

Dr. Sandip Mrinmoy Chakrabarty vs Mrs. Reshita Chakrabarty on 26 February, 2021

Equivalent citations: AIRONLINE 2021 BOM 930

Author: R. D. Dhanuka

Bench: R. D. Dhanuka, V. G. Bisht

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 31 OF 2020
ALONG WITH
INTERIM APPLICATION NO. 190 OF 2019
ALONG WITH
INTERIM APPLICATION NO. 596 OF 2019

Dr. Sandip Mrinmoy Chakrabarty
Age: 49 years, Occupation: Doctor,
R/at: F-602, Maestros Salunke Vihar Road,
Also at : 5th Floor, South Block, Sacred World
Wanowrie, Pune - 411 040.

... Appellant/
Applicant

Versus

Mrs. Reshita Sandip Chakrabarty
Age: 46 years, Occupation: Teacher,
R/at: F-601, Maestros Society,
Salunke Vihar Road, Wanowrie,
Pune - 411 040.

... Respondent

Mr. Abhijit D. Sarwate a/w Mr. Ajinkya Udane and Ms. Ria Lohade,
for the Appellant in FCA/31/2020 and Applicants in IA/190/2019 and
IA/596/2019.

Mr. Sanjay Bhojwani, for the Respondent.

CORAM : R. D. DHANUKA &
V. G. BISHT, JJ.

RESERVED DATE : 8th FEBRUARY, 2021

PRONOUNCED DATE : 26th FEBRUARY, 2021

ORAL ORDER (Per R. D. Dhanuka, J.) :-

. This Court by an order dated 3 rd December, 2020 directed to place this matter on board for deciding the issue of maintainability bdp fca-31.20.doc raised by the respondent-wife to the extent of challenge to the order of maintenance passed by the Family Court under the provisions of Protect of Women from Domestic Violence Act, 2005 (for short 'the said Domestic Violence Act') on the ground that Criminal Revision Application is maintainable against that part of the order passed by the Family Court and not this Family Court Appeal filed under Section 19 of the Family Courts Act, 1984. Some of the relevant facts for the purpose of deciding the issue of maintainability of the Family Court Appeal No. 31 of 2020 raised by the respondent are as under :-

2. Respondent had filed a petition for divorce against the appellant on the ground of adultery and cruelty on 16 th December, 2013. The said petition was filed under the provisions of Special Marriage Act, 1954.

The appellant had filed written statement and also a counter claim in the said petition and prayed for divorce on the ground of cruelty against the respondent.

3. On 11th February, 2014, the respondent-wife filed the proceedings alleging domestic violence on the part of the appellant before the learned Judicial Magistrate First Class, Pune. Respondent bdp fca-31.20.doc initially filed a divorce petition bearing P.A. No. 1374 of 2012 on 3 rd December, 2012 on the ground of cruelty and adultery. The said petition was however withdrawn on 10th December, 2012. The respondent subsequently filed the second petition bearing P.A. No. 1426 of 2012 on 17th December, 2012 for divorce.

4. The appellant herein filed Criminal Writ Petition No. 4649 of 2015 against the respondent and another in this Court inter-alia praying for transfer of the proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court, Pune and for clubbing with petition for divorce filed by the respondent before the Family Court at Pune. By an order dated 6th December, 2018 passed by this Court the said Writ Petition was allowed. This Court noticed that the respondent had also sought necessary reliefs in the form of grant of permanent physical custody of the minor son and also alimony pendente lite at Rs.75,000/- per month under the provisions of the Special Marriage Act, apart from the relief of dissolution of marriage under the said Act. The respondent no.1 had also sought to grant permanent alimony and maintenance to the tune of Rs.2 crores in her favour under the provisions of the Special Marriage bdp fca-31.20.doc Act. The respondent had also prayed for grant of interim maintenance and also for payment of damages against the appellant.

5. In the said proceedings filed before the learned Judicial Magistrate First Class, the respondent had filed an application under Section 12 of the said Domestic Violence Act on 11 th February, 2014. The parents of the appellant herein were also impleaded as parties respondent. This Court referred to the prayers in those proceedings filed by the respondent before the learned Judicial Magistrate First Class. It was contended by the appellant's advocate before this Court that the principles of Section 26 of the said Domestic Violence Act, 2005 is to ensure that any relief available under Sections 18 to 22 can be sought in any legal proceedings before a Civil Court, Family Court or a Criminal Court, whether such proceedings were initiated before or after commencement of the said

Domestic Violence Act. It was contended that jurisdiction vested in the Family Court is wide enough to consider all the reliefs that have been prayed in the application specifically preferred under Section 12 of the said Domestic Violence Act, 2005.

