

Harshakumar and Another Vs. State of Kerala and Others

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Court : Kerala

Decided On : Jun-09-2011

Judge : Thomas P. Joseph

Appeal No. : Crl.M.C.Nos.969, 1705 of 2011

Appellant : Harshakumar and Another

Respondent : State of Kerala and Others

Judgement :

1. Is the Court of Magistrate while discharging functions under the Protection of Women from Domestic Violence Act (for short, “the Act”) a Criminal Court inferior to the Court of Sessions and the High Court?

Is the judgment of Court of Sessions in an appeal filed under S.29 of the Act amenable to the revisional power of the High Court under S.397(1) and S.401 of the Code of Criminal Procedure (for short, “the Code”)?

These questions are required to be answered in these petitions filed under S.482 of the Code by the respondents in MC 8 of 2009 of the Court of learned Judicial First Class Magistrate - II, Thamarassery and MC No. 96 of 2007 of the Court of learned Judicial First Class Magistrate, Harippad.

2. In Crl. MC No. 969 of 2011 petitioners suffered an order under S.12 of the Protection of Women from Domestic Violence Act (for short, “the Act”). That order

was challenged in appeal before learned Additional Sessions Judge - II, Kozhikode in Crl. Appeal No. 29 of 2010. The order was confirmed. Judgment of learned Additional Sessions Judge is under challenge in Crl. MC No. 969 of 2011.

3. In Crl. MC No. 1705 of 2011 petitioner suffered an order under S.12 of the Act and that was challenged before learned Additional Sessions Judge - I, Mavelikkara in Crl. Appeal No. 244 of 2010. The Appeal was dismissed. Judgment of learned Additional Sessions Judge is under challenge in Crl. MC No. 1705 of 2011.

4. Learned counsel for petitioners contend that proceeding before the Magistrate under the provisions of the Act except the provisions under S.31 and S.33 of the Act which provide for punishment are civil in nature and that the Magistrate is to exercise power for providing maintenance, recovery of property, providing residence order and such other reliefs which are in the nature of a civil proceeding. In the circumstances, the Magistrate exercising power under the Act cannot be treated as a Criminal Court inferior to the Court of Sessions and the High Court. Hence it is argued that judgment of the Sessions Court confirming order of the Magistrate could be challenged in this Court only in exercise of its extraordinary jurisdiction under S.482 of the Code.

5. Learned Public Prosecutor contended that as per the scheme of the Act though the Magistrate is required to exercise functions which are of a civil nature, character of the Court does not change; it continues to be a Court of the Magistrate which is a Criminal Court inferior to the Court of Sessions and the High Court. It is also contended that the very fact that S.29 of the Act provides for an appeal to the 'Court of Sessions' would indicate that the Court of Magistrate while exercising power under the Act acts as a Court inferior to the Court of Sessions. Further argument is that at any rate, what is under challenge in these proceedings are judgments of Court of Sessions which is a Criminal Court inferior to the High Court for the purpose of S.397(1) and S.401 of the Code. Hence the proper remedy available to the petitioners is to challenge judgment of the Court of Sessions invoking the revisional power of this Court under S.397(1) and S.401 of the Code.

6. It is necessary to refer to the relevant provisions of the Act to decide the issue. In the preamble it is stated that the Act is to provide more effective protection to 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. S.2(i) of the Act defines 'Magistrate' as meaning a Judicial Officer of First Class or as the case may be the Metropolitan Magistrate exercising jurisdiction under the Code in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place. Chapter IV of the Act deals with the procedure for obtaining reliefs. S.12 of the Act states that 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 the Act. S.18 provides for grant of protection orders by the Magistrate in the manner provided therein. S.19 confers power on the Magistrate to pass residence orders while disposing of an application under sub-section (1) of S.12. S.20 deals with the power of Magistrate to grant monetary reliefs as referred to therein. S.21 deals with custody orders that may be passed by the Magistrate. S.23 confers power on the Magistrate under certain circumstances to pass interim orders as the Magistrate deems just and proper. S.27 states that the Court of Judicial Magistrate of First Class or the Metropolitan Magistrate as the case may be within the local limits of which the person aggrieved permanently or temporarily resides or carries on business or is employed, the respondent resides or carries on business or is employed or the cause of action has arisen, shall be the 'competent Court' to grant a protection order and other orders under the Act and to try offences under the Act. S.28(1) states that save as otherwise provided in the Act all proceedings under S.12, S.18, S.19, S.20, S.21, S.22 and S.23 and offences under S.31 shall be governed by the provisions of the Code. But sub-section (2) of S.28 states that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under S.12 or under sub-section (2) of S.23 of the Act. S.29 of the Act provides for an appeal 'to the Court of Sessions' within 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent as the case may be whichever is later. S.31 and S.33 of the Act are the penalizing provisions and, S.32 and S.34 deal

