings under the Domestic Violence Act?

(v) Whether the proceedings initiated under the Domestic Violence Act and pending before the Magistrate Court can be transferred to Civil Court or Family Court, by invoking Article 227 of Constitution of India.? ”

7. *Hon'ble Mr.Justice R.Subramanian*, in his reference made in Tr.C.M.P.No.478 of 2021 and C.M.P.No.12676 of 2021, dated 06.12.2021 has observed as follows:

“In this Transfer Civil Miscellaneous Petition, the husband seeks transfer of proceedings under the Protection of Women from



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Domestic Violence Act pending before the Magistrate to the Family Court to be tried along with HMOP.

2. *In CrI.O.P.No.17235 of 2016, the Hon'ble Justice A.D.Jagadish Chandira had after concluding that the power under Section 407 of the Code of Criminal Procedure cannot be used to transfer of proceeding pending before the Magistrate to the Family Court, invoked the power under Article 227 of the Constitution of India and transferred the proceedings before the Magistrate to the Family Court. However, subsequently in TR.CMP.SR.No.15785 of 2021, Hon'ble Justice S.M.Subramaniam has held that the power under Article 227 of the Constitution of India cannot be invoked for transfer of cases.*

3. *He further went on to conclude that Section 24 cannot be invoked for transfer of Criminal cases to the Family Court to be tried along with HMOPs or Guardian O.P.s or other matrimonial proceedings.*

4. *The learned counsel for the petitioner*



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also relies upon a judgment of the Hon'ble Justice S.Vaidyanathan in Mohana Seshathri vs. E.Anuja, wherein Hon'ble Justice S.Vaidyanathan held that Section 24 could not be invoked, he however directed the petition to be renumbered as a petition under Article 227 of the Constitution of India.

5. In view of the conflicting opinion expressed in the above three judgments, I am constrained to place the matter before My Lord the Hon'ble the Chief Justice for posting it before the Larger Bench for resolution of the conflict.”

8. While answering the above reference, the judgment rendered by another learned Single Judge (*Hon'ble Mr.Justice N.Anand Venkatesh*) in ***Dr.P.Pathamnathan Vs. V.Monica*** reported in ***(2021) 2 CTC 570*** has also been extensively considered by the Hon'ble Division Bench. The Hon'ble Division Bench answered the reference in paragraph 17, as follows:

“17. To sum up, our answer to the Questions referred are as follows:

(a) The proceedings under chapter IV of the Domestic Violence Act are civil in nature.



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(b) This Court can exercise power under section 482 Cr.P.C in respect of Domestic Violence Act proceedings.

(c)Section 468 Cr.P.C is not applicable for proceedings under Domestic Violence Act.

(d)We cannot by a Judicial exercise determine the period of limitation in the absence of any provision under the Act prescribing limitation.

(e) Proceedings under Domestic Violence Act cannot be transferred from a Magistrate to a Civil or Family Court at the instance of the Respondent defined under 2 (q) of the Domestic Violence Act. However, the proceedings can be transferred at the instance of the applicants/ victim or with her consent.”

9. Now, in pursuant to the answer given in paragraph 17(b), several petitions have been filed under Section 482 of Cr.P.C. challenging the application filed under Section 12 of the D.V.Act for various reliefs.

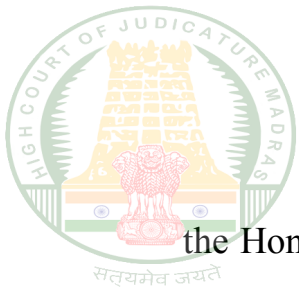


WEB COPY10. The learned counsel appearing for the petitioners would submit that in view of the Division Bench judgment, the application filed under the D.V.Act can be challenged under Section 482 Cr.P.C. Therefore, it is contended that this criminal original petition is maintainable.

11. Some of the learned counsel present in the Court viz., Mr.A.Ramesh, learned Senior Advocate, Mr.M.Mohammed Riyaz, Mr.A.E.Ravichandran pointed out that there are conflicting findings recorded by the Hon'ble Division Bench and raised doubt about the very judgment itself.

12. Of course, a learned Single Judge cannot by-pass the judgment of the Hon'ble Division Bench, but at the same time, when the findings of the Hon'ble Division Bench appears to run counter to the decisions of the Hon'ble Supreme Court and the findings also runs counter to its own findings, this Court is of the view that this Court can still go into the maintainability of the petition filed under Section 482 of Cr.P.C. challenging the application filed under Section 12 of the D.V.Act.