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6. In the said order dated 6th September, 2018 passed by this Court, after perusing the application filed by both the parties, this Court observed that there was overlapping of certain reliefs. The reliefs which were sought in the petition before the Family Court were for dissolution of marriage along with the other reliefs. The reliefs under the said Domestic Violence Act were overlapping with some of the reliefs claimed before the Family Court. The reliefs as regards the residence order or restrain order in respect of the residential house in Pune where the respondent-wife was residing was distinct and was not sought in the proceedings before the Family Court. This Court in the said order adverted to the provisions of Family Courts Act, 1984 and the provisions of the said Domestic Violence Act and held that it is apparent that the said two enactments provided for overriding remedies and reliefs. The forum of Family Court established under Family Courts Act, 1984 is competent to exercise all the jurisdiction exercisable by any District Court or any Subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation appended to Section 7 and for the purpose of exercising such jurisdiction under such law, is deemed to be a District Court or, as the case may be, Subordinate bdp fca-31.20.doc Special Court for the area to which the jurisdiction of the Family Court extends.

7. It is held that the explanation to the said Section the said section enumerates the nature of suits and proceedings and series of proceedings have been included, in respect of which the Family Court will have jurisdiction. The Family Court would also exercise jurisdiction over the property of the parties to the marriage, injunction for circumstances arising out of marital relationship, declaration as to legitimacy of any person, proceedings for maintenance, guardianship, access of children, person etc. It is held that the Family Court thus exercise the powers of Civil Court and by virtue of Section 10 of the said Act, is deemed to be a Civil Court and has all powers of such a Court. By Sub-Section 1 of Section 10 of Family Courts Act, 1984, the provisions of the Code of Civil Procedure are made applicable to the suits and proceedings before the Family Court except the proceedings under Chapter IX of the Criminal Procedure Code, 1973 which continued to be governed by the provisions of Code of Criminal Procedure.

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8. This Court in the said order held that as far as conduct of the proceedings under the said Domestic Violence Act is concerned, proceedings are initiated on an application being preferred by an aggrieved person or a protection officer or any other person on behalf of the aggrieved person seeking various types of reliefs which the Magistrate is competent to grant under Chapter IX of the Code of Criminal Procedure, 1973. Section 28 prescribes that all the proceedings under Sections 12, 18 to 23 are governed by the Code of Criminal Procedure, 1973. It is however permissible to the Court to lay down its own procedure for disposal of an application under Section 12 or under sub-Section 2 of Section 23.

9. It is held that the Family Court which is deemed to be a Civil Court possesses all the powers of a Civil Court including its inherent power to grant interim relief and therefore a Section analogous to Section 23 of the said Domestic Violence Act, 2005 did not find place in the Family Courts Act, 1984. This Court recorded the submission made by the learned Counsel for the appellant herein in the said order that those two proceedings could be clubbed together and dealt with by the same Court i.e. Family Court which was empowered to deal with bdp fca-31.20.doc the said proceedings in the manner which would serve the interest of justice and the interest of parties in a better manner. The prayer of the appellant herein was not to deprive the respondent of any reliefs which she had sought in the domestic violence proceedings but it also only the claim of the appellant that it could be decided before Family Court effectively and the Family Court by directing the parties to lead common evidence in support of the overlapping reliefs which are sought.

10. This Court accordingly held that the reliefs sought before the learned Magistrate by the respondent in the domestic violence proceedings could be effectively tried and granted by the Family Court. It is held that the Court which is competent to grant final relief is also competent to grant interim reliefs or to protect the subject matter of the proceedings before it. It is held that in order to avoid the multiplicity of litigation and in the interest of parties, it would be appropriate that the power under Section 24 of the Code of Civil Procedure, 1908 could be exercised and the proceedings could be clubbed together. Since, the evidence of respondent-wife in the domestic violence proceedings was already over, this Court directed the Family Court to rely upon the said bdp fca-31.20.doc evidence recorded in the domestic violence proceedings by the learned Judicial Magistrate, First Class at Cantonment Court, Pune and from that stage by taking the said evidence which is also recorded and directed the Family Court to proceed further and would take into consideration the averments that have been raised in the domestic violence application preferred by the respondent before the learned Judicial Magistrate, First Class. This Court accordingly directed the Family Court to dispose of the proceedings expeditiously on being transferred. It is not in dispute that the respondent has not impugned the said order dated 6th September, 2018 passed by this Court in the said petition filed under Section 24 of Code of Civil Procedure, 1908.

