

Rohan Shah vs Nishigandha Shah on 20 December, 2023

2023:BHC-AS:38681

Rohan Shah vs. N

MC

This Order is modified/corrected by Speaking to Minutes Order date

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
MISC. CIVIL APPLICATION NO. 477 OF 2022

Rohan shah,
Age 45 years, Indian inhabitant having
address at 13, Sonawalla Building, 67,
Marine Drive, Bombay-400 020.

...

~ versus ~

Nishigandha shah,
Adult, Indian inhabitant residing at B-
3001, 30th floor, India Bulls Blu,
Wing, Dr E Moses Road, Worli,
Mumbai-400 018.

...Res

A PPEARANCES
for the Applicant

Ms Tauban Irani, with Sachi L
Disha Shetty, i/b TF Ira

For the respondent

Mr Rohaan Cama, with Gayatri
Gokhale.

WITH
MISC. CIVIL APPLICATION NO. 475 OF 2022

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NAMDEO SONAWANE
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20th December 2023

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Rohan Shah vs. Nishigandha Shah
MCA-477-2022

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Piyush Subodh Gupta,
Aged 52 years, Adult Indian Inhabitant
Occupation: Services
resident at C 504, Rustomjee Seasons,
Madhusudan Kalekar Road,
Bandra East, Mumbai 400051.
~ versus ~

...Applicant

Charu Piyush Gupta nee
Charu Ahuja,
Aged 47 years, Adult, Indian Inhabitant
Having address at 12 Hassamahal,
Dahmal Park, Cuffe Parade
Mumbai 400005.

...Respondent

A PPEARANCES
for the Applicant

Mr Abhijeet Sarwate, with Shilpa
Joshi, Prerak Sharma, Hardev
Aidhen.

For the respondent

Mr Mohit Bhardwaj, with Ruturaj
Pawar.

CORAM : Kamal Khata, J.
RESERVED ON : 18th October 2023
PRONOUNCE ON : 20th December 2023

JUDGEMENT :

-

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is
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1. This Miscellaneous Civil Application is filed by the Applicant-husband under Section ("u/s") 24 of the Civil Procedure Code, 1908 ("CPC") to transfer the Application filed by the Respondent-wife u/s 12 of the Protection of Women from Domestic Violence Act, 2005 ("PWDV Act") of from Metropolitan Magistrate's 62nd Court, Bhoiwada, Mumbai to Family Court, Bandra, Mumbai.
2. The Applicant-husband and Respondent-wife got married on 23rd December 2001 at Mumbai. Out of wedlock there are two daughters born; one on 26th October 2002 and another 19th September 2005. Both are major now. Though the couple resided in USA initially, they returned to India in 2008. Eighteen years into their marriage, in or around 2019, the couple decided to separate on account of marital discord. The respondent-wife left for USA on 25th October 2021 with the intention to seek divorce and maintenance before the Supreme Court of New Jersey. The respondent-wife's application before the US Court was dismissed on the preliminary ground of jurisdiction.
3. On the other hand, Applicant-husband filed for divorce u/s 13(1) (ia) of Hindu Marriage Act, 1955 by filing Marriage Petition bearing No. A-347 of 2021 before the Family Court, Mumbai.
4. On being served with the Marriage Petition, the Respondent- wife decided to seek maintenance for herself and their children through an Interim Application (IA) in the Marriage Petition before the Family Court. Aggrieved by the Applicant-husband action, the 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Respondent-wife filed an application under Section 12(1) and sought reliefs u/s 18 to 22 of PWDV Act before the Metropolitan Magistrate's Court on 25th July 2022.
5. Ms Irani, Learned Counsel for the Applicant-husband, urged that the Respondent-wife returned to India from USA only after eight months. She had made an Application before the US Court only with an intent to pressurise the Applicant-husband to pay her higher maintenance and adhere to her terms. She failed there and although she had sought maintenance by making an Interim Application on 27th June 2022 before the Family Court, Mumbai, on 25th July 2022 only with an intent to harass the Applicant- husband she chose to also file an Application bearing No. DV/107 of 2022 under Section 12 before the Metropolitan Magistrate's Court.
6. She submitted that the reliefs sought in the Metropolitan Magistrate Court are similar to her Application for interim maintenance before the Family Court. According to her the transfer would obviate dual arguments in different forums, for the same reliefs, on same facts, between the same parties and probably even prevent conflicting views and findings. Thus, both parties could not only avoid two different trials in different Courts but also the expenses attached to it. This exercise would also avoid multiplicity of proceedings and thus she submitted that in the interest of all concerned, the Court ought to transfer the proceedings. She submitted that no prejudice would be caused if the proceedings from Metropolitan Magistrate Courts were transferred to the Family Court. In this backdrop, she submitted that the transfer 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Application be allowed and the Application before the Metropolitan Magistrate Court be transferred to the Family Court. In support of her contention to transfer the Application Ms Irani

relied upon the following judgments:

- (a) A v X1 (paragraph 17 to 19)
- (b) Anirudh Ajaykumar Garg v State of Maharashtra 2 (paragraph 19 to 21)
- (c) Sandeep Shetty v Dr Sarika Shetty³ (paragraph 7, 9, 10 to 12)
- (d) Hitesh Prashmalji Mehta v Aashika Hitesh Mehta 4 (paragraph 11 to 19)
- (e) Sandip Mrinmoy Chakraboarty v Reshita Sandip

Chakraboarty & Anr⁵ (paragraphs 1, 4, 8 to 10, 12 to 15 and 17) (f) Vaishali Abhimanyu Joshi v Nanasaheb Gopal Joshi 6 (paragraph 35 & 36)

(g) Kamatchi v Lakshmi Narayan⁷

7. In response Mr Rohaan Cama Learned counsel for the Respondent vehemently urged that the Applicant-husband had abandoned the Respondent-wife and the children on account of an 1 Amit Borkar J in Misc. Civil Application No. 498 of 2022 decided on 2nd February 2023.