13. It is relevant to note that though various issues were answered by



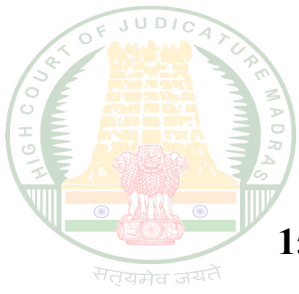
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the Hon'ble Division Bench in the reference, the main answer with regard to

the maintainability of the petition filed under Section 482 Cr.P.C. alone can

be the subject matter of discussion in this petition.

14. It is relevant to note that in *Dr.P.Pathamnathan's case* (cited supra), the learned Single Judge (*Hon'ble Mr.Justice N.Anand Venkatesh*) considering the very object of the D.V.Act and considering the Rules provided under the said Act held that an application filed under Section 12 of the D.V.Act was not akin to a complaint under Section 2(d) of the Cr.P.C. therefore, the learned Magistrate inquiring into an application filed under the D.V.Act cannot issue a summon under Section 61 of Cr.P.C. but was required to issue a notice as set out in Form VII of the D.V.Rules, 2006. On this basis, it was concluded that in an application under Section 12 of the D.V.Act, the learned Magistrate was not required to issue process under Section 204 Cr.P.C. Consequently, there was no bar for the persons aggrieved by the notice to approach the learned Magistrate and raise all defenses including the issue of maintainability etc., It is also held that the aggrieved persons also have a remedy by way of an appeal under Section 29 of the D.V.Act.



15. The learned Single Judge (*Hon'ble Mr.Justice N.Anand*

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Venkatesh) also considering the entire Act and Rules and relying upon various other judgments held that the learned Magistrate exercising powers under the D.V.Act Chapter IV is not a Criminal Court and held that a petition under Section 482 of Cr.P.C. was not maintainable. However, a petition under Article 227 of the Constitution of India was held to be maintainable if it could be shown that the proceedings before the learned Magistrate suffered from a patent lack of jurisdiction. While concluding, the learned Single Judge in Para 52 has passed the following directions, which are extracted hereunder:

“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



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D.V Act. A corrective mechanism is available in the D.V Act itself for aggrieved parties to agitate their grievances and obtain redress.

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



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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



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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



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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



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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



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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



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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-



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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. ”

16. The Hon'ble Division Bench while answering the reference has concurred with the observations of the learned Single Judge (*Hon'ble Mr.Justice N.Anand Venkatesh*) and approved the directions issued by the learned Single Judge in *Dr.P.Pathamnathan's case* (cited supra) in paragraph 52 (i) to (x), (xii) and (xiii) dealt with regard to the procedure to be followed while dealing with the applications filed under Section 12 of the D.V.Act. Only two directions namely 52(xi) and (xiv) were not approved by the Hon'ble Division Bench.

17. In paragraph 4(f) of the judgment, the Hon'ble Division Bench has categorically recorded a finding that the determination of rights under Chapter IV of the D.V.Act does not result in penal consequences so as to term it as a criminal proceedings and similarly in paragraph 4(h) the Hon'ble Division Bench has reiterated its findings that the proceedings under the D.V.Act are not criminal in nature and finally held in paragraph 4(l) as follows:

“4(l) Consequently, we answer the first



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question by holding that the proceedings under the Domestic Violence Act are civil in nature and it is only when there is a breach of the protection order passed, the proceedings become penal in nature. It would not assume the character of criminal proceeding merely because a Magistrate is conferred with the power to adjudicate the rights by adopting predominantly the procedure under the Criminal Procedure Code.”

18. It is relevant to note that the Hon’ble Division Bench has also followed the Hon’ble Apex Court judgment in ***Kunapareddy Vs. Kunapareddy Swarna Kumari*** reported in (2016) 11 SCC 774, wherein, the Hon’ble Apex Court has held that the proceedings under Chapter IV of the D.V.Act are civil in nature.

19. It is also relevant to note that during the pendency of the reference before the Hon’ble Division Bench, the Hon’ble Apex Court in ***Kamatchi Vs. Lakshmi Narayanan*** reported in 2022 SCC Online SC 446 has approved the decision of the learned Single Judge (*Hon’ble Mr.Justice N.Anand Venkatesh*) rendered in ***Dr.P.Pathamanathan's case*** (cited supra). The issue before the Hon’ble Apex Court was whether Section 468 of Cr.P.C. can be



pressed into service for the application filed under Section 12 of the D.V.Act.