11. Learned Counsel for the respondent invited our attention to the impugned judgment dated 17th May, 2019 passed by the Family Court and would submit that by the said common judgment, the Family Court disposed of not only the petition for divorce i.e. P.A. No. 1386 of 2013 but also disposed of the Criminal Misc. Application No. 73 of 2018 filed by the respondent. Learned Counsel invited our attention to the issues in P.A. No. 1386 of 2013 and also separate issues in Criminal Misc. Application No. 73 of 2018 (old number Criminal Misc. bdp fca-31.20.doc Application No. 68 of 2013) and would submit that the Family Court has answered the issues framed under the said P.A. No. 1386 of 2013 and in Criminal Misc. Application No. 73 of 2018 separately. He invited our attention to the operative part of the said judgment and would submit that directions issued by the Family Court in paragraphs 7 to 27 are under the provisions of the said Domestic Violence Act whereas the directions issued in the other paragraphs were passed in P.A. 1386 of 2013 relating to divorce petition.

12. Learned Counsel invited our attention to Section 19(2) of the Family Courts Act, 1984 and would submit that no appeal is maintainable under Chapter IX of the Criminal Procedure Code, 1973. He

relied upon Section 19(5) of the Family Courts Act, 1984 and would submit that except the orders which are appealable under Section 19 specifically, no appeal or revision can be filed to any Court from any order or decree of a Family Court. It is submitted that the said order passed by the Family Court in the Criminal Misc. Application No. 73 of 2018 could be challenged only by way of Criminal Revision Application under Section 397 of the Code of Civil Procedure and not under Section 19(1) of the Family Courts Act, 1984. In support of this bdp fca-31.20.doc submission, learned Counsel strongly placed reliance on the judgment delivered by a Full Bench of this Court in case of Nandkishor Pralhad Vyawahare v/s. Mangala, (2018) 3 Mah LJ 913 and in particular paragraphs 7, 12, 18, 29, 30, 35, 39, 40, 42, 46 and 48.

13. Learned Counsel for the respondents submits that the proceedings under the provisions of Section 28(1) of the said Domestic Violence Act are akin to the proceedings under Section 125 of the Code of Criminal Procedure. He relied upon Rule 6(5) of the Family Court Rules. Learned Counsel invited our attention to Section 29 and also Section 12 of the said Domestic Violence Act and submits that application filed by the respondent-wife to the learned Magistrate was under Section 12 of the said Domestic Violence Act and thus any order passed under the said provisions is appealable before the Sessions Court under Section 29 of the Domestic Violence Act.

14. It is submitted by the learned Counsel that the scope of Criminal Revision Application under Section 397 of the Code of Criminal Procedure is limited and not wider as in case of an appeal filed under Section 19(1) of the Family Courts Act, 1984. Merely, because both the bdp fca-31.20.doc proceedings filed by the respondent i.e. one before the Family Court under the Special Marriage Act and another before the learned Judicial Magistrate, First Class under the provisions of Domestic Violence Act were clubbed together by this Court in the proceedings filed under Section 24 of the Code of Civil Procedure, 1908, the order passed by the Family Court in various separate paragraphs of the impugned order cannot be construed an order appealable under Section 19(1) of the Family Courts Act, 1984. Both the proceedings filed by the respondent were for different reliefs by invoking provisions of the two different Acts i.e. Special Marriage Act and Domestic Violence Act and thus the remedy of the aggrieved party would be to challenge the order passed in the two different proceedings, though by a common order would be as available under the provisions of the two different Acts and not by filing an appeal under the provisions of the Family Courts Act, 1984.

15. Mr. Sarwate, learned Counsel for the appellant on the other hand strongly placed reliance on the judgment of this Court delivered on 6 th September, 2018 in Criminal Writ Petition No. 4649 of 2015 filed by his client against the respondent and another under Section 24 of the Code of Civil Procedure, 1908 and would submit that the said bdp fca-31.20.doc judgment delivered by this Court thereby clubbing both the proceedings which were filed by the respondent against his client has not been impugned by the respondent. Learned Counsel placed reliance on Section 12 of the said Domestic Violence Act and would submit that various reliefs were sought by the respondent before the learned Judicial Magistrate, First Class in Criminal Misc. Application No. 68 of 2014 by making an application under Section 12 of the said Domestic Violence Act.

