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Divergent Views on the Nature of Domestic Violence Act and Jurisdiction of the High Court

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Domestic Violence Act was enacted in response to the rising number of cases of a battered wife, in truth it tries to fill up the void between inaction and divorce, Due to such a large spectrum of marital disharmony that can occur the powers granted under the act are also sufficiently diverse in nature. It ranges from an order that grant monetary compensation to those that require to prescribe penal sanctions. And hence the question the paper would like to briefly address is of what nature is proceedings under the Domestic Violence act and if it is a civil or criminal piece of legislation and whether the High Court ought to give an order under Sec. 482 of CrPC or as part of its revisional jurisdiction or as a Writ petition under Art. 227 of the Constitution? These questions will be addressed in the Essay.

The paper would first go over the Jurisprudence behind the enactment of the legislation, it would then try to perform a comparative analysis between the act and the Criminal Procedure Code in order to understand the intended colour of the legislation. Thereby which the paper will seek to understand the metric that has been used in previous cases to determine the nature of proceedings under the DV Act, having discussed it the paper will discuss the current standing that the High Courts have taken concluding in what seems to be to the author the best way ahead in dealing with the question of jurisdiction in light of the proceedings.

Keywords: domestic violence act, civil jurisdiction, article 227, criminal jurisdiction.

INTRODUCTION

It is no surprise to the well-versed that the Protection of women from Domestic Violence Act, 2005¹ (For short “the Act”) in much of its segments prescribes that the procedure that is to be followed would be that of the CrPC² such as that of the Jurisdiction, which shall be that of the Judicial Magistrate of the First class³ and the even the orders passed by it are also to be taken as those done by a criminal court.⁴ Even so far as to prescribe that the procedure that is to be followed shall be governed by the Criminal procedure code.⁵ But what is surprising is the fact that the nature of the relief that can be sought under the act varies from being purely civil such as those of residency to being criminal in nature. Hence in light of this dichotomy, there rises a question of Jurisdiction that the High Court must excursive in the case of a writ petition, and should there be revisional jurisdiction of the High Court or should it be considered a suit?

JURISPRUDENCE SURROUNDING THE FORMATION OF THE DV ACT

The background of this duality, the court reasons is due to the intermediary nature of the act, bearing in mind that the intention of the legislature is to fill the void in terms of the actions that can be taken by a married woman while not intending to bring about criminal action against her husband or their family, and all the same not willing to file for separation or Divorce. And hence in order to achieve this sort of harmony, there is a need for such a shifty piece of legislation.

Furthermore, this also forms a quintessential portion of the jurisprudence of the act, wherefore the preamble of the act mentions the resolution adopted by the *United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women and the Vienna Accords of*

¹ Protection of women from Domestic Violence Act 2005

² Criminal Procedure Code 1973

³ Violence Act (n 1), s 27

⁴ Violence Act (n 1), s 19(4), 20(1)(d)

⁵ Violence Act (n 1), s 28(1)

1994⁶ read with *Beijing Declaration and the Platform for Action (1995)*⁷ requires the nations states to protect the natural and Human rights of women, and due to a severe lack of civil right remedies that are available to women in the case of domestic violence, therefore, the was a need to embark on this particular code.

The Supreme Court also noted in the case of *Vijay Baskar v. Suganya Devi*⁸ noted that:

“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 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”

Therefore the act should be considered most pre-dominantly as a civil one with few sections turning into criminal ones in case of a breach⁹ in order to better facilitate the ground reality of the actions which are in effect physical in nature. In so many words one could attribute this to be a tort of sorts in its jurisprudence since although torts are the bijection of civil and criminal law, the Act, tends to behave more of a criminal on will.

PROCEDURAL DIFFERENCE BETWEEN CRIMINAL PROCEDURE CODE AND DOMESTIC VIOLENCE ACT

To get a better understanding of the nature of the Legislation it is poignant to look at the key difference that one can observe between the DV act and CrPC, this will help understand what pre-texts the DV act and CrPC are not to consider as legislation mandating Criminal Action.