2 CV Bhadang J in Misc. Civil Application No. 76 of 2021 decided on 15th December 2021.

3 2021 SCC OnLine Bom 3441: (2022) 1 AIR Bom R 506. 4 CV Bhadang J in Misc. Civil (St) Application No. 788 of 2020 decided on 28th September 2020.

5 [SJ - 2018 SCC OnLine Bom 2709] 6 AK Sikri & Ashok Bhushan JJ in Civil Appeal No. 6448 of 2017 (arising out of SLP (c) No 24045 of 2016) decided on 9th May 2017. 7 Uday Umesh Lalit, J in Criminal Appeal No. 627 of 2022 (arising out of SLP (Cri) No. 2514 of 2021) decided on 13th April 2022.

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc extra marital affair and to add to her misery the Applicant-husband filed a Divorce Petition to pressurise the Respondent-wife to agree to a divorce at his terms. It was in these circumstances and under an apprehension of being rendered homeless, that the Respondent was compelled to file a complaint under the PWDV Act.

8. I had completed hearing both Counsel and reserved the matter for orders on 2nd August 2023.

9. Before the pronouncement of the judgement, on 8th August 2023, a co-ordinate bench of this Court (Sarang Kotwal, J) hearing transfer applications under section 407 of the Criminal Procedure Code 1973 ("CrPC") passed an order, to prevent a possibility of conflicting orders, that it would be appropriate if the matters before him concerning the issue, namely, 'whether the proceedings under the PWDV Act can be transferred to Family Court,' be decided by one Bench.

10. The High Court Registry pursuant to the directions of the Chief Justice, then placed those matters before me and I proceeded to hear other Counsel on the issue of transfer from Magistrate's Court to Family Court.

11. I shall now deal with each of the arguments against and for the transfer as under.

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc CONTENTIONS ON BEHALF OF RESPONDENT -WIFE

12. Mr Cama on behalf of the Respondent-wife opposed the transfer application on various grounds. He submitted that there are conflicting decisions of different Single Judge Benches and proposed that this matter be referred to a larger bench to end this controversy.

13. Mr Bharadwaj for the Respondent-wife in MCA 475 of 2022 supports the view of Mr Cama on two aspects; that the matter be referred to a larger bench and on per incuriam.

14. Broadly, he submitted that the decisions of the Kerala High Court in the case of MA Mony v M P Leelamma & Anr⁸, Chhattisgarh High Court in the case of Smt Neetu Singh v Sunil Singh⁹, Madras High Court in the case of Capt. CVS Ravi v Mrs. Ratna Sailaja¹⁰, which held against the transfer of the Application filed under section 12 of the PWDV Act before the Magistrate to the Family Court, were prior in point of time and they took the correct view. He submitted that even this Court, in the case of Abhijeet Jail v Manisha Jail¹¹ had taken the same view and thus the subsequent judgements in favour of the transfer were all per incuriam.

8 Kerala High Court SJ - 2007 SCC Online Ker 278. 9 Chhattisgarh HC DB - 2007 SCC Online Chh 19. 10 Madras HC SJ - 2009 (1) MWN (Cr.) 472.

11 SJ - 2018 SCC OnLine Bom 1206.

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15. Moreover, this view taken by the judgement in M.A. Mony (supra) he submitted was confirmed by Hon'ble Supreme Court vide its order dated 6th May 2011.

16. In view of the Apex's Court's dismissal of the Appeal in MA Mony (supra) and on the basis of the judgements namely;

- (a) Smt. Neetu Singh v Sunil Singh¹²
- (b) Capt. C.V.S. Ravi v Mrs. Ratna Sailaja¹³
- (c) Arul Daniel & Ors. v Suganya¹⁴
- (d) Sunil Babu & Ors. v Renju¹⁵
- (e) Sandeep Aggarwal v Viniti Aggarwal¹⁶

he canvassed the following propositions against the transfer as under:

(i) that no Civil Court or Family Court has jurisdiction to deal with an Application under Section 12 of the PWDV Act except the Magistrate thus Application cannot be transferred lock, stock and barrel to the Family Court under Section 12 of the PWDV Act.

(ii) if the Application u/s 12 could not be filed before a Family Court, then it cannot be transferred to the Family Court 12 2007 SCC OnLine Chh 19.

13 2009 (1) MWN (Cr.) 472.

14 2022 SCC OnLine Mad 5435.

15 Judgment dated 23rd November 2021 passed by the Hon'ble Kerala High Court in WP (C) (Filing No. 7025) of 2021.

16 2021 SCC OnLine Del 1524 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

(iii) There is no provision in the PWDV Act which permits or authorises transfer of an Application filed under Section 12 to any other Court; thus once a proceeding is filed before a Magistrate it can only be heard by him;

(iv) that the mere power to grant reliefs under Sections 18 to 22 as per section 26 of the PWDV Act does not ipso facto make the Family Court a Magistrate.

(v) Since the Family Court is empowered to grant or that it is restricted to granting reliefs u/s 18 to 22 by virtue of section 26 of the PWDV Act, obviously, reliefs other than under those sections cannot be granted.

(vi) that the reliefs under Sections 18 to 22 of the PWDV Act can be claimed before the Family Court in any other proceedings is entirely different from saying that an Application under Section 12 could lie before the Family Court.

(vii) that because an aggrieved woman can claim reliefs under the PWDV Act through the Civil Court / Family Court under Section 26, is no reason to deprive her of the vested statutory right of procedure or other protective reliefs to claim enforcement through the Criminal Court

(viii) that there is no provision for appointment of Protection Officers by the Family Court who on appointment by the Magistrate would report to him under the PWDV Act 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

(ix) that the Magistrate alone can secure the services of a welfare expert under section 15 for the purpose of assisting him in discharging his functions.

(x) Sections 19(3) & 19(4) can only be exercised by the Magistrate and not by Family Court to ensure compliance. The Family Court does not have the power to execute a bond u/Chap VIII of the Code of Criminal Procedure (CrPC).

