

S vs.j

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Court : Delhi

Decided On : Apr-17-2018

Appellant : S

Respondent : J

Judgement :

\$~ * % + IN THE HIGH COURT OF DELHI AT NEW DELHI CM(M) 750/2017 & CM No.25674/2017 Date of Decision:

17. h April, 2018 S J

... Petitioner

Through: Mr. Tanmaya Mehta and Mr. Anunaya Mehta, Advocates. versus

Through: In person Respondent CORAM: HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1 Following important questions of law have arisen for consideration in this petition:-

"I. What is the nature of proceedings under Section 26 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as D.V. Act) ?. II. What procedure is to be followed by the Court in adjudicating an application under Section 26 of the D.V. Act ?. III. Whether the Court is bound to follow Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) to adjudicate an

application under Section 26 of the D.V. Act ?.

2. The petitioner has challenged the order dated 28th March, 2017 whereby the Family Court dismissed the petitioners application under CM(M) 750/2017 Page 1 of 33 Order XIV Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as C.P.C.) for framing of additional issues.

3. Brief Facts 3.1. On 10th April, 2013, the petitioner instituted a petition for dissolution of marriage on the ground of cruelty under Section 13(1) (ia) of the Hindu Marriage Act, 1955. Along with the aforesaid petition, the petitioner filed an application under Section 26 of D.V.Act seeking reliefs under Sections 18, 19, 20, 21 and 22 of the D.V. Act. 3.2. On 27th March, 2015, the Family Court framed the following issues: a) Whether the petitioner was treated with cruelty by the respondent after solemnization of marriage?. (OPP) Relief?. b) 3.3. On 27th October, 2016, the petitioner filed an application under Order XIV Rule 5 of the C.P.C. for framing of following additional issues with respect to the reliefs sought by the petitioner in the application under Section 26 of the D.V. Act: i. Whether the petitioner is entitled to a Protection Order under Section 18 of the Domestic Violence Act?. (OPP) ii. Whether the petitioner is entitled to a Residence Order under Section 19 of the Domestic Violence Act?. (OPP) iii. Whether the petitioner is entitled to Monetary Relief under Section 20 of the Domestic Violence Act?. (OPP) iv. Whether the petitioner is entitled to an Order under Section 21 of the Domestic Violence Act?. (OPP) v. Whether the petitioner is entitled to an Order under Section 22 of the Domestic Violence Act?. (OPP) CM(M) 750/2017 Page 2 of 33 3.4. On 28th March, 2017, the Family Court dismissed the application on the ground that the proceedings under Section 26 of the D.V. Act shall be governed by Cr.P.C. which does not provide for framing of issues and therefore, the additional issues cannot be framed. The relevant portion of the order dated 28th March, 2017 is reproduced hereunder: The issue 6.1 Nonetheless, the reliefs sought by way of application cannot be said to be reliefs sought in the main petition. requiring adjudication in the main petition u/sec. 13(1)(i-a) of the HMA is whether the conduct of the respondent had been cruel towards the petitioner; so as to entitle her to seek dissolution of marriage. 6.2 Further, a study of provisions of PW D.V. Act reveal that the proceedings shall be governed by procedures of Cr.PC. This

has been so stipulated u/sec. 28 of the PW D.V. Act. Needless to say Code of Criminal Procedure does not provide for framing of issues, therefore, this Court is of the opinion that additional issues sought to be framed cannot be framed in the petition under Section 13(1)(i-a) of the HMA.

... Petitioner

shall, however, be within her rights to seek the aforesaid reliefs, which she has agitated in her application u/sec. 26 of the HMA. The application is accordingly dismissed. therefore, meritless and 7. is, 4.

... Petitioner

s contentions (Emphasis Supplied) The reliefs under the D.V.Act can be sought in pending legal proceedings before the Family Court under Section 26 of the Act and Section 28 empowers the Court to lay down its own procedure for disposal of an application under the D.V. Act. In that view of the CM(M) 750/2017 Page 3 of 33 matter, it is not mandatory for the Family Court to follow Cr.P.C. Reliance is placed on Shambhu Prasad Singh v. Manjari, 2012 (190) DLT647(DB), Rattan Deep v. Susha, 2016 (2) RCR (Civil) 798 (Delhi), and Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey, 2010 (5) RCR (Civil) 151.

5. Respondents contentions The Family Court has no jurisdiction to entertain and try the petitioners application under the D.V. Act. The petitioners application under D.V. Act is liable to be dismissed for want of jurisdiction and no issues can be framed. The Family Court has rightly dismissed the petitioners application. Reliance is placed on Capt. C.V.S. Ravi v. Ratna Sailaja, 2009(1) MWN (Cr.) 472, M.A.Mony v. M.P. Leelamma, 2007 Cr LJ2604 Neetu Singh v. Sunil Singh, AIR2008 Chh 1, Nandkishor v. Kavita Criminal Application No.2970/2008 decided by Bombay High Court on 5th August, 2009, Dr. Preceline George v. State of Kerala, (2010) 1 KLT454and Shalu Ojha v. Prashant Ojha, (2015) 2 SCC99 6. 6.1.