Definition of Complaint

⁶ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights (Vienna. 25 June 1993)

⁷ Beijing Declaration and the Platform for Action (1995), Fourth World Conference on Women, (Beijing, 1995)

⁸ *Vijay Baskar v Suganya Devi* (2010) SCC Mad 5446

⁹ *Kunapareddy Nookala Shanka Balaji v Kunapareddy Swarna Kumari & Anr* (2016) 11 SCC 774

On the outset, the very definition of a *complaint* under CrPC and *complaint* as contemplated under the D.V. Act are not the same. A complaint under Rule 2(b) of the D.V Rules¹⁰ is defined as “any *allegation made orally or in writing by any person to a Protection Officer*”.

On the other hand, a complaint, under Section 2(d) of the CrPC¹¹ is, “any *allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence.*” However, the Magistrate dealing with an application under Section 12 of the DV Act¹² is not called upon to take action for the commission of an offence.

What is more is that there is no provision asking the magistrate to take action against the respondent in the case, as compared to a complaint where a specific action is required to be taken by the magistrate. Furthermore, the complaint to a Protection Officer may not be in consequence of the commission of any offence. Hence, what is contemplated is not a complaint but an application. A complaint under the D.V Rules is made only to a Protection Officer as contemplated under Rule 4(1) of the D.V Rules.¹³ The idea of not involving the magistrate also shows the nature to which the action required is not to be penal but simple to help address the marital discord.

Taking cognizance

A complaint made to the magistrate under Section 2(d) of the CrPC¹⁴ requires the magistrate to investigate and take cognizance of the offence, whereas Rule 6(1)¹⁵ of the DV rules state that an application under Sec. 12 of the DV Act does not require the magistrate to take cognizance. This cements the idea that a complaint under the DV act cannot be considered as a complaint under the Criminal Procedure Code, as under Section 190(1)(a) CrPC¹⁶. And hence the

¹⁰ Protection of Women from Domestic Violence Rules 2006, rule 2(b)

¹¹ Criminal Code (n 2), s 2(d)

¹² Violence Act (n 1), s 12

¹³ Violence Rules (n 10), rule 4(1)

¹⁴ Criminal Code (n 2), s 2(d)

¹⁵ Violence Rules (n 10), rule 6(1)

¹⁶ Criminal Code (n 2), s 190(1)(a)

procedure under Chapter 15 of the CrPC, Complaints to Magistrate will not apply to the complaint made under DV act.

Usage of the terms

Another befuddling characteristic of this piece of legislation is the rampant use of the word “*respondent*” in place of the word “*accused*”. The Court has gone into greater detail on the issue of who is a respondent in the case of *Hiral P. Harsora and Ors.*¹⁷ This indeed brings clarity that there is a specific want or legislative intent on creating a civil colour and brings greater meaning to the chameleon like nature of the code.¹⁸ The willful removal of terms such as *accused* and *convict* shows that the Domestic Violence Act should not be mindlessly clumped up with other criminal legislation and forms a collage of both civil and criminal powers of the court which will be discussed further later on.

Issuance of Process

The default process of registering a complaint and taking cognizance and then issuing summons is quite heavily contrasted in the DV act as Compared to the Criminal Procedure Code. When it comes to the stage of issuing a summons as contemplated under Section 204, CrPC¹⁹ has no application to a proceeding under the D.V Act since in this case the Magistrate, in an application under Sec. 12 of the D.V Act²⁰, is not taking cognizance of any offence. This is because the magistrate is adjudicating upon the question of civil relief and not criminal ones.