(xi) with regard to the penalty provisions u/s 31 to 33 of the PWDV Act, he submitted that these provisions cannot be granted by Family Court and the DV Rules, 2006 which lay down various protective measures are also not available to the Family Court. Thus, compliance cannot be ensured by the Family Court. It is further submitted that the Family Court cannot frame charges as contemplated u/s 31(3) of the PWDV Act.

(xii) the power to obtain ex-parte protection orders is not available to the Family Court.

(xiii) that in matrimonial disputes transfer applications are made to dilute and/or avoid the stringent provisions coupled with penal consequences that are available to the woman under the PWDV Act.

(xiv) that Section 7 of the Family Court only contemplates proceedings between the husband and wife and therefore the other parties such as the in-laws, girlfriends, live-in partners who could 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc be dealt with under the PWDV Act cannot be dealt with by the Family Court. It is also submitted that the circular dated 28th April 2023 issued by the Family Court is partly in conflict with section 7 of the Family Court.

CONTENTIONS
HUSBAND

ON BEHALF

OF

APPLICANT

17. Mr Sarvate supporting the transfer submitted that what is sought to be provided by Section 12 of the PWDV Act is a mere presentation of an application to the Magistrate. It is procedural. It is the reliefs contained in the other sections including reliefs sought under Sections 18 to 22 PWDV Act that would form a part of the application (procedure) to be presented before the Magistrate. Thus, an application under Section 12 is a mere procedure and is not a relief and thus independent. He submitted that as contemplated by Section 26 of the PWDV Act, reliefs under Sections 18 to 22 can be also granted by the Family Court. Thus, the contention that an Application under Section 12 cannot be made before the Family Court is misconceived, misunderstood, misdirected and misread.

SECTION 12 - AN APPLICATION

18. In my view Mr Sarvate is right. Chapter IV of the PWDV Act is about 'Procedure for obtaining orders of Reliefs'. Section 12 refers to 'Application to Magistrate'. The relevant Sub clauses of Section 12 are extracted hereunder for ready reference:

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc "12 (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Proviso ...

12 (2) xxx 12 (3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto. 12 (4) xxx 12 (5) xxx"

19. On a plain reading of Section 12 (1) it can be seen who may present an application before the Magistrate and the words 'seeking one or more reliefs under this Act' make it clear what the application would contain.

20. Sub-section (3) of Section 12 amply clarifies that what is made under sub-section (1) of section 12 is an application. Thus, a proceeding amenable to transfer by a Superior Court under Section 24 of CPC or Section 407 of the CrPC.

21. The proviso under sub section (1) of Section 12, sub section (2) and its proviso are not extracted as are not relevant to the issue at hand. Sub-sections (4) and (5) say what the Magistrate must do when presented with an application and within what period the same should be endeavoured to be disposed of.

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22. Having considered section 12 of the PWDV Act, it would be useful to refer to and analyse the Act as a whole.

ANALYSIS OF PWDV ACT

23. At the outset, the PWDV Act was enacted as there was no civil remedy except writ for the protection of women from being victims of domestic violence. Domestic violence being a human rights issue and a serious deterrent to development. Prior to the PWDV Act, where a woman was subjected to cruelty by her husband or his relatives, it was an offence under section 498A of the Indian Penal Code (IPC).

24. An overview of the PWDV Act shows that the Act is divided into five chapters.

25. Chapter I contains two sections. Section 1 which deals with 'Short title, extent and commencement' and Section 2 deals with 'Definitions'.

26. Under Section 2 (a) "aggrieved person" means 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.

27. Then under Section 2 (i) "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Procedure, 1973 (2 of 1974), in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence as alleged to have taken place. Then under section 2 (q) "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;

28. Chapter II is wholly devoted to the 'Definition of domestic violence'.

29. Chapter III deals with 'Powers and Duties of Protection Officers, Service Providers, etc.' and contains sections 4 to 11. Whilst Section 4 deals with "Information to protection officer and exclusion of liability of informant", Sections 5, 6, 7, 9 and 11 deal with 'Duties' of police officers, service providers, Magistrates, shelter homes, medical facilities, protection officers and Government. Section 8 deals with 'Appointment of Protection Officers' and Section 10 deals with 'Service providers'.

30. The Chapter IV deals with "Procedure for obtaining order of reliefs" and contains sections 12 to 29. I have already extracted relevant portions of Section 12 and analysed them hereinabove. Section 13 deals with "service of notice", Section 14 deals with "counselling", Section 15 deals with "assistance of welfare 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc expert", Section 16 deals with "proceedings to be held in camera"

and Section 17 deals with "right to reside in a shared household".

31. The Sections in this Chapter namely Sections 18 to 22 deal with "orders and reliefs" that can be sought, Section 23 deals with "the Power to grant interim and ex parte orders". Then Section 24 deals with the duty of the Court to give copies of order free of cost, Section 25 deals with duration and alteration of orders. Sections 26 deals with "relief and other suits and legal proceedings" and reads thus:

"(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 that 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."

SECTION 26

32. Sub-Section (1) of Section 26 evinces that any relief available under Section 18 to 22 may also be sought in any legal proceeding, before a Civil Court, Family Court or a Criminal Court, affecting 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc the aggrieved person and the Respondent. In other words, protection orders, residence orders, monetary reliefs, custody orders and compensation orders can be sought from the aforestated Courts.

33. Sub-Section (2) of Section 26 evinces that the relief/s may be sought for in addition to and along with any other reliefs that the woman may seek in a suit or legal proceeding before a Civil or Criminal Court. An analysis of Sub-Section (1) and Sub-Section (2) of Section 26 would clarify that the woman may seek the reliefs/orders contemplated under Sections 18 to 22 in any Suit or legal proceeding that may have been initiated by her or the adult male person with whom she has been in a domestic relationship. Sub-Section (1) clearly contemplates that the reliefs/orders that the woman may seek can be sought in any Suit or legal proceeding that she may institute before a Civil Court, Family Court or a Criminal Court. Sub-Section (3) evinces that the woman would be bound to inform the Magistrate if she has obtained any relief from any proceedings other than proceeding under this Act. In other words, the woman would get additional benefits only after the Magistrate's due consideration of the reliefs already obtained from another Court and thus is prevented from claiming double/additional benefits on the same ground/s.

