"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 9TH DAY OF AUGUST 2023 / 18TH SRAVANA, 1945

TR.APPEAL (C) NO. 1 OF 2023

AGAINST THE ORDER DATED 19.01.2023 IN TR.P.(C) NO.25 OF 2023 (FILING NUMBER) OF THE HIGH COURT OF KERALA

APPELLANT/PETITIONER:

VINEET GANESH,
AGED 42 YEARS, S/O A. GANESH, RESIDING AT A-12, FLOOR, DEVIDAS MANSION, BOMAN KAWASJI BEHRAM MARG, COLABA, MUMBAI, MAHARASHTRA, PIN - 400001.

BY ADVS.
PRABHA R.MENON
ARUN SAMUEL

RESPONDENT/RESPONDENT:

PRIYANKA VASAN,
D/O LATE SHRI P.V. VASAN, RESIDING AT FLAT NO.1A, LINK HEIGHTS, PANAMPILLY NAGAR, KOCHI, KERALA, PIN - 682036.

BY ADVS.
SAIBY JOSE KIDANGOOR
BENNY ANTONY PAREL
ANOOP SEBASTIAN
PRAMITHA AUGUSTINE
IRINE MATHEW
ADITHYA KIRAN V.E
ANJALI NAIR
NAAIL FATHIMA ABDULLA A.
SWATHY SUDHIR
TANOOSHA PAUL

THIS TRANSFER APPEAL(CIVIL) HAVING COME UP FOR FINAL HEARING ON 20.07.2023, THE COURT ON 09.08.2023 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

P.G.Ajithkumar, J.

The petitioner in unnumbered Transfer Petition (C) No.25 of 2023 has filed this appeal invoking the provisions of Section 5(i) of the Kerala High Court Act, 1958. When this appeal was filed, the Registry raised an objection regarding its maintainability. As per the order dated 07.02.2023, the Registry was directed to number the Transfer Appeal subject to the decision regarding maintainability on the judicial side.

2. On 10.02.2023, notice was directed to be served on the respondent and an order of interim stay was granted for a period of one month. The interim order has been extended from time to time.

3. On 20.03.2023, the matter was referred for mediation with a direction that the mediator who mediated the matter on an earlier occasion should conduct mediation. The mediation, however, did not fetch any positive result.

4. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

5. The appellant wants M.C.No.20 of 2020 pending on the files of the court of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam to be transferred to the Family Court, Ernakulam. The application was filed invoking the jurisdiction of this Court under Section 24 of the Code of Civil Procedure, 1908. A proceeding initiated under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short D.V. Act) is of a civil nature. But, in view of Section 28 of the said Act, such an application is governed by the provisions of the Code of Criminal Procedure, 1973. The Magistrate dealing with the application is empowered under sub-section (2) of Section 28 for laying down its own procedure also. The forum constituted to deal with an application under Section 12 of the D.V. Act as per Section 27 is the court of a Judicial Magistrate of the First Class or, as the case may be, a Metropolitan Magistrate. Therefore, the proceedings in an application filed under Section 12 of the D.V. Act has to be regulated as per the provisions in the Code of Criminal Procedure, subject, of course, to the procedure being evolved by the Magistrate concerned to suit the particular facts and circumstances of the case. If so, a petition filed before the

High Court for transfer of an application under Section 12 of the D.V. Act can be governed by the provisions under Section 407 of the Code of Criminal Procedure. But, Section 407 can be invoked only when the transfer is from the court of one Magistrate to another Magistrate. Similar is the position if Section 24 of the Code of Civil Procedure is invoked. Section 24 shall be applied if the transfer is sought from one civil court to another civil court.

6. When the transfer is sought from the court of a Magistrate to a Family Court, neither Section 407 of the Code of Criminal Procedure nor Section 24 of the Code of Civil Procedure can be invoked. However, the High Court can certainly exercise its jurisdiction under Article 227 of the Constitution of India if a transfer is required from a civil court to a criminal court and vice versa in the interest of justice, and if such a transfer is not prohibited under the provisions of law. Hence, we hold that the Transfer Petition although could not have been entertained under Section 24 of the Code of Civil Procedure, it should have been considered on the judicial side under Article 227 of the Constitution of India. In that view of the matter, the Transfer Petition as well as the Transfer Appeal is maintainable.