WEB C While holding that limitation under Section 468 of Cr.P.C. will not be applicable for filing of an application under the D.V.Act. In paragraph 19 of the said judgment, the Hon'ble Apex Court has in fact approved the learned Single Judge's finding in **Dr.P.Pathamanathan's case** (cited supra). It is relevant to extract paragraph 19, which reads as follows:

“19. The special features with regard to an application under Section 12 of the Act were noticed by a Single Judge of the High Court in Dr. P.Padmanathan & Ors.2 as under:

“19. In the first instance, it is, therefore, necessary to examine the areas where the D.V.Act or the D.V. Rules have specifically set out the procedure thereby excluding the operation of Cr.P.C. as contemplated under Section 28(1) of the Act. This takes us to the D.V. Rules. At the outset, it may be noticed that a “complaint” as contemplated under the D.V.Act and the D.V. Rules is not the same as a “complaint” under Cr.P.C. A complaint under Rule 2(b) of the D.V. Rules is defined as an allegation made orally or in writing by any person to a Protection Officer. On the other hand, a complaint, under Section 2(d) of the Cr.P.C. is any allegation made orally or in writing to a



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Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence. However, the Magistrate dealing with an application under Section 12 of the Act is not called upon to take action for the commission of an offence. Hence, what is contemplated is not a complaint but an application to a Magistrate as set out in Rule 6(1) of the D.V. Rules. A complaint under the D.V. Rules is made only to a Protection Officer as contemplated under Rule 4(1) of the D.V. Rules.

20. Rule 6(1) sets out that an application under Section 12 of the Act shall be as per Form II appended to the Act. Thus, an application under Section 12 not being a complaint as defined under Section 2(d) of the Cr.P.C, the procedure for cognizance set out under Section 190(1)(a) of the Code followed by the procedure set out in Chapter XV of the Code for taking cognizance will have no application to a proceeding under the D.V.Act. To reiterate, Section 190(1)(a) of the Code and the procedure set out in the subsequent Chapter XV of the Code will apply only in cases of complaints, under Section 2(d) of Cr.P.C, given to a Magistrate and not to an application under Section 12 of the



Act.”

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20. From the above, it is clear that the Hon'ble Apex Court has in fact approved the findings of the learned Single Judge (*Hon'ble Mr.Justice N.Anand Venkatesh*) that application filed under Section 12 of the D.V.Act is not a complaint filed under Section 2(d) of the Cr.P.C. to apply the provisions of limitation.

21. The Division Bench having referred to *Kamatchi's case* (cited supra) omitted to consider paragraph 22, which reads as follows:

"22. Lastly, we deal with the submission based on the decision in Adalat Prasad. The ratio in that case applies when a Magistrate takes cognizance of an offence and issues process, in which event instead of going back to the Magistrate, the remedy lies in filing petition under Section 482 of the Code. The scope of notice under Section 12 of the Act is to call for a response from the respondent in terms of the Statute so that after considering rival submissions, appropriate order can be issued. Thus, the matter stands on a different footing and the dictum in Adalat Prasad would not get attracted at a stage when a notice is



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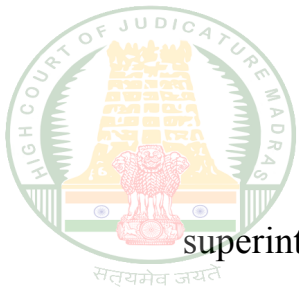
issued under Section 12 of the Act."

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The observation of the Hon'ble Apex Court that on an application filed under Section 12 of the D.V.Act, only a notice is issued calling for a response from the respondent in terms of the Statute, therefore Section 482 Cr.P.C. as against an application under Section 12 of the D.V.Act will not be maintainable as per the above judgment.

22. The Hon'ble Division Bench has concurred with the views of the learned Single Judge that an application under the D.V.Act is not a complaint and the proceedings under Chapter IV of the D.V.Act are civil in nature. The Division Bench has however held that still a petition under Section 482 of Cr.P.C. is maintainable against the proceedings filed under Chapter IV of the D.V.Act.