34. Section 27 indicates the jurisdiction of the Court namely, the Court of Judicial Magistrate of the First Class or the Metropolitan Magistrate as the case may be considering where the woman temporarily or permanently resides or carries on business or is 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc employed or the adult male with whom she is in domestic relationship resides or carries on business or is employed or where the cause of action arises. It also says that such order passed would be enforceable throughout India.

35. Sub-Section (1) of Section 28 deals with the Procedure and provides that all the proceedings under Sections 12, 18 to 23 and offences under Section 31 of the Act would be governed by the provisions of the Code of Criminal Procedure, 1973 ("CrPC") and Sub-Section (2) evinces that the Court can lay down its own procedure for disposal of an application under Section 12 or Sub-Section (2) of Section 23.

36. Section 29 then deals with Appeal to the Court of Session within the time stipulated therein.

37. Chapter V deals with miscellaneous matters and contains sections 30 to 37. The relevant Section under this Chapter is Section 31 which deals with "Penalty for breach of protection order by respondent" and reads thus:

"(1) A breach of protection of order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions."

38. Section 32 deals with the "cognizance and proof" and evinces that the offence under sub-Section (1) of Section 31 shall be cognizable and non bailable and sub-Section (2) evinces that the Court may conclude that an offence has been committed by the accused upon the sole testimony of the woman.

39. Whilst Section 30 deals with "protection officers and members of service providers to be public servants", Section 33 deals with "Penalty for not discharging duty by Protection Officer"

and Section 34 deals with "Cognizance of offence committed by Protection Officer".

40. Section 36 evinces that the PWDV Act shall be in addition to and Act not in derogation of any other law.

41. As extracted above the reliefs/orders are covered under Sections 18 to 22 of the PWDV Act. The other Sections covered by Chapter III deal with duties and functions as stated hereinabove. Consequently, there are no reliefs/orders under the Act which the woman would be deprived of. The present case is that of transfer 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc and therefore the Protection Officer would report to the Family Court instead of the Magistrate.

SECTION 24 OF CPC AND SECTION 407 OF CRPC

42. It would be beneficial if the Section 24 of the CPC and Section 407 of CrPC are analysed as I have to consider whether the High Court has the power to transfer under these provisions.

43. Section 24 and Section 407 are extracted for ready reference.

"Section 24 of CPC:

24. General power of transfer and withdrawal--(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion, without such notice, the High Court or the District Court may, at any stage--

(a) 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

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [it 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn (3) For the purposes of this Section,--

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it."

"Section 407 of CrPC:

407. Power of High Court to transfer cases and appeals.-- (1) Whenever it is made to appear to the High Court--

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order--

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same session's division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub- section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7). (5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty- four hours have elapsed between the giving of such notice and the hearing of the application. (6) Where the application is for the transfer of a case or 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the

subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309. (7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197."

44. Section 24 is a General power that vests in the High Court or District Court by which either on an application after giving notice and hearing them or on its own motion, without notice at any stage withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and try and 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; or re-transfer the same for trial or disposal to the Court from which it was withdrawn.

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45. Similarly, whenever it is made to appear to the High Court that an order under section 407 is required by any provision of this Code, will tend to the general convenience of the parties or witnesses, or that it is expedient for the ends of justice, it may order that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other Criminal Court or equal or superior jurisdiction.

46. In other words, for the purposes dealing with the proposition in this case, "that the Family Court would have no jurisdiction to try the case transferred from the Magistrate's Court", Section 24 of CPC and Section 407 of CrPC gives power to the High Court to transfer.

47. Thus, with reference to Section 24 of the CPC and Section 407 of CrPC, a harmonious interpretation of both civil and criminal Courts favours holding that the source of the substantive power of Transfer in fact flows from Articles 227 and 235 of the Constitution, and not the civil or criminal procedure themselves.

48. One cannot lose sight of the fact that the Family Court was established to preserve the family and to ensure speedy and inexpensive relief to the parties. Right to speedy trial which is

Constitutional Right under Article 21 and is also the main objective of several provisions of CPC, CrPC and Evidence Act. Thus, the provisions of this Act encourage and empower State Government's to set up Family Courts in cities with the population of over one million people. In cities and towns the Magistrate Courts are in 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc close proximity or are sharing territorial jurisdiction with the Family Courts.

49. Equally the PWDV Act was enacted with an intent to protect the woman and grant access to justice and for her protection through the Magistrate in her locality.

50. Thus, in my view the High Court would have power to transfer the case from the Magistrate to the Family Court whether or not it has jurisdiction to try it to meet the ends of justice, to convenience the parties and more importantly to lead evidence before one Court, specially when the issues may be common, and between the same parties, to save both energy and expense, to save the precious time of Court and prevent conflicting views and multiplicity of proceedings.

51. Reverting to the contention of Mr Cama u/s 12(1) of the PWDV Act, it would be profitable to refer to the Division Bench judgement of our Court in the case of Dr. Sandip Mrinmoy Chakrabarty v Reshita Sandip Chakrabarty¹⁷ and particularly paragraph 35 that referred to the Full Bench decision of this Court in the case of Nandkishore Prahlad Vyawahare v Mangala w/o Pratap Bansari¹⁸ which reads thus, "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 17 2021 (4) Mh L J 404: 2021 SCC OnLine Bom 272: (2021) 3 HLR 405: (2021) 6 AIR Bom R 417: (2022) 1 Bom CR 590 at page 416 18 FB - 2018 (3) Mh.L.J. 913 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc could be Judicial Magistrate of the First Class or as the case may be, the Metropolitan Magistrate in 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.

(Emphasis added)

52. It would thus be clear that all the contentions of Mr Cama with regard to Section 12 referred to in paragraph 15 (i) to (vi) hereinabove would be misreading of Section 12 of the PWDV Act. Consequently, the submission that the proceeding filed before the Magistrate can be heard by the Magistrate alone is misconstrued and misconceived.