7. In the impugned order the plea of the appellant was found not entertainable in the light of the law laid down by this Court in **Anish Antony Thimothy and others v. Neetha and another [2011 (3) KHC 46]** and **Rajeev Thomas and others v. Sheeja Antony and others [2018 (4) KHC 8]**. In the said decisions, this Court took the view that a case under the D.V. Act pending before a Magistrate is not liable to be transferred to the Family Court. The learned counsel appearing for the appellant by placing reliance on a decision of the High Court of Judicature at Bombay took exception to the said view and advanced a contention that in the light of the provisions of Section 26 of the D.V. Act, a petition filed under the said Act before a Judicial Magistrate of the First Class can be transferred to a Family Court for being tried along with the litigations between the same parties pending before the Family Court.

8. Section 26 of the D.V. Act reads 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.

(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."

9. The High Court of Bombay in its order dated 15.11.2021 in **Anirudh Ajaykumar Garg v. State of Maharashtra** (M.C.A.No.76 of 2021) took the view that a case initiated under the D.V. Act and pending before a Magistrate can be transferred to a Family Court, where litigation between the same spouses in relation to their matrimonial dispute is pending. The essential reason for taking such a view is that a proceeding under the D.V. Act is of a civil nature and hence both proceedings where the same issues are at trial are to be considered by the same court.

Also, it was held that the Family Court having been empowered under Section 26 of the D.V. Act to grant reliefs, which are grantable under the provisions of the D.V. Act, a proceeding initiated under the said Act could be transferred from the court of a Magistrate to a Family Court.

10. The learned counsel appearing for the appellant would, therefore, submit that proceedings under the D.V. Act are civil in nature and therefore the fact that a judicial Magistrate is constituted as a forum under the D.V. Act does not stand in the way of transferring a pending case under the D.V. Act to the Family Court. This Court after referring to the law laid down by the Apex Court in **Indira Sarma v. V.K.V.Sarma [(2013) 15 SCC 755]** and **Kunapareddy @ Nookala Shanka Balaji v. Kunapareddy Swarna Kumari and another [(2015) 11 SCC 774]** and also by this Court in **Dr.V.K.Vijayalekshmi Amma and another v. Bindu v. and others [2010 (1) KHC 57]** and **Saramma Shyju v. Shyju Varghees and others [2011 (3) KHC 235]** held in **Neethu v. Trijo Joseph [2022 (4) KHC 384]** held that the proceedings under the D.V. Act are of civil nature, although

the forum prescribed to secure the reliefs under the Act is a criminal court. Can, for that reason, a proceedings under the D.V. Act be transferred to a Family Court?

11. This Court considered the said question in a few decisions, namely, **Anish Antony Thimothy [2011 (3) KHC 46], Mony M.A. v. Leelamma M.P. and another [2007 (2) KLJ 209]** and **Rajeev Thomas [2018 (4) KHC 8]**.

12. In **Anish Antony Thimothy [2011 (3) KHC 46]**, this Court held,-

> "4. True that by virtue of the power conferred under Section 26 of the Act apart from the 'Magistrate' above referred, a civil court or Family Court or criminal court is also empowered to grant relief under Sections 18, 19, 20, 21 and 22 of the Act. That provision is not intended to equate the Magistrate exercising power under the Act with a Family Court or civil court empowered to grant certain reliefs as provided in the Act. The mere fact that power to grant certain reliefs is conferred on other courts also does not mean that the proceeding pending before the Magistrate could be transferred to those courts. I must also bear in mind that from the decision of the Family Court in exercise of power under Section 26 of the Act, there could be no appeal to the Court of Sessions under Section 29 of

the Act. Thus, 'Magistrate' as defined in Section 2(i) of the Act and other courts which are also empowered to grant certain reliefs under the Act are different and it is not as if the case pending in one court could be transferred to the other, exercising power by virtue of Section 26 of the Act. Section 7(2) of the Family Courts Act only empowered the Family Court to exercise the power conferred on a Magistrate under Chapter IX of the Code of Criminal Procedure, 1973 in relation to grant of maintenance of wife, children, etc. Learned counsel made reference to Sub-clause (b) of Sub-section (2) of Section 7. Assuming that jurisdiction conferred on Family Court by other enactments also could be exercised by that Court, it is not as if the Magistrate exercising power under the Act and the Family Court or other court referred to in Section 26 of the Act empowered to grant certain reliefs in the same position so that case pending in one court could be transferred to other court. So viewed request made by petitioner cannot be entertained."