... Petitioner

s response to the judgments cited by the respondent In Capt. C.V.S. Ravi v. Ratna Sailaja, 2009 (1) MWN (Cr.) 472, relied upon by the respondent, the husband sought transfer of the wifes application under Section 12 of the D.V. Act pending before the Magistrate to the Family Court. The Madras High Court held that though

the reliefs available under Sections 18 to 22 of D.V. Act may be claimed in any proceedings before the Family Court but the pending application before the Magistrate under Section 12 cannot be transferred to the Family Court. This judgement is not relevant as the CM(M) 750/2017 Page 4 of 33 present case does not relate to transfer of an application from the Magistrate to the Family Court. 6.2. In *M.A.Mony v. M.P. Leelamma*, 2007 Cr LJ2604 the husband sought transfer of the wife's application under Section 12 of the D.V. Act pending before the Magistrate to the Family Court where the divorce case was pending. The Kerala High Court rejected the prayer for transfer of the petition. This judgement is not relevant as the present case does not relate to transfer of an application from the Magistrate to the Family Court. 6.3. In *Neetu Singh v. Sunil Singh*, AIR2008 Chh 1, the wife filed an application under Section 12 of the D.V. Act before the Family Court which was returned to be filed before the Competent Court. The Chhattisgarh High Court upheld the order holding that the application under Section 12 of the D.V. Act can be entertained only by the Magistrate having jurisdiction whereas the Family Court is competent to entertain an application under Section 26 in a pending matter. This judgment does not help the respondent as the petitioner has filed the application under Section 26 of the D.V. Act before the Family Court in a pending divorce petition. 6.4. In *Nandkishor v. Kavita* Criminal Application No.2970/2008 decided by Bombay High Court on 5th August, 2009, the husband challenged the order passed by the Magistrate under Section 23 of the D.V. Act without calling for the report from the protection officer. Bombay High Court dismissed the petition holding that it is not mandatory to obtain the report from the protection officer. This judgment has no relevance to the present case. CM(M) 750/2017 Page 5 of 33 6.5. In *Dr. Preceline George v. State of Kerala*, (2010) 1 KLT454 the husband challenged the ex parte interim order passed by the Magistrate under Section 23 of the D.V. Act in an application under Section 12 of the D.V. Act. The Kerala High Court laid down the guidelines for the Trial Courts which have no relevance to the present case. 6.6. In *Shalu Ojha v. Prashant Ojha*, (2015) 2 SCC99 the Supreme Court dealt with the power of the Sessions Court to dismiss the husband's appeal on the ground of not making the payment in terms of the conditional interim order. This judgment is not relevant to the facts of the present case.

7. Relevant portions of the Protection of Women from Domestic Violence Act, 2005 7.1. Statement of Objects and Reasons of the D.V. Act The Protection of Women from Domestic Violence Act, 2005 was enacted on 13th September, 2005 and came into force on 26th October, 2006. The Statement Objects and Reasons of the Act record that the civil law does not address the phenomenon of domestic violence and therefore, a law be enacted to provide a remedy in civil law for protection of women from being victims of domestic violence. The relevant portion of the Statement of Objects and Reasons is reproduced hereunder:-

"INTRODUCTION The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women has its General Recommendations in CM(M) 750/2017 Page 6 of 33 recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain. The civil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society the Protection of Women from Domestic Violence Bill was introduced in the Parliament. STATEMENT OF OBJECT AND REASONS Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (C E D A W) in it's General Recommendation No.XII has recommended that State Parties should act to protect women against violence of any kind especially that occulting within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of IPC.

The Civil Law does not however address this phenomenon in its entirety.

3. It, is therefore, proposed to enact a law keeping in view of the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the Civil Law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society... (1989) (Emphasis Supplied) CM(M) 750/2017 Page 7 of 33 7.2. Civil rights under the D.V. Act Sections 17 to 23 of the D.V. Act enumerate following civil rights:-

"- Right to reside in a shared household under Section 17.-. Protection orders under Section 18.-. Residence orders under Section 19.-. Monetary reliefs under Section 20.-. Custody orders under Section 21.-. Compensation orders under Section 22.-. Interim orders under Section 23. 7.3. Procedure for seeking relief under D.V.Act Section 12 of the D.V. Act empowers an aggrieved person to approach the Magistrate to seek any of the reliefs mentioned under Sections 17 to 23 of the Act. Section 12 of the D.V. Act is reproduced hereunder: Section 12. Application to Magistrate.- (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. (2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off. (3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto. (4)

The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court. (5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing. 7.4. Jurisdiction of the Civil Court, Family Court and Criminal Court to grant relief in pending suits and other legal proceedings If any suit or legal proceedings are pending before any Civil Court, Family Court or Criminal Court, affecting aggrieved party, Section 26 empowers the aggrieved person to approach such Court for the relief under Sections 18 to 22 of the D.V. Act. Section 26 of the D.V. Act is reproduced hereunder: in other suits and legal initiated before or after Section 26. Relief 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 the commencement of this Act. (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. (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. (Emphasis Supplied) CM(M) 750/2017 Page 9 of 33 7.5. Procedure to be followed by the Court Section 28(2) of the D.V. Act provides that the Court can formulate its own procedure for disposal of an application under Section 12 of the D.V. Act and it is not bound to follow the Cr.P.C. Section 28 of the D.V. Act is reproduced hereunder:-

"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). (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. (Emphasis Supplied) 7.6. D.V. Act not in derogation of any other law Section 36 of the D.V. Act provides that the provisions of the Act are in addition to and not in derogation of any other law which means that in addition to D.V. Act, various other provisions under the general laws as well as specific statutes can be invoked by the aggrieved person. Section 36 of the D.V.