53. With regard to the other contentions raised in paragraph 15 hereinabove of the PWDV Act are concerned an analysis of the relevant provisions of Family Court Act would be worthwhile.

FAMILY COURT ACT, 1984

54. Along with the above stated objective of the Family Courts Act, it is pertinent to note:

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc "Whether the provisions of the act have an overriding effect, section 20 of the Act deals with this contention. It says that the provisions of this act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

55. Chapter III deals with 'Jurisdiction' and contains sections 7 and 8.

56. Section 7 deals with Jurisdiction which reads thus:

"Section 7 of Family Courts Act:

7. Jurisdiction. -- (1) Subject to the other provisions of this Act, a Family Court shall--

(a) have and 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; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation. --The suits and proceedings referred to in sub-section are suits and proceedings of the following nature, namely: --

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
 - (f) a suit or proceeding for maintenance;
 - (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise--
- (a) 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 (2 of 1974); and
 - (b) such other jurisdiction as may be conferred on it by any other enactment."

57. Section 8 deals with exclusion of jurisdiction and pending proceedings and reads thus:

"Section 8: Exclusion of jurisdiction and pending proceedings. -- Where a Family Court has been established for any area, --

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), --

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established."

58. Section 9 of the Family Court Act relates to "duty of family Courts to make efforts for settlement". This Section is similar to Section 14 of the PWDV Act.

59. Section 10 deals with 'Procedure generally'. Whilst sub section (1) provides that a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court, sub section (2) provides that the provisions of CrPC or the rules made thereunder, shall apply to the proceedings under Chapter IX of that code. Moreover, sub section (3) empowers the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of facts alleged by one party and denied by the other.

60. Section 11 of the Family Court Act deals with "proceedings to be held in camera" which is similar to Section 16 of the PWDV Act.

61. Section 12 of the Family Court Act relates to the assistance of medical and welfare experts which is similar to Section 15 of the PWDV Act.

62. Thus, it is evident that the Family Court is empowered to exercise jurisdiction exercisable not only by any district Court but also by a Magistrate of the First Class under Chapter IX of the CrPC.

CASE OF SANDIP MRINMOY CHAKRABOARTY

63. A coordinate bench of this Court in the case of Sandip Mrinmoy Chakraboarty v Reshita Sandip Chakraboarty 19 considered the provisions of the PWDV Act as well as the Family Courts Act, 1984 and held as under:

"11. Perusal of Act would reveal that Section 7 sets out the jurisdiction of the Family Court and provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any 19 2018 SCC OnLine Bom 2709 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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 and be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. The explanation to the said section enumerates the nature of suits and proceedings and a series of the proceedings have been included, in respect of which the Family Court will exercise its jurisdiction. Sub-section 2 of Section 7 provides that the Family Court shall exercise jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX and also other jurisdiction conferred on it by any other Enactment. Sub-section (2) reads thus...

"(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) 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 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

12. By virtue of sub-section (2) of Section 7, a Family Court is competent to exercise its jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and it is also competent to exercise such other jurisdiction as may be conferred on it by any other Enactment. Perusal of sub-section 2(b) would thus reveal that when this Enactment was brought into force, it carved out the jurisdiction of the Family Court in the existing situation by referring to the suits and proceedings which 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc would be subjected to the jurisdiction of the Family Court and covered the proceedings before the learned Magistrate First Class. However apart from nature of the suits and proceedings, the legislature also introduced Clause (b) to sub-section (2) and it kept open the scope for the jurisdiction to be exercised by the Family Court if it is conferred by any other Enactment.

13. Section 8 was introduced in the Enactment for exclusion of jurisdiction in respect of the pending proceedings where a Family Court has been established for any area so as to confer jurisdiction on the Family Court. Perusal of the Enactment would further reveal that Section 20 gives an overriding effect to the provisions of the Act and it states that the provisions of the Family Courts Act, 1984 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

14. Now provisions of the Domestic Violence Act, 2005 needs a brief mention. The Protection of Women from Domestic Violence Act, 2005 is an enactment to provide for more effective protection of 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. The said Enactment in the definition part define and assign definite meaning to certain terms which it intends to apply. The term aggrieved person is defined in Section 2(a) to mean a 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. Such a woman can approach the Magistrate by preferring an application under Section 12 of the Enactment. An aggrieved person or protection officer or other person on behalf of the aggrieved person is competent person for seeking one or more reliefs under this 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Act. What are the reliefs that may be claimed and which learned Magistrate may grant are then set out in Chapter IV and in specific from Section 17 to Section 22 of the said Enactment. In the sequence of these Sections, Section 23 finds a place. The said Section confers power on the Magistrate to pass interim order as he may deems fit, just and proper on the basis of affidavit in such form as may be prescribed, if it is prima-facie disclosed that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that such an act may be committed.

15. Reference to Section 26 is also warranted. Section 26 is a special provision contained in the Domestic Violence Act 2005. By virtue of the said section the relief which is available to an aggrieved person under Section 18, 19, 20, 21 and 22 can also be sought in proceedings instituted before the Civil Court, Family Court or Criminal Court. Section 26 reads thus: --

"Relief in other suits and legal proceedings - (1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in my 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.

16. Section 27 determines the "Jurisdiction" and the jurisdiction to be exercised by the Magistrate depend on the 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc local limits within which the parties are either residing or where the cause of action has arisen. Section 28 provides the "Procedure" to be followed and it is to be noted that all proceedings under Section 12, 18, 19, 20, 21 22 and 23 and offence under Section 31 shall be governed by the provisions of the Code of Criminal Procedure. Sub-section (2) envisages that the Court may lay down its own procedure for disposal of application for any relief or for passing ex parte order. The said Enactment also contains a provision in form of Section 30 which states that the provisions of the Domestic Violence Act 2005 shall be in addition and not in derogation of the provisions of any other law, for the time being in force.