16. It is submitted that the reliefs which can be sought under the provisions of the said Domestic Violence Act are provided in Sections 18 to 22 of the said Domestic Violence Act. He submits that

the remedy of appeal provided under Section 29 of the Domestic Violence Act could have been availed by filing an appeal to the Court of Sessions only if such order on application made by the respondent under the provisions of the said Domestic Violence Act would have been heard by the learned Judicial Magistrate, First Class and not in case of an order passed by the Family Court. He submits that in this case the said proceedings initially filed by the respondent under Section 12 of the said Domestic Violence Act though filed before the learned Judicial bdp fca-31.20.doc Magistrate, First Class, were admittedly heard by the Family Court along with the divorce proceedings filed by her pursuant to the order dated 6th September, 2018 passed by this Court under Section 24 of the Code of Civil Procedure, 1908. He submits that Section 29 of the said Domestic Violence Act thus would not be attracted in this case.

17. Learned Counsel for the appellant submits that the Domestic Violence Act does not declare anywhere that whenever reliefs under Sections 18 to 22 are sought in other pending proceedings before the Civil Court, Family Court or a Criminal Court, such Court would be deemed to be the Court of Judicial Magistrate, First Class. He also placed reliance on paragraph 19 of the said judgment and would submit that since the reliefs sought by the respondent could be rejected by a Civil Court and the final order passed by the Family Court would also indicate the same, the respondent cannot be now allowed to urge that for part of the reliefs granted by the Family Court in favour of the respondent, the appellant was required to file a Criminal Revision Application under the provisions of the Code of Criminal Procedure read with Section 29 of the said Domestic Violence Act. bdp fca-31.20.doc

18. Learned Counsel for the appellant placed reliance on the unreported judgment of this Court delivered on 15 th November, 2019 in Misc. Civil Application No. 64 of 2019 in case of Mr. Santosh Machindra Mulik v/s. Mrs. Mohini Mithu Choudhari and in particular paragraph 5. He submits that to avoid any conflicting conclusions in the two proceedings one under the provisions of the Special Marriage Act and another under the provisions of the Domestic Violence Act and for various other reliefs, this Court rightly clubbed both the proceedings by judgment dated 6th September, 2018 in Criminal Writ Petition No. 4649 of 2015. It is not the case of the respondent that if the proceedings filed by the respondent under the provisions of Domestic Violence Act would have been heard by the learned Judicial Magistrate, First Class, there was no remedy available to the appellant against the said order.

19. It is submitted that it is not the case of the respondent that even if the appellant would have filed a Criminal Revision Application against the said order passed by the Family Court. Insofar as the reliefs under the provisions of Domestic Violence Act are granted, both the proceedings arising out of the order passed under the provisions of bdp fca-31.20.doc Special Marriage Act and under the provisions of Domestic Violence Act could have been clubbed together by this Court, after obtaining an administrative order from the Hon'ble Chief Justice. He submits that though the First Appeal was filed by his client on 3 rd September, 2019, the issue of maintainability is raised only on 3rd December, 2020.

20. Mr. Bhojwani, learned Counsel for the respondent in his rejoinder arguments submits that the appellant has also not removed office objection for six months in the Family Court Appeal filed by

him. No urgency was made out in the said Family Court Appeal by the appellant for the period of eight months. The Family Court had issued a Distress Warrant against the appellant.

REASONS AND CONCLUSIONS :-

21. The question that arises for consideration of this Court is whether Appeal under Section 19(1) of the Family Courts Act, 1984 is maintainable also in respect of the reliefs granted by the Family Court claimed under the provisions of Domestic Violence Act along with the reliefs granted in the divorce proceedings under the provisions of Special Marriage Act by a common judgment or not. bdp fca-31.20.doc

22. A perusal of the record indicates that on 16 th December, 2013, the respondent had filed a Petition (P.A. No. 1386 of 2013) against the appellant inter-alia praying for divorce on the ground of cruelty and adultery. On 11th February, 2014, the respondent filed Criminal Misc. Application No. 68 of 2014 under the provisions of the Domestic Violence Act before the learned Judicial Magistrate, First Class for various reliefs. The appellant filed a counter claim in the proceedings before the Family Court filed by the respondent inter-alia praying for divorce seeking custody of the child. The respondent filed her evidence in examination-in-chief in the Domestic Violence proceedings. Her cross-examination was concluded on 24th July, 2018. However, in view of the order passed by this Court on 6th September, 2018, the said proceedings before the learned Judicial Magistrate, First Class in Criminal Misc. Application No. 68 of 2014 were transferred to the Family Court and was renumbered as Criminal Misc. Application No. 73 of 2018. She was further cross-examined before the Family Court upon transfer of those proceedings to Family Court from the learned Judicial Magistrate, First Class.

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23. After completion of the cross examination of the respondent in the Family Court, the respondent examined two more witnesses. After the evidence of the respondent, the appellant entered into witness box to prove his case and to disprove the case of the respondent. The appellant also examined another witness.

