IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 2911 of 2019

Chaitanya Singhania & Anr

-Vs-

Khusboo Singhania

For the Petitioners: Mr. Sabyasachi Banerjee, Adv.
Mr. Anirban Dutta, Adv.
Mr. Abhishek Jain, Adv.

For the Respondent: Mr. Sanjoy Bose, Adv.

Heard on: July 22, 2021.
Judgment on: September 27, 2021.

BIBEK CHAUDHURI, J. : –

1. The question that requires an answer in the instant revision is whether an order passed by the learned magistrate in a proceeding under Section 12 read with Section 23 of the Protection of Women from Domestic Violence act, 2005 (hereinafter described as the said Act) on the point of maintainability of the said proceeding can be quashed under the provisions of Section 482 of the Code of Criminal Procedure (hereafter described as the Code).

2. The above question would have been answered considering the provisions of the said Act and the Code but for the conflicting decisions on

the applicability of section 482 of the Code in a proceeding under the said Act. The Hon'ble Madras High Court in **Dr. P. Pathmanathan v. V. Monica: (2021) 2 CTC 57** pronounced an order on 18th January 2021 holding, inter alia, that the petition under section 482 of the Code is not maintainable. However, the petition under Article 227 of the Constitution is maintainable if it is found that the proceedings before the magistrate suffered from patent lack of jurisdiction. The Jurisdiction under art. 227 is one of superintendence and is visitorial in nature and will not be exercised unless there exist jurisdictional error and that substantial injustice would be caused if the power is not exercised in favour of the petitioner. 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.

3. In short, the Madras High Court said that the relief under the said Act will be granted by a civil or criminal or family court. Further there is no application of service of summons under the said Act upon the respondent as under section 61 of the Code. It also held that an application under section 12 of the said Act is not a complaint under section 2(d)and consequently section 190(1)(a) and sections 200-204 of the Code have no manner of application in such proceeding. Further, there is no concept of an accused but a concept of the respondent in the said Act and finally in absence of the concept of commission of an offence

in the PWDV Act redressal in terms of Section 482 of the Code is not available.

4. It is true that the above-mentioned judgment has no binding force on this court. However, in view of the persuasive nature of the judgment passed by the Hon'ble Single Judge of Madras High Court, this court likes to revisit the issue in order to come to a finding as to whether section 482 of the Code is applicable in relation to an application under section 12 of the said Act.

5. The Protection of Women from Domestic Violence Act, 2005 was enacted to protect women from being victims of domestic violence and to prevent the occurrence of domestic violence in society. The Act is enacted for eliminating all sorts of discrimination against women. It is the bonafide legislation to render justice to the women who suffered domestic violence. The Act states in its preamble:-

> *"An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto."*

6. Section 3 defines Domestic Violence as hereunder:-

> **3. Definition of domestic violence**: For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it
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> (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical

abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

7. Thus Domestic Violence constitutes both a criminal act and civil wrong perpetrated upon a woman who is in a domestic relationship with the respondent. The respondent may be the husband, parents, parents-in-law, maternal or matrimonial relations with whom the woman is in a domestic relationship. It is needless to say that the victim woman is termed as the aggrieved person in the said Act. The phrase 'victims of violence' indicates the incidents of physical harm and injuries caused to the victim. According to **Black's Law Dictionary**, VIOLENCE means '*Unjust or unwarranted* ***exercise of force****, usually with the accompaniment of vehemence, outrage or fury*'.

8. Definition of Domestic Violence is inclusive in nature encompassing "*harm or injuries, endangering the health, safety, life, limb or well being, whether mental or physical*". As provided above, the criminal nature of the specific acts committed by the respondent(s) is to be construed as

domestic violence is crystal clear as it includes bodily injury as well as physical harm. Section 44 of the Indian Penal Code defines injury in the following:

> *'Injury-The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.*

9. Theoretically, there is no difference between domestic assault and non-domestic assault. While the two types of assault are legally identical, they are sociologically distinct. Domestic Violence, perhaps cannot be disputed to be different from most other crimes, at the root of which is the power theory of violence. Domestic Violence is an amalgamation of criminal offence and civil wrongs. A lady at the same time may be treated with cruelty, sexual abuse, or subjected to a criminal offense under Indian Penal Code, POCSO Act, etc. And at the same time coupled with the commission of offence she may be denied of having her stridhan properties, residential rights in the shared household, monetary reliefs, and custody of her children.