17. On having bird's eye view of the two Enactments, it is apparent that the two Enactments provide for overriding remedies and reliefs. The forum of Family Court established under Section 3 of the 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 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 civil Court for the area to which the jurisdiction of Family Court extends. The suits and proceedings amenable the jurisdiction of the Family Court are the suits and proceedings between the parties to a marriage for a decree of nullity, or for restitution of conjugal rights or for judicial separation or dissolution of marriage. The Family Court would also exercise its jurisdiction over the property of the parties to a marriage, injunction for circumstances arising out of marital relationship, declaration as to legitimacy of any person, proceedings for maintenance, guardianship, custody of children, access of children etc. The Family Court thus exercises the powers of 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc a civil Court and by virtue of Section 10 of the said Act, it is deemed to be a civil Court and has all the powers of such a Court. By sub-section (1) of Section 10 of

the 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 continue to be governed by the provisions of Code of Criminal Procedure, 1973.

18. As far as the conduct of proceedings under the Domestic Violence Act, 2005 is concerned, the 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. Section 28 prescribes that all the proceedings under Section 12, 18, 19, 20, 21, 22 and 23 are governed by the Code of Criminal Procedure, 1973. It is, however, permissible for the Court to lay down its own procedure for disposal of an application under Section 12 or under subsection 2 of Section 23. Since the Code of Criminal Procedure do not contain any provision to grant ex-parte and interim orders, the legislature deemed it fit and expedient to introduce Section 23 and confer the Magistrate with the specific power to pass such interim order as he deems fit and proper. The Family Court which exercises the jurisdiction of a Civil Court and which is deemed to be a Civil Court, would exercise all the powers of a Civil Court and it is needless to say that it would include the power to grant injunction or any interim orders of any nature by virtue of Order XXXIX Rules 1 and 2. It is also empowered to pass interlocutory orders so as to protect the subject matter of the proceedings. Thus, the Family Court which is deemed to be a civil Court possess all the powers of a civil Court including its inherent power to grant interim relief, 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc and therefore, a Section analogous to Section 23 of the Domestic Violence Act, 2005 do not find place in the Family Courts Act, 1984.

19. Coming to the present controversy which this Court is called upon to deal with viz. relief that is sought for transfer of proceedings pending on the file of the learned Judicial Magistrate First Class at Cantonment Court, Pune to the Family Court at Pune, the apprehension expressed by the learned counsel for the respondents that the Family Court is not clothed with the powers as the one which is conferred on the Magistrate under Section 23 of the Domestic Violence Act, 2005 is misconceived and since it is already noted above that the Family Court which acts as a Civil Court and since it is vested with all powers of Civil Court which includes specific provision to pass interim orders, the said apprehension can be dispelled and it is to be noted that the Family Court is competent not only to deal with the application preferred under Section 12 and specifically in the light of the powers conferred by Section 26 of the Domestic Violence Act, 2005 the relief available under Section 18, 19, 20, 21 and 22 can be sought in proceeding before the Family Court and the Family Court being a Civil Court is empowered to exercise all the powers of the Civil Court which would include a power to grant interim and ex-parte orders."

DIVISION BENCH ON SANDIP MRINMOY CHAKRABORTY

64. The division bench of our Court upheld the view of the learned Single Judge. The relevant paragraphs are as follows:

"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 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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 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 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 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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, 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 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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 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.

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 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 20th December 2023 Rohan Shah vs. Nishigandha Shah

MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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 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.

40. The full bench also adverted to the judgment of Division Bench of this Court in case of Sukumar Pawanlal Gandhi v. Bhakti Sushil Gandhi, 2016 Mh.L.J Online (Cri) 28 : 2016 SCC OnLine Bom 12942 following the view taken by the Hon'ble Supreme Court in case of Kunapareddy alias Nookala Shanka Balaji v. Kunapareddy Swama Kumari, 2016 MahLJ Online (Cri) (SC) 22 : (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 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 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.

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.

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 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc relied upon by both the parties while addressing the Family Court on the different issues 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 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."

65. With regard to the other contentions stated hereinabove including the same have been answered by the coordinate bench of this Court in the case of Sandip Mrinmoy Chakraborty (supra) as referred in paragraphs 11, 12 and 19 therein and confirmed by the Division Bench as seen from the extracts herein above.

66. The contention in paragraph 15(x) that only a Magistrate can call upon the adult male (Respondent under the PWDV Act) to execute powers u/s 19(3) & (4) is only to be stated to be rejected as Section 26 of the PWDV Act clearly mentions that the relief available under Section 19 can be sought before the Family Court.

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc CHAPTER IX OF CRPC

67. A reference to Chapter IX of the CrPC which relates to "order for maintenance for wives, children and parents" would be worthwhile. Section 125 and Section 128 reads thus:

"Section 125: Order for maintenance of wives, children and parents. -- (1) If any person having sufficient means neglects or refuses to maintain--

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate 1 * * * as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct: (2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be. (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent Section 128: Enforcement of order of maintenance.--A copy of the order of [maintenance or interim maintenance and expenses of proceedings, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity

of the parties and the non-payment of the [allowance, or as the case may be, expenses, due]."

Thus, on a plain reading of section 125 and section 128 it can be seen that the Family Court can take necessary steps to tackle 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc breach of the orders. Therefore Section 26 of the PWDV Act rightly permits a family court to give directions/orders under Section 19 sub clauses (3) & (4).

SECTION 31 OF PWDV ACT

68. With regard to the submissions in paragraph 15(xi) above on Section 31 of the PWDV Act, Ms Irani submitted that the scope of section 31 is extremely limited. The proceedings u/s 31 she contends, are separate and form an independent cause of action and is not a part of the main PWDV complaint. Besides, she submits the argument is hypothetical.

69. The contention that the Family Court does not have jurisdiction to decide an application u/s 31 of the PWDV Act is an erroneous view. Ms Irani submitted that there is no specific prohibition to decide an application u/s 31 of the PWDV Act. It is not in dispute that the Family Court has the jurisdiction to decide matters u/s 125 of the CrPC, perjury proceedings u/s 340 of the CrPC, and issue warrants under execution proceedings and reliefs u/s 18 to 22 of the PWDV Act. Thus, the Family Court has powers to decide both civil as well as certain criminal proceedings. the Family Court has powers to assign a complaint to the Metropolitan Magistrate Court as done for matters u/s 340 of the CrPC. It is submitted that her contention is supported by the judgement in the case of Anirudh Ajaykumar Garg (supra).