24. Insofar as paragraph (46) is concerned, the Family Court framed several issues in P.A. 1386/2013 filed by the respondent inter alia praying for divorce on the ground of cruelty and adultery and also the issues arising out of the counter claim filed by the appellant for seeking divorce and for permanent custody of minor son. In paragraph (47) of the impugned judgment, the Family Court framed seven separate issues in Miscellaneous Application No.73 of 2018.

25. Insofar as issues in P.A.1386/2013 are concerned, the Family Court held that the respondent herein (original petitioner) had proved that she had failed to prove that the appellant had voluntary sexual intercourse with a woman other than the respondent. It is held that the respondent herein proved that the appellant had treated her with cruelty and was thus entitled to a decree of divorce. It is held that the bdp fca-31.20.doc appellant had failed to prove that the respondent herein had treated him with cruelty and was not entitled for permanent custody of the minor son. It is held that

the appellant had failed to prove that the respondent herein had been incurably of unsound mind and suffering continuously or intermittently for mental disorder of such kind and to such extent that the appellant cannot reasonably be expected to live with the respondent herein.

26. Insofar as the issues framed by the Family Court in Miscellaneous Application No.73 of 2018 arising out of the Domestic Violence Act are concerned, the Family Court held that the respondent herein had proved that the appellant had committed act of domestic violence against her. It is held that the respondent herein is entitled for maintenance for herself and for her son. It is held that the respondent herein is entitled to the relief of injunction restraining the appellant from causing interference in physical custody of the son with her and is entitled to the relief of injunction as claimed in prayer clauses (iv), (v) and (vi) of domestic violence proceedings in respect of Flat No. F-601, Maestros, Wanowrie. It is held by the Family Court that the respondent herein is entitled to the damages as claimed in the domestic violence bdp fca-31.20.doc proceedings and is entitled to get the instrument of investments etc. from the appellant herein.

27. A perusal of the impugned judgment delivered by the Family Court and more particularly paragraph 160 thereof indicates that in both the petitions i.e. in divorce petition and domestic violence petition, the most of the facts are on same footings and the nature of the evidence to some extent was the same and in view of order dated 6 th September, 2018 passed by this Court in the writ petition filed by the appellant herein, the domestic violence case has been transferred to the Family Court for trial with the divorce petition. The Family Court followed the judgment of this Court in case of XXX and others vs. ABC and another delivered on 2nd March, 2016 in Criminal Writ Petition No. 647 of 2016 and held that the objection to the maintainability of the domestic violence petition could not be accepted.

28. In paragraph 163 of the impugned judgment, it is held that the respondent therein had claimed permanent alimony for herself under the provisions of section 37 of the Special Marriage Act, 1954 and in domestic violence proceedings. In paragraph 194 of the impugned bdp fca-31.20.doc judgment, the Family Court rejected the claim for damages made by the respondent herein in domestic violence proceedings on the ground that the respondent had failed to prove that the appellant herein had voluntarily sexually intercoursed with the respondent no.2 in the criminal miscellaneous application. The respondent had claimed the relief of divorce under the provisions of section 27(1)(a) of the Special Marriage Act, 1954 on the ground of adultery. The Family Court considered the evidence led by both the parties in both the proceedings while considering some of the reliefs claimed under the provisions of Special Marriage Act as well as under the Domestic Violence Act.

29. Under section 24 of the Code of Civil Procedure, 1908, the High Court or the District Court may at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and try or dispose of the same; or transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same. Under section 24(2) of the Code of Civil Procedure, 1908, it is clearly provided that where any suit or bdp fca-31.20.doc proceeding has been transferred or withdrawn under

sub-section (1) of section 24, the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

30. In this case, the evidence in the proceedings filed by the respondent before the learned Judicial Magistrate, First Class at Cantonment Court, Pune was partly recorded. This Court after hearing both the parties had transferred those proceedings filed by the respondent under the provisions of the Domestic Violence Act to the Family Court. Both the parties thereafter participated before the Family Court. It is not in dispute that the said order passed by this court under Section 24 of the Code of Civil Procedure in the writ petition filed by the appellant herein has not been impugned by the respondent before the Hon'ble Supreme Court.

31. Under section 7 of the Family Court Act, the Family Court exercises all the jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force in bdp fca-31.20.doc respect of suits and proceedings of the nature referred to in the explanation. Explanation (c) provides that a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them would be a suit or the proceedings referred to in sub-section (1) of section 7. Explanation (f) refers to a suit or proceeding for maintenance. Explanation (g) refers to a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Sub-section (2) of section 7 provides that subject to the other provisions of this Act, a Family Court shall also have and exercise the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973. Sub-section 2 (b) of section 7 provides that such other jurisdiction as may be conferred on it by the Family Court by any other enactment subject to the other provisions of the said Act.