10. The said Act speaks of the following reliefs for an aggrieved person:-

i. Protection Orders(Section 18)
ii. Residence Orders (Section 19)
iii. Monetary Reliefs (Section 20)
iv. Custody Orders (Section 21)
v. Compensation Orders (Section 22)

11. Section 23 empowers the Magistrate to grant interim and ex parte orders on the basis of an affidavit of the aggrieved person providing temporary reliefs under section 18-21 of the said Act.

12. Section 27 lays down jurisdiction to adjudicate an application under section 12 of the said Act the provision runs thus:-

> *27. Jurisdiction.—(1) The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which— (a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or (b) the respondent resides or carries on business or is employed; or (c) the cause of action has arisen, shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.*
> *(2) Any order made under this Act shall be enforceable throughout India.*

13. Section 28 speaks of the Procedure stating:-

> 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.

14. The Act also provides the provision of appeal against an order passed by a Judicial Magistrate of First Class or a Metropolitan Magistrate before a Court of Sessions. Non-compliance with an order under sections 18-22, 23, and 29 is an offense under 31 of the Act.

15. The above, being the provision of the said Act, confusion arises in the mind of the court to negotiate the two provisions contained in the said Act, namely Section 26 and Section 28. While the provision of Section 28 prescribes the procedure to be followed in deciding an application under Section 12 read with Section 23 of the said Act, Section 26 states as follows:-

> 26. Relief in other suits and legal proceedings.—(1) Any relief available under sections 18, 19,20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.
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> (2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.
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> (3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

16. If the scheme of the Act is taken into consideration, it would appear that Section 26 is an enabling provision empowering an aggrieved person to seek reliefs under Section 18, 19, 20, 21 and 22 in a pending legal proceeding before a civil court, family court or a criminal court between

the aggrieved person and the respondent. The said provision states that in a suit for restitution of conjugal rights, judicial separation or divorce pending in the civil court or family court an aggrieved person may file an application under Section 12 of the said Act claiming one or different reliefs as provided in Section 18-22 of the said Act. It is needless to say that notwithstanding Section 26 being in the statute book, general provision as to the procedure is laid down in Section 28 of the said Act.

17. There cannot be any dispute that the reliefs under the said Act are civil in nature and protection order, residence order, monetary reliefs, custody order and compensation orders are the reliefs for violation of civil wrong of an aggrieved person by the respondent in course of domestic violence. Since domestic violence infringes several penal provisions and at the same time civil wrongs, an enabling provision has been included in the statute by the parliament while enacting the Act.

18. However, the general provision as to the procedure to be followed for reliefs to be provided to an aggrieved person, Section 28 in unequivocal term states that it shall be governed by the provision of the code of criminal procedure.

19. A distinction is sought to be made by the Higher Judiciary and interpreters of the statutes that Sub-Section (2) of Section 28 speaks of a non-obstante clause empowering the court to lay down its own procedure for disposal of an application under Section 12 or Sub-Section (2) of Section 23 of the said act.

20. In my considered view, Sub-Section (2) of Section 28 cannot be read separately in isolation of Sub-Section (1) of Section 28. The trial court is empowered to lay down its own procedure for disposal of an application under Section 23 but such procedure shall not be dehors the provision of the Code.