Furthermore, as has already been pointed out, the respondent before the Court in an application under Section 12 of the Act is not an accused but is a respondent. The complaint is not taken cognizance of and neither is there any summons. Hence, the requirement of framing a charge also does not arise either.²¹

¹⁷ *Hiral P. Harsora & Ors v Kusum Narottamdas Harsora & Ors* 2016 (10) SCC 165

¹⁸ Violence Act (n 1), s 2(q)

¹⁹ Criminal Code (n 2), s 204

²⁰ Violence Act (n 1), s 12

²¹ *V. Palaniammal v Thenmozhi* (2010) 1 MWN Cri 217

In fact, Section 13 of the D.V Act²² and Rule 12 of the D.V Rules²³ expressly provide that the Magistrate shall issue "a notice" as compared to a summons. It can also be argued that the D.V Act does not contemplate the issuance of a summons under Section 61, CrPC in an application under Section 12, although Rule 12(2)(c) enables resort to Chapter VI of the CrPC this is only to ensure the efficiency of the service of notice only but not to be considered as a basis for issuing summons, but this may not be considered as stringent settled law but rather a matter of practicality since the certain condition may necessitate the use of summons. In *Vijaya Baskar v. Suganya Devi*,²⁴ a learned single judge of Madras High Court expressly disapproved the practice of issuing summons in Domestic Violence cases since the idea is not to initiate Criminal Proceedings and make bitter the situation.

JURISDICTION OF THE HIGH COURT

Whether the court of the magistrate can exercise the power of the civil court is a common question that is bound to come up is but more importantly can these criminal courts handle the civil jurisdiction or not. What is interesting to note here is that there is no stone cold definition of what a criminal court is. The Criminal Procedure Code under Sec. 6²⁵ only defines the classes of criminal courts. Although undoubtedly the Court of Judicial Magistrate of the First Class does fall under the category of classification that does not bar it from exercising a Civil Subject matter as part of its jurisdiction.

In cases of revenue collection many times the court of Judicial Magistrate has had to exercise its civil jurisdiction such as that of *V.B. D'Monte vs Bandra Borough Municipality*²⁶ wherein the question of whether the Bombay High Court could exercise its criminal revisional jurisdiction as a criminal court when a magistrate was deciding a revenue case, the court of a judicial magistrate being subordinate criminal court and having given due consideration to the

²² Violence Act (n 1), s 13

²³ Violence Rules (n 10), rule 12

²⁴ Baskar (n 8)

²⁵ Criminal Code (n 2), s 6

²⁶ *V.B.D. Monte v Bandra Borough Municipality* AIR 1950 Bom 397

case of *Ahmedabad Municipality v. Vadilal*²⁷, the court decided that the application lied under Sec. 115 of CPC²⁸ and on the civil side of the High Court.

The court in the case of *V.B. D'Monte vs Bandra Borough Municipality*²⁹ opined that:

“The better view seems to be that a Criminal Court may be constituted as a Court designate and civil jurisdiction may be conferred upon that Court. If a criminal Court exercises that jurisdiction, then it is not necessarily an inferior Criminal Court within the meaning of the Criminal Procedure Code; and if a right of revision is given from a decision of such a Court, then that revisional application is civil in its character and not criminal. That is the only limited question that we have to consider in this case.”

THE CONFLUENCE OF CIVIL AND CRIMINAL NATURE

What is surprising is the nature in which Civil and Criminal Jurisdiction of the courts have applied in India. Specifically, with reference to the encroachment of civil subject matters into criminal court, this is more pronounced in the subject of tax, revenue, and land arrears. So much so that provisions of the CrPC even entertain the session court as an appellate court for Registration of Property³⁰. This can be attributed to the residual legislation of the British Era where there was a greater intersection between revenue courts and the Criminal Court in order to improve the efficiency of collection of revenue. The Madras High Court in the case of *Dr.P.Pathmanathan vs Tmt.V.Monica*,³¹ upheld the test formulated by Justice Chagla in the case of *V.B D'Monte v. Bandra Borough Municipal Corporation*.³²