23. It is relevant to note that in *Dr.P.Pathmanathan's case* (cited supra), the learned Single Judge has held that a petition under Article 227 of the Constitution of India may still be maintainable if it is shown that the proceedings before the learned Magistrate suffer from a patent lack of jurisdiction. The jurisdiction under Article 227 of the Constitution is one of



superintendence and is visitatorial 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. While coming to the said conclusion, the learned Single Judge has

relied upon the judgment of a learned Single Judge of this Court (*Hon'ble*

Mr.Justice V.Ramasubramanian, as His Lordship then was) in

M.Muruganandam Vs. M.Megala reported in *(2011) 1 CTC 841 (MAD)* to

hold that this Court can exercise its revisional powers under Article 227 of

the Constitution, in respect of the orders passed under the D.V.Act. Whereas,

the Hon'ble Division Bench in paragraph 16(h) of the order has categorically

held that there is no dispute about the proposition of law laid down in

M.Muruganandam's case (cited supra). However, the Hon'ble Division

Bench has taken a view that this Court in *M.Muruganandam's case* (cited

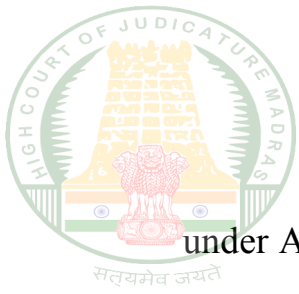
supra) did not hold that a petition under Section 482 Cr.P.C. is barred.

24. In *M.Muruganandam's case* (cited supra) a petition under Section

482 of Cr.P.C. was initially filed and the Registry entertained a doubt as to

its maintainability. The learned Single Judge (*Hon'ble Mr.Justice*

V.Ramasubramanian, as His Lordship then was) has held that a petition



under Article 227 of the Constitution is maintainable and observed as under:

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“Therefore, it is clear that this Court can exercise its revisional powers under Article 227 of the Constitution, in respect of the orders passed under the Protection of Women From Domestic Violence Act, 2005. However, it will always be subject to the restrictions, subject to which the power has to be exercised.”

25. It is relevant to note that in paragraph 4(k) the Hon’ble Division Bench has not approved the direction of the learned Single Judge in *Dr.P.Pathmanathan's case* (cited supra) namely paragraph 52(xiv) that the exercise of power under Article 227 of the Constitution based on the decision in *Muruganandam's case* (cited supra), whereas, subsequently in paragraph 16(h), the Hon’ble Division Bench has not doubted the proposition of law in *Muruganandam's case* (cited supra) that a petition under Article 227 of the Constitution would lie to challenge a proceedings under Section 12 of the D.V.Act.

26. With great respect, when the Hon’ble Division Bench has not doubted *Muruganandam's case* (cited supra) it ought to have affirmed the



direction given in paragraph 52(xiv) in *Dr.P.Pathmanathan's case* (cited

supra). Therefore, the findings of the Hon'ble Division Bench in paragraph 4(k) and 16(h) are clearly contradictory.

27. It is relevant to note that the Hon'ble Division Bench as well as the Hon'ble Apex Court has categorically recorded a finding to the effect that the proceedings under Chapter IV of the D.V.Act are only civil in nature and penal action will commence only when there is a breach of the protection order and cognizance would be taken only when there is a breach of the protection order for the offence till such time the proceedings are civil in nature, though enquired by a learned Magistrate it will not be taken as a criminal proceedings. Though the Hon'ble Division Bench has also not given much emphasis on the procedure contemplated under Section 28 of the D.V.Act, it is relevant to extract Section 28 of the D.V.Act, which reads as follows:

“Section 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)



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(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.”

28. Though Section 28 of the D.V.Act makes it clear that the proceedings are governed by Cr.P.C. Sub-Section (2) to Section 28 makes it clear that the Court can lay down its own procedure for disposal of an application filed under Section 12 or sub-section (2) of Section 23 of the D.V.Act. Therefore, it can be stated that all the proceedings are civil in nature and only the procedure under Cr.P.C. should be followed.

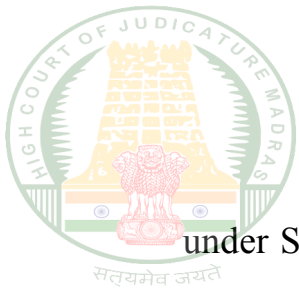
29. When an application is filed under Section 12 of the D.V.Act, the respondents are not treated as an accused and even the Court has held that personal appearance is not required. Taking of cognizance arises only after the breach of the protection order under Section 31 of the D.V.Act though the Hon'ble Division Bench has held that even assuming that the learned Magistrate while exercising power under Section 12 of the D.V.Act is not a Criminal Court, the learned Magistrate is exercising the power under the Cr.P.C. in view of Section 28(1) of the D.V.Act.