Act is reproduced hereunder:-

"Section 36. Act not in derogation of any other law.- The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force. Relevant judgments 8. 8.1. In Indra Sarma v. V.K.V. Sarma 2013 (14) SCALE448 the Supreme Court examined the scope of D.V. Act and held that D.V. Act was enacted to provide a remedy in civil law for protection of women from being victims of domestic violence. The Supreme Court CM(M) 750/2017 Page 10 of 33 observed that the reliefs under Sections 18 to 22 can be sought in any legal proceedings pendings before a Civil Court, a Family Court or a Criminal Court. Relevant portion of the said judgment is reproduced hereunder: 14. The D.V. Act has been enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The D.V. Act has been enacted also to provide an effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family. xxx xxx xxx 17. Section 26 of the D.V. Act provides that 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. Further, any relief referred to above may be sought for in addition to and along with any other reliefs that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. Further, if 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. (Emphasis Supplied) 8.2. In Kunapareddy v. Kunapareddy Swarna Kumari (2016) 11 SCC774 the Supreme Court considered the nature of proceedings under the D.V. Act and held that Section 28(2) of the D.V. Act empowers the Court to lay down its own procedure and the Magistrate CM(M) 750/2017 Page 11 of 33 dealing with the D.V. Act is empowered to allow the amendment of the application. Relevant portion of the said judgment is reproduced hereunder:-

"Whereas proceedings under certain sections of the D.V. Act as specified in sub-Section (1) of Section 28 are to be governed by the Code, the Legislature at the

same time incorporated the provisions like sub - Section (2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the D.V. Act. This provision has been incorporated by the Legislature keeping a definite purpose in mind. (Emphasis Supplied) 8.3. In *Shambhu Prasad Singh v. Manjari* 2012 (190) DLT647 relied upon by the petitioner, the Division Bench of this Court held that the Magistrate is not obliged to call for and consider DIR before issuing notice to the respondent in proceedings under Section 12 of the D.V. Act. In para-9 of the judgment, the Division Bench observed that the woman exposed to domestic violence is entitled to move to the Court in pending proceedings such as divorce and maintenance etc. Relevant portion of the said judgment is reproduced hereunder:-

"9. The basic objective in enacting the Act is to secure various rights to a woman living in matrimony or in a relationship akin to matrimony, or any domestic relationship. Domestic violence, is, per se, not a criminal offence but is defined extensively and comprehensively to include various conditions. The woman exposed to such domestic violence is given the right to move to Court for any of the reliefs outlined in Section 12 through either a comprehensive proceeding, claiming maintenance, right to residence, compensation etc. or even move to Court seized of any other pending CM(M) 750/2017 Page 12 of 33 in to residence proceeding, such as divorce and maintenance etc. (Section 26). Section 17 has, for the first time, enacted a right favor of such women. The Act being a beneficial one, the Court should adopt a construction to its provisions which advances the parliamentary intention rather than confining it. If the latter course is adopted the result would be to defeat the object of the law. As noticed earlier, domestic violence is per se not an offence but its incidence or occurrence enables a woman to approach the Court for more than one relief. The Court is empowered to grant ex-parte relief and ensure its compliance, including by directing the police authorities the order, particularly those relating to residence etc. If such an order is violated by the respondent (a term defined in the widest possible terms, to include female relatives of the husband or the male partner etc), such action would constitute a punishable offence, which can be tried in a summary manner under Section 31 of the Act. to implement (Emphasis Supplied) 8.4. In *Nidhi Kaushik v. Union of India*, (2013) 203 DLT722 the Division Bench of this Court (in which I was

one of the member) examined the nature of proceedings under the D.V. Act. This Court held that the reliefs under Sections 18 to 22 of the D.V. Act can be sought in a Civil Court, a Family Court or a Criminal Court and the concerned Court can formulate its own procedure under Section 28(2) of the D.V. Act. Relevant portion of the said judgment is reproduced hereunder:-

"19. Nature of proceedings under D.V. Act D.V. Act was enacted to provide a remedy in 19.1 civil law for the protection of woman from being victims of the domestic violence as noted in the Statement of Object and Reasons. CM(M) 750/2017 Page 13 of 33 to pass appropriate orders 19.2 The object of the D.V. Act appears to be that Section 498A IPC dealing with the cruelty to the women is not an appropriate remedy because with the arrest of the husband and his family members, leads to such acrimony that it becomes difficult for the parties to live together again. Secondly, there was no provision to protect the women from further cruelty and to protect her being outstayed from matrimonial home. D.V. Act empowers the Magistrate to pass a protection order and appoint a protection officer to protect the women from further violence. The Magistrate is also empowered to pass an injunction order to restrain the women from being thrown out from her matrimonial home. The Magistrate is also empowered for maintenance and compensation to the women. In proceedings under Section 12 of the D.V. Act, the Magistrate is empowered to award the reliefs under Sections 8 to 23 of the Act. Since the proceedings under Section 12 of the D.V. Act are civil in nature, it does not aggravate the situation which happens with the arrest of the husband and his family members under Section 498A IPC. The breach of the protection order under Section 18 amounts to an offence under Section 31 of the D.V. Act. However, if there is no breach of the protection order under Section 18, the proceedings remain civil in nature. 19.3 The proceedings under Sections 12 and 18 to 23 of D.V. Act are purely civil in nature. The reliefs under Sections 18 to 22 of the D.V. Act can be sought in the Civil Court, Family Court or Criminal Court as they are civil in nature and have nothing to do with the conviction for any offence as provided in Section 26(1) of D.V. Act. 19.4 The Court dealing with proceedings under Sections 12, 18 to 23 can formulate its own procedure under Section 28(2) of the D.V. Act. Thus, any departure from the provisions of Code of Criminal CM(M) 750/2017 Page 14 of 33 Procedure does not vitiate the