Furthermore, the differentiating nature of Civil and Criminal Proceedings of the Court has been discussed in greater detail by that supreme court in the case of *Ram Kishan Fauji v State of Haryana*³³, the Supreme Court in so many words opined that the nature of the Tribunal does not automatically confer the nature to the proceedings instituted Infront of it, but rather

²⁷ *Ahmedabad Municipality v Vadilal* AIR (15) 1928

²⁸ Civil Procedure Code 1908, s 115

²⁹ Monte (n 26)

³⁰ Criminal Code (n 2), s 351(4)

³¹ *Dr. P. Pathmanathan v Smt. V. Monica* CrI No.28458 of 2019 [2021]

³² Monte (n 26)

³³ *Ram Kishan Fauji v State of Haryana* (2017) 5 SCC 533

the nature of the proceedings depends on the nature of the right that is violated and the relief that may be sought. And hence,

*"Merely because a Magistrate is called upon to adjudicate and enforce civil rights in an application under Chapter IV of the D.V Act, it does not follow that the proceeding before it is of a criminal character. A Court of Magistrate not exercising functions or determining cases of a criminal character cannot be said to be a Criminal Court"*³⁴

This ratio of the Supreme Court was affirmed in the cases of *The Dargah Committee, Ajmer vs State Of Rajasthan*³⁵ wherein the Supreme Court noted that the District magistrate was excising Civil Jurisdiction and hence the proceedings were civil in nature rather than criminal. This Kerala High Court in the case of *Mammoo vs State Of Kerala And Anr.* ³⁶ Also confined itself to the ratio of the Supreme Court.

POWERS OF THE HIGH COURT

The powers of the High Court in the case of a Criminal Case can be distinctively categorised into two parts that are namely, (i) Revisional Powers of the Court & (ii) inherent powers of the court. It is not in the purview of the paper to go into the details of what constitutes each portion of such powers and whether or not each one of them is distinctively different and independent of the other³⁷ but to know whether the High Court can exercise it in cases initiated under DV Act or not.

On the question of the revisional powers of the High Court, there is a need for there to be an inferior criminal court as envisaged under Sec. 397 of CrPC³⁸ and therefore the courts must be as the previously mentioned class of criminal court excising its jurisdiction in a criminal matter with a relief that is sought to be that of death, imprisonment, fine or forfeiture of property which as a characteristic of Criminal Cases.

³⁴ S.A.L. Narayan Row & Anr v Ishwarlal Bhagwandas AIR 1965 SC 1818.

³⁵ The Dargah Committee, Ajmer v State of Rajasthan 1962 AIR 574

³⁶ Mammoo v State of Kerala & Anr AIR 1980 Ker 18 (FB)

³⁷ Madhu Limaye v State of Maharashtra 1978 AIR 47

³⁸ Criminal Code (n 2), s 397

In *The Dargah Committee, Ajmer vs State Of Rajasthan*³⁹ the Supreme Court Considered the idea that since the question of municipality laws was purely civil hence the precedent set in the case of *V.B D'Monte v. Bandra Borough Municipal Corporation*,⁴⁰ is to be followed. This makes clear the question of whether or not certain proceedings present in the Subordinate Judiciary will attract the revisional powers of the High Court. But a supplementary Question that arises is that of whether the proceedings when initiated be civil and subsequently, can they become criminal in nature as is prescribed in the breach of the condition set forth under Sec.31 of DV Act.⁴¹

A Division Bench of the Allahabad High Court in, *Mt Mithan v. Municipal Board of Oral and State of U.P.*,⁴² has clarified this aspect and pointed out as under:

“63. If once an authority acts as an inferior Criminal Court, a subsequent proceeding before it may also be said to be one before an inferior Criminal Court, but it does not follow that because a subsequent proceeding is before an inferior Criminal Court, the earlier proceeding also is, especially when the two proceedings are entirely distinct from each other through one follows the other In view of the above, the stage of deciding an application under Section 12 is entirely different from the stage where the Magistrate tries an offence under Section 31 or 33 of the Act. Merely because the Court of Magistrate is a criminal court in the latter stage, it does not follow that it is a criminal court in the former stage as well.”