70. Mr Sarvate submits that Section 31 is regarding breach of protection orders or interim protection orders. The application can 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc be filed by an aggrieved person under Sub Rule 1 of Rule 15 of PWDV rules. The aggrieved - woman can report such breach to the protection officer who would then forward a complaint to the magistrate under Sub Rule 3 of Rule 15 or make a complaint directly to the magistrate or the police under Sub Rule 4 of Rule 15. The words "as far as practicable" in Sub Section 2 of Section 31 he submits, contemplates that the legislature was aware that breach of orders shall be tried by such other Court.

71. It is clear he submits, that charges framed under section 31 shall be separated and tried summarily in accordance with the provisions of Chapter XXI of the CrPC.

72. In my view, the procedure as laid down in Section 31 of the PWDV Act is unambiguous. It has to be read with Rule 15 of Protection of Women against Domestic Violence Rules, 2006 ("PWDV Rules"). It is a separate procedure to be initiated and followed before the Magistrate.

73. Besides courts not considering section 31 of the PWDV Act cannot be a ground for referring the matter to a larger bench. In my view there was no occasion for the courts to consider the same. A court is not required to consider issues not before it and decide on the same based on presumptions.

CASE OF ABHIJEET PRABHAKAR JAIL 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

74. The next contention of Mr Cama is a reference to the decision of this Hon'ble Court in the judgement of Abhijeet Prabhakar Jail v. Manisha Abhijeet Jail & Anr 20 decided on 5th June 2018 - and submitted that the view was upheld by the Hon'ble Supreme Court in SLP (Crl) No 6110/2018 vide its dismissal order dated 13/08/2018. According to him thus what was upheld was that:

(i) "Relief provided under Section 22 of the PWDV Act can be claimed before the Family Court or before any other Civil Court (with reference to paragraph 8).

(ii) However, the Application under Section 12, albeit claiming reliefs including those under Sections 18 to 22 of the PWDV Act, is required to be filed before the Magistrate "which alone has jurisdiction to entertain it" (with reference to paragraph 9).

(iii) No doubt an aggrieved person / woman can independently claim such reliefs through a Civil Court or Family Court in addition to those claimed in the DV proceedings. However, the right to file proceedings before the Magistrate under Section 12 of the PWDV Act, cannot be made sterile by transferring such already initiated proceedings to the Family Court (with reference to paragraph 9).

(iv) The proceedings initiated under Section 12 of the PWDV Act before the Court of competent jurisdiction i.e. the Judicial Magistrate First Class, could not be ordered to be transferred to the Family Court and would have to be entertained and decided by the Judicial Magistrate First Class (with reference to paragraph 9). The Family Court cannot entertain an independent Application filed under Section 12 of the PWDV Act (with reference to paragraph 20 2018 SCC OnLine Bom 1206 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

9).

(v) Relying on the judgment of the Hon'ble Supreme Court in Garikapati Veeraya vs. N. Subbiah Choudhry & Ors.²¹ and in particular paragraph 23 thereof, it was held that transferring the proceedings initiated by the wife under the PWDV Act would deprive her of her statutory remedy under Section 29 of PWDV Act, which as per Garikapati (supra) was laid down by the Hon'ble Supreme Court to be a vested right which ensured from the date of filing of the proceedings until conclusion thereof (referencing paragraphs 11 and 12).

(vi) The wife is the master of the litigation initiated by her and "she alone is entitled to choose the forum from which desires to claim relief" (referencing paragraph 12).

(vii) The respondent / wife would be deprived of her statutory right of appeal to the Sessions Court, by transfer of proceedings under the PWDV Act (referencing paragraph 12).

(viii) The remedy of Appeal from the order of the Family Court was not an effective remedy as the challenge only lay in the High Court (referencing paragraphs 9/12)."

75. For ready reference paragraphs 9, 11 and 12 are reproduced below:

"9. I have carefully perused the copy of the petition and also the proceedings, which are instituted before the Family Court and also the application preferred under Section 12 of the Domestic Violence Act, 2005 before the learned Judicial Magistrate First Class, Pune. A perusal of the both applications would reveal that there is overlapping of certain reliefs. The relief which is sought in the petition before the Family Court is for dissolution of marriage along 21 AIR 1957 SC 540 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc with the other reliefs and the reliefs which are sought under the Domestic Violence Act, 2005 are overlapping some of the reliefs claimed before the Family Court. The reliefs as regards the residence order or restrain orders in respect of the residential house i.e. Flat No. F-601 Maestros, S. No. 60/7 Maestros, S. No. 60/7 Wanowrie, Pune - 411 040 where the petitioner wife is residing is distinct and that is not sought in the proceeding before the Family Court. The important question is whether the relief which is sought in Domestic Violence application before learned Magistrate can be granted by Family Court and whether it has the jurisdiction to grant such a relief. In order to answer the question, it would be apt to refer to provision of the two Enactment in brief.

11. Perusal of Act would reveal that Section 7 sets out the jurisdiction of the Family Court and provides that subject to the other provisions of the Act, a Family Court shall have and 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 and be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. The explanation to the said section enumerates the nature of suits and proceedings and a series of the proceedings have been included, in respect of which the Family Court will exercise its jurisdiction. Sub-section 2 of Section 7 provides that the Family Court shall exercise jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX and also other jurisdiction conferred on it by any other Enactment. Sub-section (2) reads thus...

"(2) Subject to the other provisions of this Act, a Family Court is competent to exercise its jurisdiction which is 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 (2 of 1974); and it is also competent to exercise such other jurisdiction as may be conferred on it by any other Enactment. Perusal of sub-section 2(b) would thus reveal that when this Enactment was brought into force, it carved out the jurisdiction of the Family Court in the existing situation by referring to the suits and proceedings which would be subjected to the jurisdiction of the Family Court and covered the proceedings before the learned Magistrate First Class. However apart from nature of the suits and proceedings, the legislature also introduced Clause (b) to sub-section (2) and it kept open the scope for the jurisdiction to be exercised by the Family Court if it is conferred by any other Enactment."