13. This Court in **Mony M.A. [2007 (2) KLJ 209]** held as follows:-

"10. The learned counsel submits that in view of the stipulations in Section 26(1), there cannot be a bar against transfer of a claim under Section 12 to any such civil court or family court. The counsel further submits

that Section 7(2)(b) of the Family Courts Act, which I extract below, is also sufficient to indicate that the Family Court has jurisdiction to deal with a claim under Section 12.

> Section 7. Jurisdiction - (1) Subject to the other provisions of this Act, a Family Court shall - xx xx
>
> 2. Subject to the other provisions of the Act, a Family Court shall also have and exercise --
>
> (a) xxx xxxx
>
> (b) such other jurisdiction as may be conferred on it by any other enactment.

I am unable to accept this argument at all. Though under Section 7(2)(b), the Family Court is clothed with authority to deal with matters, which, under any other law the Family Court can consider, it is significant that the Family Court is not invested with any power to deal with an application under Section 12 of the DVA. That reliefs under Sections 18 to 22 can be claimed before the Family Court in any other proceedings is a world different from the contention that a petition under Section 12 can be considered and disposed of by the Family Court. There is nothing in the language, scheme or purport of the DVA, which can even remotely suggest that a Civil court or Family Court is competent to deal with an application under Section 12 and grant reliefs under Sections 18 to 22 in such application under Section 12. Of course, the Family Court and the Civil Court have the jurisdiction in a proceedings pending

before it to grant the reliefs under Sections 18 to 22 of the DVA also. But certainly there is no power for the Family Court or Civil Court to deal with an application under Section 12. They cannot entertain an application under Section 12 either when it is originally filed before them nor can the superior courts entertain any jurisdiction to transfer such petition under Section 12 pending before the Magistrate to such Civil or Family Court so that such court can entertain jurisdiction to deal with an application under Section 12. The decision of the Legislature to confer the right to redressal through the criminal court cannot obviously be denied to or taken away from an aggrieved woman by such an order of transfer by the superior court. That she can claim the reliefs under the DVA through the civil court also is no reason to deprive her of the vested statutory right of procedure to claim enforcement through the Criminal Court. I, therefore, take the view that except the Magistrate clothed with authority to deal with petitions under Section 12 of the DVA, no Civil Court or Family Court has jurisdiction to deal with an application under Section 12. Consequently this Court cannot direct transfer of a petition under Section 12 pending before the Magistrate to the Family Court and thus clothe the Family Court with jurisdiction to consider such application under Section 12. The prayer for transfer cannot hence succeed."

(underline supplied)

14. In **Rajeev Thomas [2018 (4) KHC 8]**, this Court held thus:-

> "16. These decisions clearly show that the correct interpretation of section 26 of the DV Act is that, though an application under section 12 can be considered only by a magistrate and cannot be considered by a Family Court or Civil Court or any other Court, the reliefs that can be granted under Sections 18 to 22 can also be granted by other courts while dealing with the pending disputes. There is a sea of difference between holding that both courts have concurrent jurisdiction and that, one Court can grant the reliefs, which can be granted by another court. What is clarified by section 26 is that, the reliefs under sections 18 to 22 can be granted by other civil courts. Section 26(3) of the DV Act clarifies that, if a relief under sections 18 to 22 is granted by other court, it shall be reported to the jurisdictional magistrate, which clearly and categorically clarifies that, both the jurisdictions conferred thereon on other courts are not concurrent.
>
> 17. In the light of the clear distinction of jurisdictions, there cannot be a transfer of the case pending before the magistrate court under section 12 of the DV Act to a Family Court. Further, the procedures to be followed in adjudication, the enforcement of orders and the provisions for appeal are different in both courts. Hence, reliefs sought by the petitioners herein cannot be granted."
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> (underline supplied)