The question of the inherent power of the High Court as encompassed under Sec. 482 of the CrPC is a peculiar one since it brings into question, not just the nature of the proceedings as previously discussed but also whether the High Court in the case that it is a criminal case should exercise its inherent power.

In *State of W.B. v. Sujit Kumar Rana*⁴³ , the Supreme Court has opined as under:

³⁹ *The Dargah Committee, Ajmer v State of Rajasthan* 1962 AIR 574

⁴⁰ *Monte* (n 26)

⁴¹ *Violence Act* (n 1)

⁴² *Mt Mithan v Municipal Board of Oral and State of U.P.* AIR 1956 All 351

⁴³ *State of W.B. v Sujit Kumar Rana* (2004) 4 SCC 129

“From a bare perusal of the aforementioned provision, it would be evident that the inherent power of the High Court is saved only in a case where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court amounts to abuse of the process of the court. It is, therefore, evident that power under Section 482 of the Code can be exercised by the High Court in relation to a matter pending before a court;”

This view of the Supreme Court was also expressed by the Madras High Court in the case of *Rajamanickam v State of Tamil Nadu*⁴⁴. But all the same, it does not preclude the High Court from exercising its power under Art. 227 of the Constitution⁴⁵, this was the opinion of the Madras High Court in the case of *M. Muruganandam v. M. Megala*⁴⁶. Further more the relation between the two particular codes that of Art. 227 and Sec. 482 are made more than clear by the court in the case of *State of Orissa v. Debendra Nath Padhi*⁴⁷ which had re-affirmed the guidelines that were laid down in the *Bhajan Lal Case*⁴⁸.

VIEWS OF CERTAIN HIGH COURTS

The view taken up by the High Courts has been varying from High Court to High Court, wherein the decision is also subject to change in the case of different Judges. Justice GR Swaminathan Putting an end to the diverging views of the Madras High Court on administrative problems caused by the issue of the nature of the petition said that the same could be entertained under the powers granted by the constitution under Art. 227.⁴⁹ This was in response to the plea of the plaintiff who has asked that his petition be listed under Art. 227 and the registrar refused to do so in light of the previous judgement of the Madras High court.⁵⁰

⁴⁴ *Rajamanickam v State of Tamil Nadu* 2015 (3) MWN Cri 379

⁴⁵ Constitution of India 1950, art 227

⁴⁶ *M. Muruganandam v M. Megala* (2011) 1 CTC 841

⁴⁷ *State of Orissa v Debendra Nath Padhi* (2005) 1 SCC 568

⁴⁸ *State Of Haryana & Ors v Ch. Bhajan Lal* 1992 AIR 604

⁴⁹ Constitution of India (n 45), art 227

⁵⁰ Live Law News Network, 'Article 227 Petition Maintainable Against Domestic Violence Act Proceedings: Madras High Court' (*Live Law*, 12 June 2021) <<https://www.livelaw.in/news-updates/article-227-petition-maintainable-against-domestic-violence-act-proceedings-madras-high-court-175611>> accessed on 23 June 2021

In the case of *Baiju Son of Chandra Nair v. Latha*⁵¹ also the Kerala High Court considered the text put forth with regards to the subject matter of the Dispute but concluded that although the subject matter of the dispute is civil in nature the Court of the magistrate cannot be considered to not exercising their powers as a criminal court. The Kerala High Court had taken an opposing view in two of its later decisions in *Santhosh v. Ambika. R*,⁵² and *T. Rajan v Vani. P*.⁵³ In a recent decision, *Latha P.C v State of Kerala*,⁵⁴ the Kerala High Court held that an application under Section 482 CrPC is not maintainable to quash a complaint under Section 12 of the D.V. Act.