21. The Code of Criminal Procedure lays down the procedure for trial of different types of proceedings and cases.

22. Chapter VIII deals with the procedure for passing an order for maintenance of wives, children and parents. Chapter X empowers the Executive Magistrate for maintenance of public order and tranquillity, having three distinct parts namely (A) Unlawful Assembly, (B) Public Nuisance, (C) Urgent Cases of Nuisance and Apprehended Dangers. The Executive Magistrate is empowered to follow the procedure under the Code under Chapter X while passing the order. It is important to note that under Section 142 of the Code of Criminal Procedure the Magistrate is empowered to pass even an order of injunction, which relief is absolutely civil in nature. Apart from the above-stated proceedings, Chapter XVIII delineates the procedure regarding trial of offences before a Court of Session, Chapter XIX lays down the procedure for trial of warrant cases. Chapter XX states the procedure of trial of summons cases and Chapter XXI deals with the procedure of summary trial.

23. Since section 28 of the said Act authorizes application of Code of Criminal procedure so far as the procedure to adjudicate all proceedings under the said Act, it is specifically stated in Rule 6(5) of the Protection of

Women from Domestic Violence Rules, 2006, that the application under Section 12 shall be dealt with or order is enforced in the same manner laid down under section 125 of code of criminal procedure. Section 126 of the Code prescribes the procedure for adjudication of proceeding under section 125 which runs as hereunder:-

> 126. Procedure.—(1) Proceedings under section 125 may be taken against any person in any district—
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> (a) where he is, or
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> (b) where he or his wife resides, or
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> (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.
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> (2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:
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> Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to

such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

24. Within the meaning of Section 2(e) read with Section 6 of the Code, the High Court is the highest appellate court of the State. Section 6 of the Code recognizes the High Court as a criminal court within the meaning of the Code. The High Court is, therefore, a Court created under the Constitution and recognized under the provision of Code. The High Court has therefore to act within the parameter of 'Law'. Being a criminal court, the jurisdiction of the High Court is to determine the existence of a dispute in the nature of domestic violence between the aggrieved person and the respondent. Similarly, the High Court has the jurisdiction to determine the existence of a dispute within the meaning of the said Act while exercising the jurisdiction under Section 482 of the Code when the High Court finds that no dispute between the parties or no offence has been disclosed, it ceases to have its jurisdiction into the matter any further. The High Court is equally bound by the written law like any other ordinary criminal law. The only exception is that the High Court can interpret written law when ordinary criminal courts denude of such power. Nevertheless, the High Court must act within the four corners of the statutory provision. For example, the High Court cannot impose sentences less than the minimum sentence as statutorily provided. Nor

can the High Court waive the requirement of pre-deposit in preferring an appeal/revision in case the pre-deposit is the legislative mandate. Under Section 482 of the Code, the High Court exercises the summary jurisdiction. In **State of Andhra Pradesh vs. S.R Rangadamappa** reported in **AIR 1982 SC 1492** it is held by the Hon'ble Supreme Court that where a minimum sentence is prescribed by the statute without providing for an exception and without conferring any discretion on the ground to award, a sentence below the prescribed minimum is not permissible.

25. In **Ajay Kumar Das vs. State of Jharkhand**, reported **(2011) 12 SCC 319**, the Hon'ble Supreme Court was pleased to observe that the purpose of Section 482 of the Code is to find out the existence of an offence. In such determination, it is the rule that the averments of the complaint are to be treated as the gospel truth. Generally, no defence of the accused, however plausible the same may be, can be considered by the High Court. Hence, in coming to the conclusion regarding the existence of an offence under Section 482 of the Code, the High Court decided everything from the point of view of the complainant or the informant. It is a complainant or informant's centric approach. Since the defence of the accused and his private documents are beyond the scope of consideration of the High Court, therefore, the High Court under Section 482 Cr.P.C. does not adjudicate upon the defence of the accused.

26. The principle set forth in article 482 of the Cr.P.C. based on the maxim "***quando lex aliquid alicui concedit , concedere videtur ed it***

sine quo res ipsae esse non potest", i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable (**Dinesh Dutt Joshi v. State of Rajasthan**, **(2001) 8 SCC 570)**. The concept of inherent powers depends on the distinction between powers expressly set forth in the Constitution or laws and powers vested in the government, constitutional official or individual government official; tacit possession, whether because of the nature of sovereignty or because of the easy reading of the language of the Constitution or statutes. **Black's law dictionary** defines it as "powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from the express grants". **Webster's New World Dictionary** defines inherent power as "a power that must be deemed to exist in order for a particular responsibility to be carried out".