proceedings initiated under Section 12. xxx xxx xxx Section 31 of the Act provides 19.9 for punishment only if a person commits breach of protection order passed under Section 18 or an order of interim protection passed under Section 23 of the Act. Thus, commission of acts of domestic violence by themselves do not constitute any offence punishable under the Act and it is only the breach of the order passed by the Magistrate either under Section 18 or under Section 23 of the Act which has been made punishable under Section 31 of the Act. No criminal liability is thus incurred by a person under this Act merely on account of his indulging into acts of domestic violence or depriving a woman from use of the shared household. It is only the reach of the orders passed under Sections 18 and 23 of the Act, which has been made punishable. (Emphasis Supplied) 8.5. In *Rattan Deep v. Sushma* 2016 (2) RCR (Civil) 798 (Delhi), the Division Bench of this Court held that reliefs under Sections 18 to 22 of the D.V. Act can be sought in any legal proceedings before a Civil Court, a Family Court or a Criminal Court. Relevant portion of the said judgment is reproduced hereunder:-

"Under Section 26 of the P.W.D.V. Act, 2005, it was open to the respondent to seek any relief available under Sections 18 to 22 of the enactment in any legal proceeding before a Civil Court, Family Court or a Criminal Court affecting the aggrieved person and the respondent. (Emphasis Supplied) 8.6. In *Bipin Prataprai Bhatt v. Union of India* (2010) 3 GLH276 the husband challenged the constitutional validity of Section 26(1) of CM(M) 750/2017 Page 15 of 33 the D.V. Act on the ground that it is violative of Article 20(1) of the Constitution. The Division Bench of Gujarat High Court dismissed the petition holding that the proceedings under Sections 18 to 22 of the D.V. Act are civil in nature and have nothing to do with the conviction for any offence. Article 20(1) is attracted only in matter of conviction for any offence and it does not relate to a civil relief which may be granted without any conviction. The Court further held that the reliefs under Sections 18 to 22 of the D.V. Act can be sought even from a Civil Court as provided in Section 26 as the reliefs are civil in nature. The relevant portion of the said judgment is reproduced hereunder: 9. From Sec.26(1) of Domestic Violence Act, it will be evident that the aggrieved person can ask for relief in other suits and legal proceedings as available u/Secs. 18, 19, 20, 21 and 22 of the said Act. Sec. 18 empowers the Magistrate to pass a protection order prohibiting respondents from committing any

act of domestic violence, aiding or abetting in the commission of acts of domestic violence, entering a place of employment of the aggrieved person, etc. Under Sec.19, the Magistrate, on being satisfied that domestic violence has taken place, may pass a residence order restraining the respondents from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, irrespective of legal or equitable interest of women in the shared household, etc. Sec. 20 deals with monetary reliefs which empowers the Magistrate to direct the respondents to pay to the aggrieved women to meet the expenses incurred and losses suffered by aggrieved person and any child of the aggrieved person as a result of the domestic violence. CM(M) 750/2017 Page 16 of 33 Under Sec.21, the custody order of the child or children of the aggrieved person or the person making an application on her behalf can be passed by a Magistrate. Under Sec.22, the Court is also empowered to pay compensation.

10. Sec.23 empowers the Magistrate to grant interim and ex-parte orders; including the power vested u/Secs. 18, 19, 20, 21 and 22 of the Domestic Violence Act. All the aforesaid reliefs can be granted under other suits and legal proceedings in view of Sec.26 of the Domestic Violence Act, relevant portion of which is quoted hereunder: xxx xxx xxx From the aforesaid provisions of Domestic Violence Act, it will be evident that the reliefs granted are civil in nature and have nothing to do with the conviction for any offence. From the aforesaid provisions, it will be evident that Art.20(1) is attracted only in the matter of conviction for any offence and it do not relate to civil relief as may be granted without any conviction.

11. As it will be evident that Secs. 18 to 22 of the Domestic Violence Act relate to relief, which can be sought for even from civil court and they are civil in nature, the petitioner cannot derive the advantage of Art.20(1) of the Constitution to challenge the validity of Sec.26 of the Domestic Violence Act. (Emphasis Supplied) 8.7. In *Jaydipsinh Prabhatsinh Jhala v. State of Gujarat*, 2010 CriLJ2462 the Gujarat High Court considered the question as to whether the proceedings under D.V. Act are of criminal nature and whether the Magistrate has the power to recall the summons issued to the respondent. The Gujarat High Court held that the Magistrate is empowered to recall the summons in view of Section 28(2) of the D.V. Act which empowers the Court to lay down its own procedure. CM(M)