A Division Bench of the Bombay High Court had reached the same conclusion in *Sukumar Pawanlal Gandhi v Bhakti Sushil Gandhi*⁵⁵. However, a Full Bench of the Bombay High Court in *Prabhakar Mohite v State of Maharashtra*⁵⁶ overruled the decision in *Sukumar Pawanlal Gandhi*. The Full Bench correctly noted that the character of a proceeding is not dependent upon the nature of the Tribunal but on the nature of the right violated. The Full Bench held, and rightly so, that the nature of the right in a proceeding under the D.V Act is purely civil in nature. Although having held this particular metric of considering the proceedings, the Full Bench, nevertheless, held that an application under Section 482 CrPC would lie.

The Gujrat High Court held that⁵⁷ the proper remedy against the impugned Judgement and Order of Magistrate is Criminal revision Application under Sec. 397(1) read with Section 401 of the Code of Criminal Procedure 1972 and not the Writ Jurisdiction of the High Court under 227. This is contrary to the view taken up by various High Courts and Contrary to the decision of the Gujrat High Court itself in the case of *Nitin Kumar Manilal Shah v. State of Gujrat*⁵⁸.

All in all the High Courts are divided in their views of whether or not the application under 482 or 227 will lie or not, but what remains poignant is the plight of the respondent who for no

⁵¹ *Baiju Son of Chndra Nair v Latha* 2011 (3) R.C.R (Criminal 704)

⁵² *Santhosh v Ambika. R* (2015) SCC Ker 26542

⁵³ *T. Rajan v Vani. P* (2020) SCC Online Ker 25170

⁵⁴ *Latha P.C. v State of Kerala* 2020 (6) KLT 496

⁵⁵ *Sukumar Pawanlal Gandhi v Bhakti Sushil Gandhi* (2016) SCC Online Bom 12942

⁵⁶ *Prabhakar Mohite v State of Maharashtra* (1973) 3 SCC 219

⁵⁷ *Reamesh Bhai Ramaji Bhai Desai v State of Gujrat* Special Civil Application No. 15687 of 2014

⁵⁸ *Nitin Kumar Manilal Shah v State of Gujrat* 2014 (2) GLR 1353

fault of his own has to listen to the ivory tower occupant judges discuss an impertinent technicality.

CONCLUSION

From a purely practical stand of view, it would occur to a person that the question of the act under which the court derives its jurisdiction is no so important as to have denied the petitioner a hearing Infront of the court, although the question of the nature of proceedings is important in so much as it does not affect the justice imparted such question are of mere erudition and should not cause such grave inconvenience to the respondents. The delay cost due to such discrepancies far outweighs the ephemeral consonance with the intention of the legislation. In truth, the outcome of justice is not going to be subjugated to the wills of the procedure and the procedure is simply a means to a certain end. But considering that there might be a greater consequence to that nature of justice that is achieved whilst considering the question of the nature of the act one might have to ponder if it is not possible to categorise it as follows:

For those orders that arise out of the contravention of the order set forth under 12, 18, 19, 20, 21, 22, and 23 and offences under section 31 should be strictly considered as criminal proceedings and hence the High Court would be correct to consider the court of Judicial Magistrate to be that of an inferior court. And specifically in respect of squashing of proceeding the same should be done under the Revisional Jurisdiction of the High Court the powers to squash proceedings under Domestic Violence act.

With Reference to all other proceedings, it should be considered as civil in nature and thereby do not attract there revisional powers of the High Court, of course, a set procedural guild line or flowchart would go miles to ensure that there is no question of procedural discrepancies in the functioning of the lower court. As has been previously mentioned I feel the very basis of the jurisdiction capsizing the case defeats the goals of justice and therefore elongates the already painstakingly long procedure that is present in the Judicial System and therefore the court should be cautious in denying petitions simply because a certain section number is not

invoked especially when *prima facie* jurisdiction does exist. It is my humble opinion that this approach of the court shows gross negligence towards the plight of the petitioner who has to run pillar to post for the hearing of the case all over again simply due to a clerical difference in the Section Numbers.