27. Section 482 Cr.P.C. stated three conditions under which the inherent powers may be exercised by the High Court, namely:-

(i) in order to give effect to an order under the Code,
(ii) to prevent abuse of the process of the court; and
(iii) to otherwise secure the ends of justice.

28. The three conditions are mutually not exclusive, rather the application of these conditions would necessarily overlap. For example, preventing the abuse of the process of the court cannot be distinguished as a category different from securing the ends of justice; in fact, preventing such abuse would be with a view to secure the ends of justice only. Likewise to give effect to an order under the code also serves to

secure the ends of justice. It is very clear though, that the ambit of "securing the ends of justice" is a very broad term, broader and inclusive of the first two conditions. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent powers of the court. Undoubtedly the power possessed by the High Court under the said provision is very wide and is not limited in nature. It has to be exercised sparingly, cautiously and carefully, ex debito justitiae to do real and substantive justice for which only the court exists. [**Jefrey J. Deirmeir v. State of W.B., (2010) 6 SCC 243 at 251**].

29. Inherent jurisdiction of High Court is not part of the ordinary litigation process. While exercising powers under section 482, the court does not function as a court of appeal or revision. Appeal and revision processes are creation of statutes and not contemplated to be the part of inherent powers of the court. The High Court while exercising its inherent powers would not enter into the appreciation or re-appreciation of evidence as it done if a case would reach the court by way of a statutory appeal. Again the scope of revision is different from the inherent power of the Court. In revision, jurisdictional error, illegality of an order and material irregularity are the issues. But under the inherent power in the High Court, the Court will see if continuation of a criminal proceeding shall cause abuse of the process of the Court and cause of justice shall be defeated, if the proceeding is allowed to be continued.

30. The orders passed by the High Court in its exercise of inherent powers are not appealable by way of a provision for statutory appeal.

Against the order of High Court the affected party can take up the matter to the Supreme Court by a special leave petition under Article 136 of the Constitution.

31. In **Amit Kapoor v. Ramesh Chander** reported in **(2012) 9 SCC 460**, the Supreme Court held that there may be some overlapping between the power of revision of High Court under section 397 Cr.P.C. and its inherent powers under section 482 Cr.P.C. because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent powers being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of Cr.P.C.

32. In the case of **State of Haryana v. Bhajan Lal** reported in **(1992) Supp (1) SCC 335** the Supreme Court has gathered broad guidelines for the exercise of inherent powers with a view to quash criminal proceedings under section 482 of Cr.P.C. and Article 226/227 of the Constitution from the different legal provisions and the pronouncements made by the courts in India. Identifying those guidelines by way of illustration while saying that an exhaustive list is not possible or desirable, the Supreme Court stated as follows:-

> (i) *Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.*

(ii) *Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(iii) *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

(iv) *Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.*

(v) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

(vi) *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

(vii) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously*

instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

33. In **Pepsi Food v. Special Judicial Magistrate** reported in (**1998) 5 SCC 749**, the Supreme Court held that though the magistrate can discharge the accused at any stage of the trial if he considers the charges to be groundless, this does not mean that the accused cannot approach the High Court under section 482 to have the complaint quashed if the complaint does not disclose the commission of a cognizable offence against the accused person. The Court, therefore, concluded that the order of the High Court refusing to quash the complaint on the ground that alternative remedy was available under the Code to the accused was not proper.

34. I am not unmindful to note, that the above discussion in the foregoing paragraphs is in relation to offence within the meaning of section 2(n) of the Act. Since the said Act clearly states that the Code of Criminal Procedure will apply while adjudicating the dispute under Sections 18 - 22 and 23(2) of the said Act and the applications are to be filed before the court of Ld. Judicial Magistrate of 1st class or the Metropolitan Magistrate. The Protection of Women from Domestic Violence Act, 2005 is predominantly a criminal act.