WEB COPY30. It is relevant to note that exercising power under Cr.P.C. is not mandatory and there are exceptions provided under Section 28(2) of the D.V.Act, which has not been dealt with by the Hon'ble Division Bench.

31. Be that as it may, it is relevant to note that the procedure under Chapter IV of the D.V.Act has been held to be a civil proceeding, a statutory appeal is also provided under Section 29 of the Act before a Court of Sessions. Merely because, Court of Sessions was hearing the appeals, such proceedings would not attain the character of a criminal proceeding but the proceedings would remain as civil proceedings and to be dealt with by the concerned Court of Sessions. Even in the appeal provision, the person against whom the order is passed has not been treated as an accused and he is treated to be a respondent as per Section 29 of the D.V.Act. Therefore, when effective alternative remedy is already available by way of statutory appeal under Section 29, for the proceedings conducted under Chapter IV of the D.V.Act, the question still arises is as to whether a petition under Section 482 of Cr.P.C. is maintainable.

32. It is relevant to note that it is well settled that the inherent powers



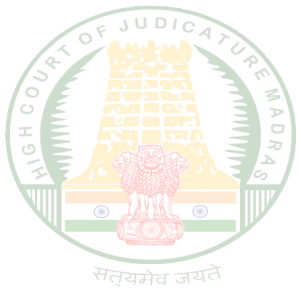
under Section 482 Cr.P.C. cannot be exercised where other specific remedies

exist for redressal. This principle was laid way back in ***MCD Vs. Ram***

Kishan Rohtagi reported in ***(1983) 1 SCC 1***, wherein, the Hon'ble Apex Court has held that the inherent powers under Section 482 of Cr.P.C. can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the Statute. Further, the power being an extraordinary one, it has to be exercised sparingly.

33. In ***Padal Venkata Rama Reddy Vs. Kovvuri Satyanarayana Reddy*** reported in ***(2011) 12 SCC 437***, the Hon'ble Supreme Court has reiterated the aforesaid principle and has held as follows:

“13. It is well settled that the inherent powers under Section 482 can be exercised only when no other remedy is available to the litigant and not in a situation where a specific remedy is provided by the statute. It cannot be used if it is inconsistent with specific provisions provided under the Code (vide Kavita v. State [2000 Cri LJ 315 (Del)] and B.S. Joshi v. State of Haryana [(2003) 4 SCC 675 : 2003 SCC (Cri) 848]). If an effective alternative remedy is available, the High Court will not exercise its powers under this section, specially



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when the applicant may not have availed of that remedy.”

34. Further in para 22 of *Kamatchi's case* (cited supra), the Hon'ble Supreme Court has held that petition under Section 482 of Cr.P.C. is not maintainable. Therefore, permitting a petition under Section 482 of Cr.P.C. to challenge the proceedings under Section 12 of the D.V.Act without exhausting the remedies available under the Statute before the learned Magistrate and the Court of Sessions, there would be parallel remedies; one before the learned Magistrate and other before the Sessions Court or the High Court, which is clearly against the settled principles of law and it would only lead to flooding of petitions under Section 482 of Cr.P.C. As the proceedings are civil in nature under Chapter IV of the D.V.Act, the respondent may first have to approach the learned Magistrate and raise defense open to him and any order passed there can be challenged by way of an appeal as provided under Section 29 of the D.V.Act. The Hon'ble Division Bench in paragraph 16(h) has held that it did not doubt the proposition of law laid down by this Court in *M.Muruganandam's case* (cited supra), which held that revision under Article 227 of the Constitution is maintainable. Therefore, I am of the view that though remedy by way of revision is approved, petition under



Section 482 Cr.P.C. cannot be maintainable.

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35. Even in *S.Subramaniam Vs. S.Janaki* reported in **2020 5 CTC SC 464** the Hon'ble Apex Court has held that when a person is aggrieved by the non filing of the FIR, he cannot go to the High Court under Article 226 of the Constitution of India, the aggrieved person can follow the procedure provided under the Cr.P.C. The above judgment makes it clear that when there is an alternative procedure and remedy available in the Statute, invoking inherent jurisdiction will not arise at all. Whereas, having held that the proceedings under Chapter IV of the D.V.Act is a civil proceedings and not penal in nature and when there is a statutory appeal as provided under Section 29 of the D.V.Act, this Court is of the firm opinion that a petition under Section 482 of Cr.P.C. will not be maintainable without exhausting the statutory appeal or alternative remedy available.