750/2017 Page 17 of 33 Relevant portion of the said judgment is reproduced hereunder. 2.1 Second question is the nature of proceedings that the Magistrates conduct under the procedure that has to be adopted for the same. In other words, question is whether the proceedings under the Act are strictly of criminal nature..... the Act and xxx xxx xxx 10. For the purpose of securing justice to such oppressed women, who complain of domestic violence, wide powers are given to the Magistrate permitting him to pass appropriate orders, which the Magistrate can pass in an application under sub-section (1) of section 12 of the said Act. Said powers include passing an order for residence to an aggrieved person or even removing the respondent from the shared household. Such powers include grant of monetary relief and compensation, powers of handing over the custody of children to the aggrieved person. The Act specifically empowers the Magistrate to pass such orders by way of interim direction or even ex-parte interim orders. Section 26 of the Act as already noted permits the Civil Court, Family Court or Criminal Court, where any legal proceeding are pending to grant any of the reliefs available under Sections 18 to 22 of the said Act. Though Section 28 of the Act provides that all proceeding under Sections 12 and 18 to 23 and for the offence under Section 31 of the said Act shall be governed by the provisions of the code of criminal procedure, 1973, sub-section (2) of section 28 clearly provides that nothing contained 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 of the said Act. In other words, though procedure to be followed in the said proceedings is that provided under the Code of Criminal Procedure, the Magistrate can still lay down his own procedure while dealing with the applications under sub-section (1) of section 12 or while considering CM(M) 750/2017 Page 18 of 33 grant of interim or ex-parte ad-interim relief orders under sub-section (2) of Section 23 of the Act. Thus whole purpose of this legislation appears to be to provide for a smooth machinery to ensure justice to oppressed women by cutting through legal red-tapism and passing such orders as may be found necessary in the interest of justice in the facts of the case. xxx xxx xxx 20. In so far as the second question is concerned, introduction to the objects and reasons provides that in order to provide a remedy in civil law, Bill is introduced in the Parliament. Again in Para Nos.2 & 3 of the objects and reasons also, it is

stated that existing civil law does not address to the phenomenon of domestic violence and, therefore, to provide a remedy under civil law to protect a woman from being victim of domestic violence, the Bill is introduced. Predominantly thus aim of the legislature is to provide civil remedies to a woman who is subjected to domestic violence.

21. Apart from the statement of objects and reasons even the different provisions contained in the Act make it clear that predominantly the rights and remedies created under the Act are in the nature of civil rights. Barring Sections 31 and 33, which provide for penalty for breach of protection order and Protection Officer not discharging his duties respectively, there are no other penal provisions in the Act. On the other hand, the act provides for remedies to a woman subjected to domestic violence, empowers the Magistrate to pass variety of orders to make such remedies effective. All these proceedings are in the nature of civil remedy.

22. It is true that the procedure to be adopted by the Magistrate while dealing with the application under Section 12 of the Act and other provisions are governed by the provisions of the Code of Criminal Procedure as provided under sub-section (1) of section 28 of the Act. However, under sub-section (2) of Section 28 of the Act, it is clarified that the Magistrate while disposing of the CM(M) 750/2017 Page 19 of 33 application under Section 12 of the Act or under sub- section (2) of Section 23 of the Act may also lay down his own procedure for disposal.

23. In view of the nature of the proceedings before the Magistrate and in view of the procedural flexibility provided by the legislature to the Magistrate in deciding the applications under Section 12(1) of the Act, it cannot be stated that the Magistrate is bound by the straight jacket formula or procedure laid down under the Code of Criminal Procedure. In a given case, it would be open for the Magistrate to make deviation therefrom as may be found necessary in the interest of justice. (Emphasis Supplied) 8.8. In *Vijaya Baskar v. Suganya Devi*, MANU/TN/3477/2010 the Madras High Court examined the scope of D.V. Act and held that the term civil law used in the Statement of Object and Reasons of the Act is not an empty formality and would exemplify and demonstrate that the proceedings in the first instance should be civil in nature. The legislature was

conscious of the fact that the enforcement of a criminal law on the husband and relatives would have deleterious effect in the matrimonial relationship. The object of the D.V. Act is that the victim lady should be enabled by law to live in a family atmosphere at her matrimonial house. It is not the intention of the said enactment to enable the lady to get snapped once and for all her relationship with her husband or the husband's family and for that, civil law and civil remedies are most efficacious and appropriate. The High Court referred to Rule 6(5) of the D.V. Rules which provides that the application under Section 12 shall be dealt with and enforced in the same manner as laid down in Section 125 Cr.P.C. The Court further CM(M) 750/2017 Page 20 of 33 observed that the violation of protection orders would constitute an offence under Section 31 and Section 32 of the D.V. Act which provides that such violation would amount to a cognizable and non-bailable offence. Relevant portion of the said judgment is reproduced hereunder:

11. Paramount, it is, to consider the gamut and the scope of the Act, namely The Protection of Women from Domestic Violence Act, 2005; certain excerpts from the objects and reasons are of immense importance which would run thus: 2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. 12. The term civil law twice used therein is not an empty that would exemplify and demonstrate, display and convey that the proceedings at the first instance should be civil in nature. The legislators were conscious of the fact that all of a sudden if criminal law is enforced on the husband and his relatives, certainly that might boomerang and have deleterious effect in the matrimonial relationship between the husband and wife. The object of the Act is that the victim lady should be enabled by law to live in the matrimonial family atmosphere in her husband/in-laws' house. It is not the intention of the said enactment to enable the lady to get snapped once

and for all her relationship with her formality and CM(M) 750/2017 Page 21 of 33 including the authorities husband or the husband's family and for that, civil law and civil remedies are most efficacious and appropriate and keeping that in mind alone in the Act, the initiation of action is given the trappings of civil proceedings which the Magistrate responsible to enforce the said Act should not lose sight of.

13. The status of the respondents should not be treated as that of accused and that would spoil the very tenor and tone with which the Act has been drafted. Keeping that in mind alone, Section 13 of the Act would contemplate only service of notice on the respondents and Rule 6(5) of the Protection of Women from Domestic Violence Rules, would contemplate that the applications under Section 12 shall be dealt with in conformity with Section 125 of the Code of Criminal Procedure, 1973.