35. In this regard, I am tempted to record the observation made by this Court in the case of the **Deputy Legal Remembrancer vs. Upendra Kumar Ghose r**eported in **[1907] 12 C.W.N. 140**, wherein it was observed that

the function of the Court is only to expound the law and not to legislate it. "Judicis est jus dicere, non dare" which means it is the proper role of a Judge to state the right, not to endow it. Generally, interpreted it is the duty of the judge to administer justice and not to make law **(Black's Law Dictionary at page 1727)**. In interpreting a statutory provision, a judge can iron out the creases but "must not alter the material of which the act is woven. Therefore in interpreting a statute, a court cannot import any foreign material into it which is not in the Act.

36. The Hon'ble Supreme Court in **Padma Sundara Rao vs. State of T.N** reported in **(2002) 3 SCC 533** was pleased to hold that it is well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statue is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said, "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them'.

37. In **D.R. Venkatchalam v. Dy. Transport Commr [AIR 1977 SC 842]**, it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the

provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

38. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in Narasimhaiah case. In Nanjudaiah case the period was further stretched to have the time period run from date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only clause (i) and/or clause (ii) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent.

39. Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular

provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. “An intention to produce an unreasonable result”, said Danckwerts, L.J., in **Artemiou v. Procopiou [(1965) 3 All ER 539, 544**], “is not to be imputed to a statute if there is some other construction available”. Where to apply words 21 literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result”, we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction. 16. The plea relating to applicability of the stare decisis principles is clearly unacceptable. The decision in K. Chinnathambi Gounder [AIR 1980 Mad 251], was rendered on 22-6-1979 i.e. much prior to the amendment by the 1984 Act. If the legislature intended to give a new lease of life in those cases where the declaration under Section 6 is quashed, there is no reason why it could not have done so by specifically providing for it. The fact that the legislature specifically provided for periods covered by orders of stay or injunction clearly shows that no other period was intended to be excluded and that there is no scope for providing any other period of limitation. The maxim actus curiae neminem gravabit highlighted by the Full Bench of the Madras High Court has no application to the fact situation of this case.

40. Again in **D. M., Aravali Golf Club v. Chander Hass : 2007 (14) SCC 1**, the Supreme Court observed hereunder:-

"18. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain vide Indian Drugs & Pharmaceuticals Ltd. v. The Workman of Indian Drugs & Pharmaceuticals Ltd. (2007)1 SCC 408 and S.C. Chandra v. State of Jharkhand, JT 2007 (10) 4 SC 272.

19. Under our Constitution, the Legislature, Executive and Judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State ' the legislature, the executive and the judiciary ' must have respect for the others and must not encroach into each others domains. 25

21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book The Spirit of Laws) broadly holds the field in India too. In chapter XI of his book 'The Spirit of Laws' Montesquieu writes : "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and

executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." We fully agree with the view expressed above Montesquieu's warning in the passage above quoted is particularly apt and timely for the Indian Judiciary today, since very often it is rightly criticized for 'over-reach' and encroachment into the domain of the other two organs."

22. In **Tata Cellular v. Union of India [AIR 1996 SC 11]**, this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges' preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the field of administration while the Court does not. In the word of Chief Justice Neely: "I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the

intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."

41. The English Law has also enunciated the same principle as narrated above in **Inco Europe Ltd. vs. First Choice Distribution (a firm)** reported in **2000 WLR 586** observed as hereunder:-

"I freely acknowledge that this interpretation of section 18(1)(*g*) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation* , 3rd ed. (1995), pp. 93–105. He comments, at p. 103:

"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course

which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see *per* Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105–106. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to construction of the statute which accords with the intention of the legislature."