with the power of learned Magistrate to take cognizance of such offences.

7. The argument of learned counsel for petitioners is that it is the 'Magistrate' who is empowered under the Act to exercise the duties and functions mentioned therein which are of a civil nature and hence it cannot be said that the Magistrate while acting under the provisions of the Act acts as an inferior Criminal Court for the purpose of S.397(1) and S.401 of the Code. Learned counsel have placed reliance on the decisions in *Mt. Mithan and Another v. Municipal Board of Orai and State of U.P.*, AIR 1956 All. 351, *Dargah Committee, Ajmer v. State of Rajasthan and Another*, 1962 KHC 495 : AIR 1962 SC 574 : 1962 (2) SCR 265 : 1962 (1) Cri LJ 507, *Correya v. STO and Others*, 1970 KHC 342 : 1970 KLJ 957 and *Mammoo v. State of Kerala*, 1979 KHC 348 : 1979 KLT 801 : ILR 1979 (2) Ker. 721 : 1979 KLT SN 126 : AIR 1980 Ker. 18. Learned counsel, in fairness has also brought to my notice the decisions in *Satyabhama v. Ramachandran*, 1997 KHC 405 : 1997 (2) KLT 503 : 1997 (2) KLJ 213 : ILR 1997 (3) Ker. 659, *Peter v. Sara*, 2006 KHC 1450 : 2006 (4) KLT 219 : ILR 2006 (4) Ker. 157 : AIR 2007 Ker. 81 and *Preceline George (Dr.) @ Antony Preceline George v. State of Kerala and Another*, 2010 (1) KHC 417 : 2010 (1) KLT 454 : 2010 (1) KLD 189 : ILR 2010 (1) Ker. 663.

8. In *Mt. Mithan and Another v. Municipal Board of Orai and State of U.P.* (supra) question considered was whether a Magistrate who passes an order under S.247(1) or S.310(2) of the Municipalities Act does so as a Criminal Court and whether such Court is a inferior Court as contemplated under S.435 of the old Code (corresponding to S.401 of the present Code). The Division Bench of the Allahabad High Court held that though a First Class Magistrate is a Criminal Court, a proceeding held by that Court is a proceeding before an 'inferior Criminal Court' within the meaning of S.435 (of the old Code) and its record can be called for and examined by the High Court but a proceeding held by that Court in exercise of any special jurisdiction conferred by any other law is not a proceeding in the inferior Criminal Court. In paragraph 6 learned Judges held that revisional jurisdiction can be exercised only over an inferior Criminal Court, the explanation to S.435 (of the old Code) makes it clear that all Magistrates are to be deemed to be inferior to the Sessions Judge for the purpose and that they are inferior to the High Court. But the gradation of the Criminal Court is only for the purpose of jurisdiction conferred

by the Code. It is held that a Magistrate of the Second Class when trying a person for an offence cannot be compared with a First Class Magistrate exercising jurisdiction under S.247(1) of the Municipalities Act and cannot be said to be a lower or inferior Court. It is also held that it is a mere accident that the authority on which the special jurisdiction is conferred is a Criminal Court. In that view of the matter it was held by the Division Bench that when a Court of Magistrate exercises power under S.247(1) of the Municipalities Act it is not acting as a Criminal Court inferior to the Court of Sessions or the High Court for the purpose of exercise of revisional power under S.435 of the old Code.