36. Further the Hon'ble Division Bench has also held in paragraph 16(i) as follows:

"16(i).....The nomenclature of the petition makes no difference. The roaster system/portfolio allocation is an Administrative act for the purpose



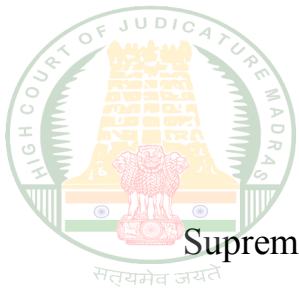
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of convenience and to bring about regularity in distribution of cases. It does not take away the powers inherent in every Judge of this Court. Every Judge irrespective of the portfolio can exercise inherent powers in criminal Cases or powers of superintendence under Article 227 Constitution of India or power to issue Writs under Article 226. When it was the Parliament's intention to confer powers on a Magistrate/ criminal Court to adjudicate Civil rights and confer appellate power to the Court of Sessions, we cannot rule out the Criminal jurisdiction of this Court alone by saying Section 482 of Cr.P.C is inapplicable. It is therefore, the procedure which is more relevant rather than the reliefs sought for the purpose of invoking Section 482 Cr.P.C. We are also of the view that any person aggrieved by an order passed under Section 29 by the Sessions Court can approach this Court under Section 397 Cr.P.C, provided he is able to bring his case within the limited scope of revision under Section 397 of Cr.P.C."

37. I respectfully disagree with the above findings of the Hon'ble Division Bench since it is contrary to the law laid down by the Hon'ble



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Supreme Court in ***State of U.P. Vs. Neeraj Chaubey*** reported in (2010) 10

WEB C SCC 320, wherein it has been held as follows:

“9..... a Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court only if the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from this procedure is permissible.”

38. Similarly, in ***State of Punjab Vs. Davinder Pal Singh Bhullar*** reported in (2011) 14 SCC 770 the Hon’ble Supreme Court has observed as in paras 70, 85 and 106 follows:

“70. In view of the above, the legal regime, in this respect emerges to the effect that the Bench gets jurisdiction from the assignment made by the Chief Justice and the Judge cannot choose as to which matter he should entertain and he cannot entertain a petition in respect of which jurisdiction has not been assigned to him by the Chief Justice as the order passed by the court may be without jurisdiction and make the Judge coram non iudice.



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85....The question does arise as to whether the applications under Section 482 CrPC could be entertained in a disposed of appeal or could be heard by a Bench to which the roster has not been assigned by the Hon'ble the Chief Justice.

106. The order impugned has rightly been challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 CrPC coupled with the principles of constructive res judicata; and the Bench had not been assigned the roster to entertain the petitions under Section 482 CrPC. The entire judicial process appears to have been drowned to achieve a motivated result which we are unable to approve of."

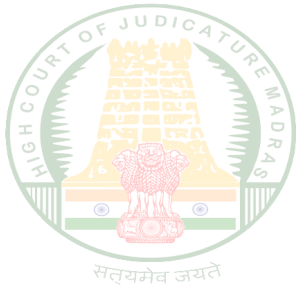
39. In view of the above, the conclusion of the Hon'ble Division Bench in paragraph 16(i) that every Judge, irrespective of portfolio, is entitled to exercise inherent jurisdiction under Article 226 / 227 of the Constitution or Section 482 of Cr.P.C. runs counter to the aforesaid decisions of the Hon'ble Apex Court in *Neeraj Chaubey's case* (cited supra) and *Devinder Pal Singh Bhullar's case* (cited supra).



WEB COPY40. In view of the above discussions and the further fact that effective alternative remedy by way of appeal is provided in the Statute itself, still a petition under Section 482 Cr.P.C. is maintainable is a question to be answered, as the decision of the Hon'ble Division Bench on the applicability of Section 482 of Cr.P.C. / Article 227 of the Constitution appears to run counter to the decisions of the Hon'ble Supreme Court, referred to supra. Therefore, I am of the firm view that the following issues has to be answered by a larger Bench for authoritative pronouncement:

(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 Cr.P.C. ?

(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



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appeal under Section 29 of the D.V.Act ?

Therefore, the Registry is directed to place these matters before My Lord, the Hon'ble The Chief Justice for constituting a Bench of requisite strength to authoritatively decide the above questions.

12.08.2022

Index : Yes / No
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N.SATHISH KUMAR, J.

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