42. Section 5 of the Code is saving clause which reads thus:- "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." The interpretation of the word 'affect' came up for consideration before the Division Bench of this Court in **Anand Singh Bisht vs. Union of India** : **1985 (II) CHN 447**. The Division Bench of this Court observed that Section 5 does not provide that if there is a Special Law the Code will not 'apply', but it says that the Code will not 'affect' the Special Law unless there is a specific provision to the contrary. 'Affect' means to produce a material influence upon or alteration in ; to prejudice ; to override. In the context of the plain meaning of the word 'affect' and the interpretation given by the Supreme Court in Section 5 of the Code, in the case of **Maru Ram vs. Union of India** reported in **AIR 1980 SC 2147** in the following words that anatomy of this saving section is simple, yet subtle. Broadly speaking, there are three components to be supported. Firstly, the procedure Code generally governs the matter covered it. Secondly, if a special or local law exists covering the same area, the letter law will be saved and will prevail. Now comes the third component which may be clinching. If there is a specific provision to the contrary then that will override the special or local law.

43. It is needless to say that the Protection of Women from Domestic Violence Act, 2005 is a special law. At the risk of repetition, it is recorded

that Section 28 of the said Act clearly states that all proceedings under Section 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provision of the Code of Criminal Procedure, 1973. Thus, when the Special Act clearly lays down the procedure of trial of the proceedings under the said Act, there is absolutely no reason to apply any other procedure. The only exception being in Section 26 of the said Act is where a civil suit is pending between the parties, the aggrieved person can pray for relief under Section 18-23 in the said suit.

44. It will not be out of place to mention at this stage that the Hon'ble Supreme Court in **Savitri vs. Govind Singh Rawat : (1985) 4 SCC 337** and **Vijay Kumar Prasad vs. State of Bihar : (2004) 5 SCC 196** held that proceedings under Section 125 of the Code are quasi civil in nature. In **Sanjeev Kapoor vs. Chandana Kapoor and Ors** reported in **AIR 2020 SC 1046**, the Apex Court held that a petition under Section 482 is maintainable against any order given under Section 125.

45. In **Rafiq Ahmedbhai Paniwala vs. State of Gujrat : (2019) 5 SCC 464**, it is held by the Hon'ble Supreme Court that an order passed by the Executive Magistrate under Section 131 can be quashed by the High Court under Section 482 of the Code. The orders of Executive Magistrate in cases of Public Nuisance under Section 132-143 of the Code, though being quasi criminal, can be quashed by the High Court under Section 482 of the Code. Decision of the Allahabad High Court in **L.J Bhatthi vs. The State of U.P & Ors : (2014) 1 ALL LJ 527** may be relied on in this regard.

46. In **Kanak Deka and R.M Deka vs. State of Assam : (2012) 5 Gau Lr 415**, an order under Section 145-148 can be assailed under the provision of Section 482 of the Code.

47. Similarly, there is no bar in invoking Section 482 in the cases under Protection of Women against Domestic Violence Act, 2005. In **Suresh Ahirwar vs. Priya Ahirwar** [M. Cr. C No.22777/2017], vide order dated 11th November, 2018, the Madhya Pradesh High Court quashed a proceeding under Section 482 of the Code where aggrieved person impleaded some persons as respondents in a proceeding under Section 12 of the said Act with whom she had no domestic relationship.

48. This being the interpretation of the statute, a court of the Judicial Magistrate or the Metropolitan Magistrate cannot pass any order in a proceeding under Section 125 of the Code or under the provision of Protection of Women against Domestic Violence where there is no relation or domestic relation exists between the parties. For example, an order of maintenance cannot be passed against a stranger. Similarly, an order of residence under Section 19 of the said Act cannot be passed against a landlord under the instance of an aggrieved person. Even a residence order cannot be passed against the father-in-law of the aggrieved person if the residence is not a shared household of the respondent along with his father (**See Satish Chander Ahuja Vs. Sneha Ahuja** reported in **(2021) 1 SCC 414**). If such application is filed by an aggrieved person, will it be a logical proposition that the respondent will not be able to nip the proceedings in bud without waiting for a prolonged trial or otherwise wait

for a considerable period till the disposal of trial? My considered reply is - such questions affecting the maintainability of the procedure itself can be decided by this Court under Section 482 of the Code of Criminal Procedure.