14. It is obvious that the proceedings under Section 125 Cr.P.C are not in stricto sensu criminal proceedings.

15. After the passing of the protection order, if there is any violation, then only, such violation would constitute an offence under Section 31 of the said Act and Section 32 of the Act would indicate that such violation would amount to a cognizable and non-bailable offence. (Emphasis Supplied) 8.9. Rajkumar v. Sarita, 2009 (1) Mh.L.J.

466, relied upon by the respondent, supports the petitioner. In the above case, the Bombay High Court held that reliefs under Sections 18, 19, 20, 21, and 22 of the D.V. Act can be sought in any legal proceedings 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. Relevant portion of the judgment is reproduced hereunder:-

"12. Reading of the aforesaid provisions would go to show that Section 26 provides that any relief available CM(M) 750/2017 Page 22 of 33 under Sections 18, 19, 20, 21 and 22 can also be sought in any legal proceedings, 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. 8.10. In *Sudhannya K.N. v. Umasanker Valsan*, (2013) 1 KLT375 the wife filed the petition before the Family Court under Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 for past maintenance. In the aforesaid proceedings, the wife filed an application under Section 26 of the D.V. Act seeking reliefs under Section 18 and 19 of the D.V. Act. The Family Court dismissed the application holding that it does not have the jurisdiction to pass an interim order under Section 18 and 19 of the D.V. Act. The Gujarat High Court held that the Family Court had the power to pass an interim order. The relevant portion of the said judgment is reproduced hereunder:-

"11In our opinion Section 26 of the D.V. Act gives option to the aggrieved person, the beneficiary of the legislations, to approach either the Magistrate under Section 12 of the Act or the Family Court if the person needs the reliefs contemplated under Sections 19, 19, 20, 21 and 22 of the D.V. Act. xxx xxx xxx 13. The power to grant interim orders should be conceded to all courts having power to pass final orders as the very purpose of passing the interim orders is to prevent a situation of final order becoming meaningless. xxx xxx the xxx We set aside the impugned order and hold that the Family Court has power in view of Section 26 of the CM(M) 750/2017 Page 23 of 33 D.V. Act to pass interim protection orders as well as interim residence orders (Emphasis Supplied) 8.11. In *Naorem Shamungou Singh v. Moirangthem Guni Devi*, AIR2014 Mani 25, the Manipur High Court held that the D.V. Act provides the remedies available under Civil law. The Court further held that though Section 28(1) of the D.V. Act provides that all proceedings shall be governed by provisions of Cr.P.C. but Section 28(2) empowers the Court to lay down its own procedure for disposal of the application under Sections 12 and 23(2) of the D.V. Act. The flexibility has been given to the Court as the proceedings under Sections 12 and 18 to 23 provide civil remedies whereas Section 31 provides a criminal offence. Relevant portion of the said judgment is reproduced hereunder: 11. In this context, it may be noted that Protection of Women from Domestic Violence Act, 2005 was enacted by the Parliament keeping in view that phenomenon of domestic violence which is widely prevalent has remained largely invisible in the public domain and even though there is a specific offence under section 498-A of the Indian Penal Code dealing with cruelty by husband and relatives, there is no civil law to address this issue. The Parliament

keeping in mind the said aspect and to provide the remedy under the Civil law which is intended to protect the women from being victims of domestic violence and to prevent occurrence of domestic violence, enacted the said law as evident from the Statement of Objects and Reasons, ... The Statement of Objects and Reasons indicates that various issues arising out of and relating to domestic violence are sought to be dealt with by enacting the said law and by providing remedies which are normally CM(M) 750/2017 Page 24 of 33 available under the civil law. Therefore, even if Section 28(1) of the Act provides that the proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of Code of Criminal Procedure, 1973, in view of different remedies which one can obtained under Section 12 of the Act, some of which are of civil in nature, the Act itself has provided under sub-section (2) of Section 28 that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under section 12. Therefore, the Legislature has introduced an element of flexibility in the procedure to be adopted while dealing with application under section 12 of the Act. This is, perhaps, because of the intention of the Legislature in seeking to provide civil remedies also under the said Act. Code of Criminal Procedure had been enacted primarily to provide a fair procedure to deal with the offences punishable under various penal Acts and is geared to find out the guilt or innocence of the person, who has been charged of any offence. Many of the reliefs contemplated under the Act are of civil nature which cannot normally granted by the Criminal Court, but only by a Civil Court. That is the reason why the Legislature incorporated sub-section (2) in Section 28 permitting the Court to lay down its own procedure for disposal of an application under section 12 of the Act.