32. The Full Bench of this Court in case of Nandkishor Pralhad Vyawahare (supra) has dealt with the provisions of sections 12(1), 18 to 22 and 31 and 33 of the Domestic Violence Act and has also dealt with the power of court under section 482 of the Criminal Procedure, bdp fca-31.20.doc Code, 1974. The Full Bench of this Court considered the issue 'Whether or not the proceedings under the Protection of Women from Domestic Violence Act, 2008 are in the nature of criminal proceedings?' . It is held that the Domestic Violence Act nowhere makes any reference to the character or nature of the proceedings that are initiated under the Domestic Violence Act.

33. In paragraph (18), it is held that the Domestic Violence Act does not declare anywhere that whenever reliefs under sections 18 to 22 are sought in other pending proceeding before a Civil Court, Family Court or a Criminal Court, such Court would be deemed to be the Court of Judicial Magistrate, First Class. Silence of the legislature on this issue is likely to create difficulty in selection of the forum for filing of an appeal against any order passed in respect of the reliefs under the Domestic Violence Act by a person not satisfied with the being that section 29 of the Domestic Violence Act which creates right of appeal, mandates that such forum would be the Court of Session and it is possible in a given case that the order granting or rejecting relief may have been passed by the judicial forum equal in rank or designation as the Court of Session. In paragraph (19) it is held that the Hon'ble bdp fca-31.20.doc Supreme Court has paved the way for finding out the nature of a

proceeding. The examination of the nature of the rights created, the reliefs provided and the kinds of final order that could be passed, would be sufficient indices of the nature of a proceeding.

34. In paragraph 21 of the said judgment, this Court held that a proceeding in which the party asserts the existence of civil rights conferred by the civil law or by statute and claims a relief for breach thereof would be a proceedings of civil nature and the proceeding which upon conclusion results in the imposition of sentences, such as death, imprisonment, fine or forfeiture of property would be a proceeding of criminal nature. It is held that it is not the nature of the proceeding and it is the nature of the right violated and the relief provided for violation of the right is what ultimately decides the nature of a proceeding. This Court held that the preamble of the Domestic Violence Act indicates that the enactment is intended to provide more effective of rights of women guaranteed under the Constitution, who are victims of the violence occurring within the family and for matters connected there with or incidental thereto. In order to remove the deficiencies in civil law in respect of a offence punishable under bdp fca-31.20.doc Section 498 A of the Indian Penal Code and keeping in view the rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India, the parliament enacted the Domestic Violence Act to provide for a remedy under the civil law.

35. This Court also adverted to Section 26 of the Domestic Violence Act and held that any relief available under the Domestic Violence Act can also be sought in any other legal proceeding before a Civil Court, Family Court or a Criminal Court as long as such proceeding affects the aggrieved person and the respondents. Section 28 makes applicable the provisions of the Criminal Procedure Code to all the proceedings under Sections 12 and 18 to 23 in particular case. Section 29 prescribes that an appeal from the order made by the Magistrate shall lie to the Court of Session, within thirty days from the date of an order. This Court held that these provisions essentially create is a plethora of civil rights breach of which results in basically providing civil remedies which are alien to criminal law.

36. These rights and remedies are such as, right against domestic violence to be realized through a prohibitory order (Section 18), right bdp fca-31.20.doc to reside in a shared household and right from being dispossessed or disturbed in enjoying the possession of a shared household to be realized through a suitable restraining order (Section 19), right to get monetary reliefs and compensation (Sections 20 and 22), right to seek temporary custody of the child (Section 21) and right to seek interim and ex-parte orders in certain cases (Section 23). These rights and reliefs are not found in classical criminal jurisdiction, which is about punishing the rule breaker by sentencing him to death or imprisonment or forfeiture of property and in some cases making him pay the compensation to the victim of crime. The notice that is issued first on an application under Section 12(1) of the Domestic Violence Act is civil in nature as can be seen from the provision of Section 13 and neither any cognizance is taken as under Section 190 of the Criminal Procedure Code nor any process is issued as under Section 204 of Criminal Procedure Code in respect of such an application.