49. A similar view was taken by the Delhi High Court in **Bijoy Verma Vs. State (NCT Delhi)** reported in **ILR 2011 Del 36**, by Rajasthan High Court in **Nisanth Hussain Vs. Sima Saddique (2012) SCC Online Raj 2873,** by Karnataka High Court in **Smt. Nagarthama Vs. M.S. Valithasharee (2016) SCC Online Kar 1437, Avinash Madhav Deshpande & Ors. vs. Madhuri Satish Deshpande & Ors. 2018 SCC online Bom 17170.**

50. The next point for adjudication is as to whether an appeal under Section 29 shall lie against an order passed by the learned Judicial Magistrate or Metropolitan Magistrate upon an application filed by the respondent(s) challenging maintainability of the application under Section 12 of the said Act. There is again divergent opinion of different High Courts. It is, however pertinent to note that difference of opinion arose on the question as to whether 'any' order passed by the learned Magistrate on an application under Section 12 of the said Act is appealable or an order adjudicating the right to relief under Sections 18-22 and 23 is appealable. In Avijit Bhikaseth vs. State of Maharashtra : 2009 Cr.L.J 889 (Bom), the scope of appeal has been formulated as under:

(i) An appeal will lie under Section 29 of the said Act against the final order passed by the Magistrate under Sub-Section (1) of Section 12 of the said Act.

(ii) Under Sub-Section (2) of Section 23 of the said Act, the Magistrate is empowered to grant an ex-parte relief in terms of Sections 18-22 of the said Act. The power under Sub-Section (1) is a granting interim relief in terms of Section 18-22 of the said Act. Before granting an interim relief, under Sub-Section (1), an opportunity of being heard is required to be granted to the respondent.

(iii) An appeal will also lie against orders passed under Sub-section (1) and Sub-Section (2) of Section 23 of the said Act which are passed by the magistrate. However, while dealing with an appeal against the order passed under Section 23 of the said Act, the appellate court will usually not interfere with the exercise of discretion by the Magistrate. The appellate court will interfere only if it is found that the discretion has been exercised arbitrarily, expressly, perversely or if it is found that the court has ignored settled principles of law regulating grant or refusal of interim relief.

51. Therefore, an interlocutory order passed in a proceeding under Section 12 of the said Act, like that of issuance of notice upon the

respondents, summoning of witnesses, personal appearance of the respondent etc are not appealable under Section 29 of the said act.

52. The order on an application challenging maintainability of a proceeding under Section 12 of the said Act by the respondent or any of them is final in nature because if the learned Magistrate allows the application, it would mean dismissal of the application under Section 12 of the said Act by the aggrieved person. On the other hand, if such an application challenging maintainability is dismissed, rights of the respondents are affected. Therefore an order passed by learned Magistrate upon an application challenging maintainability of the proceeding under Section 12 of the said Act is, in my considered view, appealable under Section 29 of the Act. An aggrieved party may challenge the order of the court of appeal under Section 29 of the said Act in revision under Section 397 read with Section 401 of the Code.

53. A respondent can challenge maintainability of a proceeding under Section 12 of said Act without filling any such application before the learned Magistrate, in the High Court invoking its inherent jurisdiction under Section 482 of the Code. In other words, in order to invoke section 482 of the Code, it is not required as a precondition that the respondent shall have to file an application challenging maintainability of the proceeding before a learned Magistrate and then appeal and finally an application under Section 482 of the Code.

54. In view of the legal provisions and statutory right of revision, appeal etc contained in the said Act as well as the Code, invocation of Article 227

of the Constitution is illusory because of the existence of specific alternative remedy provided by the said Act and Code. The decision of the Hon'ble Supreme Court in **D.N Bhattacharjee v. State of W.B** reported in **(1972) 3 SCC 424** may be relied on this regard.