15. The preamble of the D.V.Act exemplifies that it is an Act enacted to provide for more effective protection of the rights of women guaranteed under the Constitution of India who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. A victim of violence of any kind occurring within the family is an aggrieved person. An aggrieved person as defined in Section 2(a) of the D.V.Act is any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Domestic relationship is defined in Section 2(f) of the D.V. Act as a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Respondent is defined in Section 2(q) as follows:-

> "'respondent' means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has

> sought any relief under this Act:
>
> Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

From the above definitions, it is possible for a woman alone seeks reliefs under the D.V. Act. Further, a female living in a relationship in the nature of a marriage also eligible to seek reliefs under the D.V.Act.

16. The scheme of the D.V.Act is such that an aggrieved person is ensured more effective protection through the forum of a criminal court. The D.V.Act was enacted much after the Family Courts Act, 1984 came into force. The Legislature, fully conscious of the provisions of the Family Courts Act, had enacted the D.V.Act in 2005 creating a special forum by investing powers on Judicial Magistrates to deal with the applications under Section 12 and also creating a Court of Session as the appellate forum under Section 29. The intention of the Legislature to confine the jurisdiction to entertain an application under Section 12 of the D.V. Act to the Judicial Magistrates is clear from provisions in the Act. As

long as the Family Court or, for that matter, other civil courts cannot have original jurisdiction to entertain an application under Section 12 of the D.V. Act, no application under Section 12 pending before a Magistrate can be transferred to a Family Court.

17. As stated above, women alone can claim reliefs provided under Sections 12 to 18, be it by filing an application under Section 12 or by applying in a pending proceedings by invoking Section 26 of the D.V. Act. When women alone are given that right, allowing a respondent in an application under Section 12 of the Act to get the application transferred to a Family Court or other civil court will amount to denial of the special right conferred upon the aggrieved women. Often that will result in facilitating the respondent to pin down the aggrieved woman to a forum which may be totally inconvenient to her.

18. What is clarified in **Rajeev Thomas [2018 (4) KHC 8]**, is that there is a sea of difference between holding that both courts have concurrent jurisdiction and that one court can grant the reliefs, which can be granted by another

court. What is provided by section 26 is that the reliefs under sections 18 to 22 can be granted by the Family Court and other civil courts. Section 26(3) of the D.V. Act explains that, if a relief under sections 18 to 22 is granted by another court, it shall be reported to the jurisdictional Magistrate, which clearly and categorically clarifies that the jurisdictions conferred on different courts are not concurrent. We are quite in agreement with that proposition of law.

19. It may be noted that going by the definition of the respondent in Section 2(q) of the D.V. Act, a female living in a relationship in the nature of a marriage, in other words, living-in-relationship may also file an application under Section 12 of the D.V.Act. If it is held that an application under Section 12 of the D.V.Act is liable to be transferred to a Family Court, that will result in an indiscriminate classification inasmuch as a Family Court is empowered to entertain disputes between the parties to a marriage only. That also is a reason to hold that an application under Section 12 of the D.V. Act cannot be transferred to a Family Court.

20. Viewed so, we are in agreement with the findings of this Court in **Anish Antony Thimothy [2011 (3) KHC 46], Mony M.A. [2007 (2) KLJ 209]** and **Rajeev Thomas [2018 (4) KHC 8].** The said view expounds the correct proposition of law. The view taken by the High Court of Judicature at Bombay in **Anirudh Ajaykumar Garg v. State of Maharashtra** (M.C.A.No.76 of 2021) cannot, therefore, be accepted as the correct principle.

21. Accordingly, we hold that a proceedings initiated under the D.V. Act before a Judicial Magistrate of the First Class cannot be transferred to a Family Court. It follows that the plea of the appellant in unnumbered Transfer Petition (C) No.25 of 2023 fails. Therefore, this appeal is liable to be dismissed. We do so.

Sd/-
ANIL K. NARENDRAN, JUDGE

Sd/-
P.G. AJITHKUMAR, JUDGE

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