37. In paragraphs 30 to 32 of the said judgment, full bench of this Court held that under Section 12(1) of the Domestic Violence Act, an application made to the Magistrate, who could be Judicial Magistrate of the First Class or as the case may be, the Metropolitan Magistrate in bdp fca-31.20.doc Mumbai Metropolitan Region, as defined under Section 2(i), for seeking various reliefs as provided

under Sections 18 to 22 which are for redressing breach of civil rights and have a civil flavour, not known to criminal law. It is held that it is not the Judicial Magistrate, First Class or the Metropolitan Magistrate, as the case may be, who alone is competent to decide an application under Section 12(1). As even a Civil Court or a Family Court or any other Criminal Court conducting any legal proceeding which has the power under Section 26 to do so.

38. It is held that it is possible to obtain these reliefs even in a petition filed for divorce between the same parties under the provisions of Hindu Marriage Act, 1955. The rights created and remedies provided for the breaches thereof under Domestic Violence Act have been viewed by the Parliament as basically of civil nature and, therefore, by specific provisions, authority has been conferred even upon the Civil Courts, in addition to Criminal Courts, under Section 26 of the Domestic Violence Act, to deal with an application filed for seeking various remedies provided under Section 18 to 22 of the Domestic Violence Act. It is held that making of Criminal and Civil Courts simultaneously as appropriate to obtain the reliefs provided under the bdp fca-31.20.doc Domestic Violence Act is a certain pointer to the fact that the character of the proceeding is not dependent upon the nature of the tribunal which is invested with the authority to grant relief, but upon the nature of the right violated and the kind of relief that may be had. The rights created and remedies provided for in the Domestic Violence Act are basically of civil nature.

39. In paragraphs 34 and 35 of the said judgment, the full bench of this Court held that the applicability of provisions of the Criminal Procedure Code and providing of criminal consequences for breaches are only indicative of the intention of the Parliament to make various civil remedies available under the Domestic Violence Act more effective and meaningful. Parliament thought in its wisdom that mere giving of remedies of civil nature or an order of injunction or prohibition for that matter, may not be sufficient to enable the aggrieved person realise the benefits of civil remedies. It is held that as an effective tool in the hands of the Court and the aggrieved person, the procedure to be followed generally is criminal and breach of protection order and directions issued in such order constitute two separate and distinct offences. They have no bearing upon and do not determine the bdp fca-31.20.doc basic character of the proceeding initiated under Section 12(1) of the Domestic Violence Act which is by and large of the civil nature. These provisions are best, are the effective instruments by which to make available speedily the remedies under the Domestic Violence Act to the aggrieved person and enable her to enjoy the fruits of the remedies.

40. The full bench also adverted to the judgment of Division Bench of this Court in case of Sukumar Pawanlal Gandhi v/s Bhakti Sushil Gandhi, 2016 SCC OnLine Bom 12942 following the view taken by the Hon'ble Supreme Court in case of Kunapareddy alias Nookala Shanka Balaji v/s. Kunapareddy Swarna Kumari, (2016) 11 SCC 774 and held that the proceedings under Section 12(1) of the Domestic Violence Act are predominantly of civil nature and it opined that the power under Section 482 of Criminal Procedure Code would not be available for quashing of an application under sub-Section (1) of Section 12 seeking reliefs under Sections 17 to 22 of the Domestic Violence Act. However, it gave a clarification that because Sections 31 and 33 create distinct offences, power under Section 482 of Criminal Procedure Code could also be exercised for quashing of the prosecution under Sections 31 and 33 of the Domestic Violence Act. bdp fca-31.20.doc

41. Section 31 of the Domestic Violence Act provides for penalty for breach of protection order and interim application order by the respondent. Such offences shall be as far as practicable be tried by the Magistrate who has passed the order, the breach of which has been alleged to have been caused by the accused. Section 33 of the Domestic Violence Act provides that if any protection officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause, he shall be punished with imprisonment of either of one year, or with fine which may extend to twenty thousand rupees, or with both.

42. A perusal of the relief granted by the Family Court in favour of the respondent on the application filed by the respondent under the provisions of the Domestic Violence Act clearly indicates that neither any of the reliefs falling under Sections 31 or 33 were sought nor were granted by the Family Court. All the reliefs sought by the respondent and granted by the Family Court were under the provisions of Sections 19 to 22 of the Domestic Violence Act, which were of the civil nature and did not attract any offence punishable under criminal law. The bdp fca-31.20.doc learned Counsel for the respondent who raised an issue of maintainability of the Family Court Appeal insofar challenge to the order passed by the Family Court granting various reliefs in the application filed by the respondent under the provisions of the Domestic Violence Act could not point out any relief granted by the Family Court attracting any punishment for any alleged offence committed by the appellant, which could be tried by any Criminal Court.