12. Thus, it is clear that even though section 28(1) specifically provides that all proceedings under section 12 shall be governed by the provisions of Cr.P.C., 1973, it is directory in nature and any departure from the provisions of Code of Criminal Procedure will not vitiate a proceeding initiated under section 12. Therefore, this Court will hold that the Courts while dealing with proceedings under section 12 of the Protection of Women from Domestic Violence Act, 2005 shall abide by the provisions of Cr.P.C., 1973 as far as possible. However, any departure from the provisions of Cr.P.C. will not have the effect of vitiating the

proceeding in view of the CM(M) 750/2017 Page 25 of 33 fact that the statute itself specifically provides for the Court to lay down its own procedure for disposal of an application under section 12. (Emphasis Supplied) 8.12. In Narayan Babi Salgaonkar v. Jayshree @ Manasi Narayan Salgaonkar 2017 SCC Online Bom 723, the Bombay High Court considered the question whether the application under Section 26 of the D.V. Act is maintainable in the divorce proceedings. The Bombay High Court considered the Division Bench judgment of this Court in Nidhi Kaushik v. Union of India (supra) and held the application under Section 26 of the D.V. Act to be maintainable in the divorce proceedings. The husband raised the similar objection as raised by the respondent before this Court that the Family Court has no jurisdiction to entertain the application under Section 26 of the D.V. Act which can be considered only by the Magistrate. The Bombay High Court rejected this argument. The Bombay High Court further held that the appeal under Section 29 of the D.V. Act shall not lie to the Court of Sessions. Relevant portion of the judgment is reproduced hereunder:-

"2. the following questions arise in the present petition:- (i) Whether an application under Section 26 of the Protection of Women from Domestic Violence Act, 2005 (for short, D.V. Act) is maintainable in a suit for divorce, which is purely a civil proceeding?. xxx xxx xxx 8. Mr. Vaz, the Counsel for the petitioner has made the following submissions in support of this petition:- a) That an application under Section 26 of the D.V. Act is not maintainable in a civil proceeding instituted by the petitioner, seeking relief of divorce, which is again purely civil in nature. The Civil Court, therefore, CM(M) 750/2017 Page 26 of 33 exceeded its jurisdiction in entertaining the application under Section 26 of the D.V. Act; b) In support of the aforesaid, Mr. Vaz refers to the scheme of the D.V. Act, and lays emphasis upon Section 27 to submit that it is only the Court of Judicial Magistrate, First Class or the Metropolitan Magistrate, as the case may be, who shall be competent to grant protection orders or other orders under the D.V. Act. Mr. Vaz also makes reference to Section 28 to submit that the procedure to be adopted for considering grant of reliefs under Sections 18 to 23 shall be governed by the Code of Criminal Procedure, 1973. On this basis, Mr. Vaz submits that the application under Section 26 was not maintainable and in case Jayashree was desirous of seeking any relief under the D.V. Act, it was for her to institute proceedings before the concerned

Judicial Magistrate, First Class under Section 12 of the D.V. Act. xxx xxx xxx 12. The first question to be determined is whether an application under Section 26 of the Protection of Women from Domestic Violence Act, 2005 (for short, D.V. Act) is maintainable in a suit for divorce, which is purely a civil proceeding?. xxx xxx xxx 15. Provisions of Section 26, therefore, make it clear that the aggrieved person is entitled to seek reliefs as available under Sections 18 to 22 of the D.V. Act in any legal proceedings before a Civil Court, Family Court or a Criminal Court in addition to and along with other reliefs that may have been applied for in such a suit or legal proceedings. It is not necessary that an aggrieved person, in order to obtain reliefs under Sections 18 to 22, has to necessarily take out proceedings in Section 12 of the D.V. Act alone. If there are legal proceedings whether initiated before or after the commencement of the D.V. Act before a Civil Court, Family Court or Criminal Court, it is always open to the aggrieved CM(M) 750/2017 Page 27 of 33 person to apply for reliefs under Sections 18 to 22 of the D.V. Act, in such suit or legal proceedings 16. The answer will be same if the matter is examined from yet another perspective. Although normally the procedure for obtaining reliefs under the D.V. Act is to institute the proceedings before a Magistrate, as defined under Section 2(i) of the D.V. Act and further, in terms of Section 28 of the D.V. Act, the proceedings under Sections 12, 18 to 23 and 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973, yet, the proceedings under the D.V. Act are essentially civil in nature. Therefore, there is no question of any anomaly, if it is held that an application under Section 26 of the D.V. Act is maintainable in a suit for divorce, which is purely a civil proceeding. xxx xxx xxx 20. The Division Bench of Delhi High Court in Ms. Nidhi Kaushik (supra), after detailed analysis of the provisions of the D.V. Act, has held that the proceedings under the D.V. Act are essentially of civil nature. xxx xxx xxx 22. Therefore, upon consideration of the provisions under Section 26 of the D.V. Act and the principles in the aforesaid decisions, it will have to be held that an application under Section 26 of the D.V. Act is very much maintainable in a suit for divorce, which is purely a civil proceeding. The first question stands answered accordingly. xxx xxx xxx 35. Accordingly, it will have to be held that the Civil Court or a Family Court entertaining an application under Section 26 of the D.V. Act will have to consider whether the case of domestic violence, prima facie or otherwise, has been made