55. For the reasons stated above let me summarize the findings herein below:-

(i) Respondent(s) can challenge maintainability of an application under Section 12 of the said Act filled by the aggrieved person before the Court of the learned Magistrate immediately after appearance in the proceeding by filing appropriate petition.

(ii) The Learned Magistrate shall dispose of such application challenging maintainability of the proceeding under Section 12 of the said Act after giving the opportunity of being heard to the aggrieved person. An aggrieved party may file an appeal under Section 29 of the said Act against the order passed by the learned Magistrate under the provision of Section 29 of the said Act before the learned sessions judge.

(iii) Against the order passed by the court of appeal, a revision under Section 397 read with Section 401 of the Code shall lie.

(iv) Alternatively, a respondent may file an application under Section 482 of the Code of Criminal Procedure challenging maintainability of a proceeding under Section 482 of the Code for quashing of the proceedings immediately on receipt of notice before the High Court.

(v) An order upon an application challenging maintainability under Section 12 of the said Act shall not be assailed under Article 227 of the constitution.

56. In view of the above discussion, with all humility, I respectfully differ from the decision of the Hon'ble Single Judge of the Madras High Court in **Dr. P. Pathmanathan v. V. Monica: (2021) 2 CTC 57.**

57. Coming to the instant case, it is necessary to narrate in brief the factual situation involved:-

> The aggrieved person, the opposite party herein is the wife of one Pravin Sighania, son of the present petitioner. Their marriage was solemnized in 26th June, 2004 and in the said wedlock the opposite party gave birth to a child on 8th December, 2005. It is alleged that the aggrieved person was abused by her husband and the parents-in-law (petitioners herein) and was finally driven out from her matrimonial home on 20th January, 2014 as she could not fulfill the demand of dowry of the petitioners and their son. It is also alleged that after marriage the petitioners compelled the opposite party to handover of her all stridhan articles. The said stridhan articles are in the custody of the petitioners. Allegations were also made against the son of the petitioners that he openly stated to the opposite party that he would completely abandon her and remarry. She also filed a written complaint

before the police on the basis of which Phulbhagan P.S Case No.116 of 2017 dated 20th August, 2017 under Section 498A/406/34 of the Dowry Prohibition Act was initiated against the petitioners and their son.

58. In the said proceedings under Section 12 of the said Act the petitioners and their son filled an application challenging maintainability of the said proceedings stating, inter alia, that the petitioner has simultaneously moved two forums claiming for identical relief of maintenance, one before the learned Additional Chief Judicial Magistrate, Bidhannagar by filling an application under Section 125 of the code, which was registered as M-22 of 2017 and the proceeding under the Domestic Violence Act. According to the respondents/petitioners the petitioner/ opposite party cannot claim identical reliefs in two forums on the selfsame cause of action and continuation of the proceeding under the Domestic Violence Act shall cause double jeopardy.

59. The said application was disposed off by the learned Judicial Magistrate, Bidhannagar by rejecting the same.

60. The said order of rejection of the petition challenging maintainability of proceeding under Section 12 of the said Act is assailed in the instant Criminal Revision under Section 401 read with Section 482 read with Section 397 of the Code.

61. Without going into the merit of the instant revisional application, I would like to record that I have already held that an order allowing or rejecting an application for maintainability of a proceeding under Section

12 of the said Act is final in nature affecting the rights and/or liabilities of the parties in relation to the question as to whether the aggrieved person is entitled to get relief under Section 18-22 and Section 23(2) of the said Act.

62. In view of my specific finding made herein above, the impugned order is made appealable under Section 29 of the said Act.

63. For the reasons recorded, I don't find any merit in the instant criminal revision.

64. However the petitioners are given liberty to file an appeal before the learned court of sessions subject to the Law of Limitation and while computing the period of limitation, the period from the date of institution of the instant proceeding and date of passing of the order shall be excluded.

65. The instant criminal revision is thus disposed of on contest, however without cost.

(Bibek Chaudhuri, J.)