9. In *Dargah Committee, Ajmer v. State of Rajasthan and Another* (supra), it was held that the Magistrate who entertains an application under S.234 of the Municipalities Regulation Act, 1925 is not an inferior Criminal Court. In paragraph 6, learned Judges observed that it is difficult to hold that the Magistrate who entertains the application is an inferior Criminal Court. The claim made before him is for recovery of tax and the order prayed for is for the recovery of tax by distress and sale of movable property of the urged in support of the liberal construction of S.234 turns out to be fallacious defaulter. If at all that would at best be a proceeding of a civil nature and not criminal. Learned Judges took the view that the Magistrate who entertains the application under S.234 of the Municipalities Regulation, 1925 is not a inferior Criminal Court.

10. This Court considered the power of the Magistrate to take proceeding for recovery of tax under the provisions of the Kerala General Sales Tax Act, 1963 in *Correya v. STO and Others* (supra). There, it was held that when there is no provision in the said Act dealing with recovery of tax by the Magistrate in any particular form he is bound to follow the provisions of the Act itself and not the provisions of the Code and hence S.435, S.436, S.438 and S.439 of the old Code cannot be resorted to for interfering with an order passed by the Magistrate under S.23(2) of the said Act.

11. In *Mammoo v. State of Kerala* (supra) the Full Bench of this Court was dealing with the question whether an order passed by the District Magistrate under S.16(1) of the Indian Telegraph Act is revisable under S.397 of the Code. The Full Bench

answered the question in negative. In paragraph 8 it is pointed out that S.397(1) of the Code confers revisional power on the High Court and the Sessions Judge. Sessions Judges could therefore seek to revise proceedings of the inferior Criminal Court. The Executive Magistrate constituted under S.6 of the Code is a Court inferior to the Sessions Judge. The explanation to S.397 of the Code provides that all Magistrates whether executive or judicial shall be deemed to be inferior to the Sessions Judge for the purpose of S.397(1) as also S.398 of the Code. The Full Bench held that the term 'Criminal Court' is not defined in the Code and hence the Court has to examine whether the District Magistrate acting under provisions of the Telegraph Act could be deemed to be a Criminal Court. Answering that question in negative, the Full Bench held that order of the District Magistrate under S.16(1) of the Indian Telegraph Act is not revisable under S.397 or under S.401 of the Code.

12. In *Preceline George (Dr.) @ Antony Preceline George v. State of Kerala and Another* (supra), this Court referring to S.12 and S.23 of the Act held that reliefs provided under the said provisions are of a civil nature.

13. Another Full Bench of this Court in *Satyabhama v. Ramachandran* (supra) considered whether a Family Court which passed an order under S.7(2)(a) of the Family Courts Act is a Criminal Court for the purpose of exercise of revisional jurisdiction under S.397 of the Code. The Full Bench held that while disposing the application filed under S.125 of the Code in exercise of its jurisdiction under S.7(2)(a), the Family Court is acting as a Criminal Court and not a Civil Court.

14. A Division Bench of the Allahabad High Court in *Saman Ismail v. Rafiq Ahmad and Another*, 2002 KHC 2654 : 2002 Cri LJ 3648 considered the question whether an order passed by the Magistrate under S.3(1) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is revisable under S.397(1) of the Code. The Division Bench took the view that the order is revisable under S.397(1) of the Code. S.2(c) of the said Act defines 'Magistrate' as a Magistrate of First Class exercising jurisdiction under the Code in the area where the divorced woman resides. The said Act does not say that the Magistrate has to follow the procedure laid down in the Code. Nor does the said Act provide for any remedy under S.397

of the Code against the order of the Magistrate. In view of the definition of 'Magistrate' under S.2(c) of the said Act, the Allahabad High Court in the decision referred supra held that the order of the Magistrate under the said Act is revisable under S.397(1) of the Code.