43. Both the parties proceeded on the premise before this Court in the application filed under Section 24 of the Code of Civil Procedure and thereafter before the Family Court upon transfer of the proceedings from the Judicial Magistrate, First Class to the Family Court as civil proceedings falling within the jurisdiction of the Family Court under Section 7 of the Family Courts Act, 1984. In our view, there is thus no merit in the preliminary objection raised by the respondent for maintainability of the appeal filed by the appellant-husband impugning the reliefs granted by the Family Court in the application filed by the respondent under the provisions of the Domestic Violence Act on subsequent transfer to Family Court for adjudication along with the bdp fca-31.20.doc petition for divorce filed by the respondent. The principles laid down by the full bench of this Court in case of Nandkishor Pralhad Vyawahare (supra) applies to the facts of this case. We are respectfully bound by the said judgment.

44. A learned single Judge of this Court in case of Mr. Santosh Machindra Mulik v/s. Mrs. Mohini Mithu Choudhari dealt with an application for seeking transfer of a criminal proceedings filed under Section 12 of the Domestic Violence Act pending before the Court of Judicial Magistrate, First Class, Pune to the Family Court at Pune to be tried along with the pending Divorce petition within the parties. It is held that since from the domestic violence proceeding that may be heard along with the matrimonial proceeding before the Family Court, an appeal would lie to this Court, and in that sense, no party can be said to be losing his right of appeal, what is lost is a further right of revision. That, however, is no ground to deny transfer of proceedings on the basis of principle of justice. The Family Court in this case has rendered a finding that some of the evidence before the Family Court in the proceedings was common and was relied upon by both the parties while addressing the Family Court on the different issues bdp fca-31.20.doc framed by the Family Court in the two proceedings.

45. It was not the case of the respondent that against the proceedings filed by the respondent under the provisions of the Domestic Violence Act by the learned Judicial Magistrate, First Class, there was no remedy available to the appellant against the said order. Even if the appellant would have filed separate criminal revision application against the part of the order passed by the Family Court arising out of the same facts, the appellant could always apply for obtaining an administrative order from the Hon'ble Chief Justice for clubbing both the matter together. There is no substance in the submission of the learned Counsel for the respondent that for part of the order passed by the Family Court in a composite order, the appellant could not have filed Family Court Appeal under Section 19 of the Family Courts Act, insofar as the reliefs under the Domestic Violence Act, the appellant ought to have filed a criminal revision application.

46. The learned counsel for respondent is clearly unreconciled to the fact that pursuant to the order of clubbing of both the proceedings in question a common trial ensued and was taken to logical conclusion by bdp fca-31.20.doc the Family Court. The learned counsel is still harbouring a belief that impugned order passed by the learned judge of Family Court should be bifurcated into orders one passed under the provisions of Special Marriage Act and other under the provisions of Domestic Violence Act having clothed in the capacity of a magistrate. Of crucial importance here is that, we reiterate at the cost of repetition, all the reliefs canvassed and sought by the respondent and granted by the learned judge of Family Court under the provisions of Sections 19 to 22 of the Domestic Violence Act are predominantly of the civil nature sans character of criminality.

47. The moment both the proceedings came to be clubbed by judicial order of this Court and directed to be tried together, the jurisdiction of the Family Court became abundantly clear over the proceedings under the Domestic Violence Act. Resultantly, the order passed in the proceedings became the orders passed by the learned judge of the Family Court for all purposes and therefore, it would be a fallacy and myopic to term part of the order pertaining to the reliefs under Domestic Violence Act as an order amenable to revisional jurisdiction. This would amount to nothing but a self serving interpretation. The bdp fca-31.20.doc proceedings under the provisions of Domestic Violence Act having subsumed with the proceedings of Special Marriage Act by virtue of the order of clubbing and consequently final orders flowing therefrom, needless to say acquired the characters of orders passed by the learned judge of Family Court and nothing else. Backed by these reasonings the remedy against these orders is nothing but Appeal. This is our view at its simplest.

48. We therefore pass the following order :-

(a) Since, reliefs granted by the Family Court in the application filed by the respondent under the provisions of the Domestic Violence Act were of civil nature, this Family Court Appeal challenging the said common order including in the proceedings arising out of the provisions of Domestic Violence Act is maintainable.

(b) It is made clear that this Court has not expressed any views on the merits of the Family Court Appeal filed by the appellant and the same would be considered by this Court at the stage of hearing of the Family Court Appeal.

49. Place the matter on board for directions on 17th March, 2021.

(V.G. BISHT, J.)

(R.D. DHANUKA, J.)