out before any reliefs in terms of Sections 18 to 22 of the D.V. Act is actually granted to the aggrieved person. If it is proposed to grant interim relief or ad interim relief, then, a prima facie case may suffice. CM(M) 750/2017 Page 28 of 33 xxx xxx xxx initiated before or after 39. Section 26 of the D.V. Act merely provides that the Civil Court or the Family Court is also empowered to grant reliefs under Sections 18, 19, 20, 21 and 22 of the D.V. Act in any legal proceedings before it, affecting the aggrieved person and the respondent whether such proceedings were the commencement of the D.V. Act. This means that the Civil Court or the Family Court when it considers whether or not to grant reliefs under Sections 18, 19, 20, 21 and 22 of the D.V. Act does not lose its essential character as Civil Court or a Family Court as the case may be. By granting relief or for that matter, by refusing relief under Sections 18, 19, 20, 21 and 22 of the D.V. Act, the Civil Court or the Family Court is not converted into a Magistrate as defined under Section 2(i) of the D.V. Act. At least for the purpose of Section 29 of the D.V. Act, it cannot, therefore, be said that the orders made by the Civil Court or the Family Court either granting or refusing reliefs under Sections 18, 19, 20, 21 and 22 of the D.V. Act can be regarded as orders made by the Magistrate as defined under Section 2(i) of the D.V. Act. Therefore, against such orders, an appeal will not lie to the Court of Sessions under Section 29 of the D.V. Act. The remedy against such orders will be the remedy, which is otherwise available against orders made by the Civil Court or the Family Court. xxx xxx xxx 43. Upon cumulative consideration of the aforesaid, it will have to be held that as against the orders made by the Civil Court or the Family Court in an application under Section 26 of the D.V. Act, granting or refusing reliefs under Sections 18 to 22 of the D.V. Act, an appeal will not lie under Section 29 of the D.V. Act to the Court of Sessions. xxx xxx xxx 50. Accordingly, this petition is disposed of with the following order:- CM(M) 750/2017 Page 29 of 33 (a) An application under Section 26 of the D.V. Act is held maintainable in a suit for divorce, which is purely a civil proceeding. Accordingly, the application at Exhibit D-9 made by Jayashree was maintainable before the Civil Court in the present case. (Emphasis Supplied) 9. Summary of principles 9.1. D.V. Act provides a remedy in civil law for the protection of victims of the domestic violence as noted in the Statement of Object and Reasons. 9.2. The aggrieved person can file the application for the reliefs under the D.V. Act to

the Magistrate under Section 12 of the D.V. Act. 9.3. If any suit or other legal proceedings affecting the aggrieved person are pending before a Civil Court, Family Court or Criminal Court, Section 26 gives an option to the aggrieved person to approach such Court for reliefs under the D.V. Act. However, no independent application is maintainable before the Civil Court or Family Court, if no proceedings are pending before them affecting the aggrieved person and the respondent. 9.4. The Civil Court, Family Court or Criminal Court dealing with the application under Sections 18 to 22 of the D.V. Act can formulate its own procedure under Section 28(2) of the D.V. Act. The word Court in Section 28(2) of the D.V. Act includes Civil Court, Family Court as well as the Criminal Court. 9.5. The Court shall formulate the procedure after completion of pleadings in an application under Section 26 of the D.V. Act. 9.6. After completion of pleadings, the concerned Court shall consider whether evidence is necessary to adjudicate the application CM(M) 750/2017 Page 30 of 33 under the D.V. Act and if so, the Court shall frame the issues and record the evidence. However, if no evidence is considered necessary, the Court shall list the application for hearing.

10. Findings 10.1. In the present case, the Family Court is dealing with the petition for dissolution of marriage filed by the petitioner under Section 13(1) (ia) of the Hindu Marriage Act, 1955 and therefore, the petitioners application under Section 26 of the D.V. Act seeking reliefs under Section 18, 19, 20, 21 and 22 of the D.V. Act is maintainable before the Family Court. 10.2. The Family Court is empowered to formulate its own procedure for disposal of the petitioners application under D.V. Act. In that view of the matter, it is not mandatory for the Family Court to follow Cr.P.C. 10.3. The proper procedure for disposal of the petitioners application under Section 26 of the D.V. Act after completion of pleadings is to consider whether evidence is necessary to adjudicate the petitioners application under Section 26 of the D.V. Act. 10.4. If the Court finds that the evidence is not necessary, the Court shall list the application for hearing. However, if the evidence is considered necessary, the Court shall frame the issues and record the evidence along with the evidence in the divorce petition. 10.5. The respondents defence before the Family Court as well as this Court that the Family Court has no jurisdiction to entertain the petitioners application under Section 26 of the D.V. Act, is frivolous and is rejected. CM(M) 750/2017 Page 31 of 33 10.6. The respondent

attempted to mislead this Court by raising a frivolous defence with respect to the nature of proceedings under Section 26 of the D.V. Act whereas the law is clear and well settled that the Civil Court, Family Court and Criminal Court have jurisdiction to entertain and try an application under Section 26 in pending proceedings affecting the parties and the Court can formulate its own procedure to conduct the proceedings. 10.7. The judgments cited by the respondent do not help the respondent for the reasons given in para 6 above which are hereby accepted.

11. Conclusion 11.1. The petition is allowed; the impugned order dated 28th March, 2017 is set aside and the petitioners application under Order XIV Rule 5 C.P.C. is remanded back to the Family Court. 11.2. The parties are directed to appear before the Family Court on 23rd April, 2018 when the Family Court shall fix the date for hearing whether the evidence is necessary to adjudicate the petitioners application. 11.3. The Family Court shall frame the issues if the evidence is necessary to adjudicate the petitioners application under Section 26 of the D.V. Act. However, if evidence is not necessary, the Family Court shall proceed to hear the parties. 11.4. Considering the delay occasioned by the impugned order, the Family Court is directed to expedite the hearing and disposal of the petition and endeavour to decide the same within eight months.

12. Trial Court record be sent back forthwith. CM(M) 750/2017 Page 32 of 33 13. Pending application is disposed of.

14. Copy of this judgment be given dasti to counsel for the petitioner and respondent under signature of Court Master.

15. Copy of this judgment be sent to the Registrar General of this Court who shall circulate it to all the Family Courts and the District Judges. APRIL172018 dk/ak J.R. MIDHA (JUDGE) CM(M) 750/2017 Page 33 of 33

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