15. No doubt, the reliefs which the Magistrate is required and authorised to grant under certain provisions of the Act are of a civil nature. But, it cannot be said that the Magistrate while exercising those functions is not acting as a Criminal Court. The Magistrate while exercising power under the Act acts as a Criminal Court, though the proceeding, or the nature of relief that may be granted under certain provisions are of a civil nature. Jurisdiction is conferred under the Act on the 'Magistrate' and the expression 'Magistrate' is defined in S.2(i) of the Act as meaning the Judicial Magistrate of first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place. It is also apposite to refer to S.28 of the Act which states that except as otherwise provided in the Act, all proceedings under S.12, S.18, S.19, S.20, S.21, S.22 and S.23 and offence under S.31 of the Act are to be governed by the provisions of the Code. Even as regards proceedings other than mentioned above, I do not find anything in the Act which excludes the procedure laid down in the Code. At least for proceedings under S.12, S.18 to 23 and 31 of the Act the procedure before learned Magistrate is governed by the provisions of the Code. S.27 of the Act confers jurisdiction on the Court of Judicial Magistrate of the First Class or the Metropolitan Magistrate as the case may be and such Court is also empowered to try offences under the Act. S.31 provides that a breach of the protection order, or of an interim protection order is an offence and is triable by the Magistrate. S.33 provides for punishment of the Protection Officer in certain circumstances. These provisions also indicate that the Court of Magistrate or Metropolitan Magistrate acts as a Criminal Court while discharging functions under the Act though some of the reliefs it could grant under the Act are of a civil nature. This was not the situation in *Mt. Mithan and Another v. Municipal Board of Orai and State of U.P.* (supra) or the other decisions which learned counsel for petitioners have relied in support of their contentions. S.29 of the Act provides that from any order that the Magistrate may pass, an

appeal shall lie to the 'Court of Sessions'. It is relevant to note that the Act does not say what procedure the Court of Sessions is to follow while entertaining and hearing an appeal preferred under S.29 of the Act. The provisions in the Code regarding admission, hearing and disposal of the appeals must apply to an appeal preferred to the Court of Sessions under S.29 of the Act. Under S.29, appeal lies to the 'Court of Sessions' and not to the Sessions Judge. An appeal is provided to the Court of Sessions under S.29 since the Court of the Magistrate whose order is under challenge is a Criminal Court inferior to the Court of Sessions. I therefore hold that the Magistrate exercising functions under the Act acts as a Criminal Court inferior to the Court of Sessions and the High Court.

16. The next question is whether the judgment of the Court of Sessions in an appeal under S.29 of the Act is amenable to the revisional jurisdiction of the High Court under S.397(1) and S.401 of the Code. I stated that the appeal is governed by the provisions of the Code though right of appeal is provided by S.29 of the Act. The Act does not say that judgment of the Court of Sessions is subject to challenge before any other Court. Under S.397(1) of the Code, High Court may call for and examine the records of any proceeding before any inferior Criminal Court. A Court of Sessions is a Criminal Court inferior to the High Court for the purpose of exercise of revisional power under S.397(1) and S.401 of the Code. S.397(1) of the Code empowers the Courts specified therein to call for records of the inferior Criminal Court and examine them for the purpose of satisfying themselves as to whether a sentence, finding or order of such inferior Court is legal, correct or proper or whether the proceedings of such inferior Court is regular. The object of conferring revisional power is to give the superior Criminal Courts supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment which has resulted on the one hand in some injury in the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals. The power of revision is supervisory in character enabling the superior Courts to call for records of the inferior Criminal Courts and examine them for the purpose of satisfying themselves that the sentence, finding, order or proceeding of such inferior Court is legal, correct or proper. The Allahabad High Court in *Shafaat Ahmad v. Smt. Fahmida Sardar*, AIR

1990 All. 182 considered whether an order under S.3 of the Muslim Women (Protection of Rights on Divorce) Act is revisable under S.397(1) of the Code. The said Court held:

“The fact that it has not been said in the Act that the order under S.3 is revisable, is of no consequence. A provision need not be made in every Act and it is sufficient if it is provided in one Act. The Act provides that the order is to be passed by the Magistrate and the Criminal PC provides that the order of the Magistrate can be revised by the High Court. The Act does not exclude the application of the Criminal PC. So Criminal PC has to be given effect and the order passed by the Magistrate under S.3 of the Act becomes revisable in view of the provisions in the Criminal PC.”

Judgment of the Court of Sessions in an appeal though preferred under S.29 of the Act being of an inferior Criminal Court, is revisable by the High Court in exercise of its power under S.397(1) and S.401 of the Code. Petitioners have to take recourse to that remedy. In the circumstances, I am not inclined to exercise the extraordinary jurisdiction conferred on this Court under S.482 of the Code.

Resultantly these Criminal Miscellaneous Cases are dismissed without prejudice to petitioners challenging the judgments of Appellate Courts in revision as provided under law. The original documents produced by petitioners shall be returned to the counsel on request.

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