(a) 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 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

12. By virtue of sub-section (2) of Section 7, a Family Court is competent to exercise its jurisdiction which is exercisable by a Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and it is also competent to exercise such other jurisdiction as may be conferred on it by any other Enactment. Perusal of sub-section 2(b) would thus reveal that when this Enactment was brought into force, it carved out the jurisdiction of the Family Court in the existing situation by referring to the suits and proceedings which would be subjected to the jurisdiction of the Family Court and covered the proceedings before the learned Magistrate First Class. However apart from nature of the suits and proceedings, the legislature also introduced Clause (b) to sub-section (2) and it kept open the scope for the jurisdiction to be exercised by the Family Court if it is conferred by any other Enactment."

76. Therefore, in his view, the judgements upheld by the Supreme Court in MA Mony (supra) and Abhijit Prabhakar Jail (supra) were binding on this Court.

PER INCURIAM 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

77. According to him since these judgments were not considered by most of the Courts, the subsequent judgments Sandip Mrinmoy Chakrabarty (supra) of this Court would be per incuriam.

78. There are only two Courts which briefly noted the judgement of Abhijeet Jail (supra) and that too only in the context of the point on Appeal namely Sanket Khanolkar v Surabhi Sanket Khanolkar²² and Vijay Kakade v Anushka Kakade²³.

79. In Sanket Sanjeev Khanolkar v Surabhi Sanket Khanolkar (supra), the judgment of Abhijeet Jail (supra) was noted, but only in the context of the Appeal aspect (paragraph 9). According to him, the Hon'ble Judge has ex facie erred in relying upon Section 19 of the Family Courts Act without noting that Section 19 is only allowed for an Appeal against a final decree or order and not against an interim order. Thus, the vested right of Appeal to challenge an interim order under Section 29 of the PWDV Act was not noted by the learned Single Judge. Further the learned Single Judge did not consider the portion of Abhijeet Jail (supra) dealing with the judgment of the Hon'ble Supreme

Court in Garikapati's case which clearly provided that the right of appeal is a vested right which enures from the commencement of the proceedings and cannot simply be taken away. Further, the learned Single Judge failed to note that in *Abhijeet Jail* (supra) (paragraphs 9 and 12), the remedy of a Family Court Appeal was noticed and dealt with as not providing a suitable remedy.

22 2021 SCC OnLine Bom 5234 (Nitin W. Sambre, J.) 23 Misc. Civil Application No. 498 of 2022 (Amit Borkar, J.) 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

80. The judgement of the Hon'ble Bombay High Court in *Vijay Suryakant Kakade v Anushka Vijay Kakade & Ors.* 24 also noted the judgement of *Abhijeet Jail* (supra) but only in the context of the issue of Appeal. The learned Single Judge erroneously held that there was no conflict with *Abhijeet Jail* (supra) on the ground that the Division Bench in the case of *Dr. Sandip Mrinmoy Chakrabarty v Mrs. Reshita Sandip Chakrabarty*²⁵ had approved the judgement of the learned Single Judge in the case of *Santosh Machindra Mulik v Mohini Mithu Choudhari*²⁶. The learned Single Judge failed to note that not only had the Division Bench not gone into the issue of transfer at all or the vested right of appeal, but that *Santosh Mulik* (supra) was itself *ex facie per incuriam* as it had not considered the binding judgement of *Abhijeet Jail* (supra) that was passed prior to it.

81. Mr Cama while referring to the judgement in the case of *Sanket Khanolkar* (supra) submitted that the learned Judge ought to have considered that the view taken by the *Abhijeet Jail* (supra) case was upheld by the Supreme Court and thus said judgement also was *per incuriam*. He further submitted that subsequent judgments of this Court have not been taken into consideration that the Family Court had no powers to consider granting of reliefs under Section 19 Sub-clause 3 of the PWDV Act.

82. The bone of Mr Cama's contention is based on the dismissal of the Appeals in the case of *MA Mony* (supra) and *Abhijeet Jail* (supra). In the case of *Andhra Pradesh Scheduled Tribes v Aditya* 24 judgment dated 2nd February 2023 in Miscellaneous Civil Application No.498 of 25 judgment dated 26th February 2021 in Family Court Appeal No.31 of 2020 26 2019 SCC OnLine Bom 13101 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Pratap Bhanj Dev & Ors²⁷ a reference was made to the decision in the case of *State of Manipur v Thingujam Brojen Meetei* which considered the effect of dismissal of SLP. The relevant paragraphs are extracted as under:

83. "106. In *State of Manipur v. Thingujam Brojen Meetei*, (1996) 9 SCC 29, the apex Court considered the effect of dismissal of SLP in limini and held:

84. "It is no doubt true that Special Leave Petition (Civil) No. 285 of 1993 filed by the State of Manipur against the decision of the High Court in *N. Aran Kumar Singh v. State of Manipur*, Cr. No. 2978/91/235/91, decided on 27-3-1982, was dismissed by this Court by order dated 15-2-1993. The said special leave petition was, however, dismissed in limini without expressing any opinion on the merits of the impugned

judgment. The dismissal of a special leave petition by a non-speaking order which does not contain the reasons for dismissal does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-

speaking order of dismissal without anything more only means that this Court has decided only that it is not a fit case where the special leave petition should be granted. Such an order does not constitute law laid down by this Court for the purpose of Article 141 of the Constitution. (See: *Rup Diamonds v. Union of India*, (1989) 2 SCC 356; *Nawab Sir Mir Osman Ali Khan v. CWT*, 1986 Supp SCC 700 and *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187). The High Court was, therefore, in error in holding that by dismissing the special leave petition against the judgment in *N. Aran Kumar Singh v. State of Manipur* this Court has affirmed the said decision of the 27 2001 SCC OnLine AP 988 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc High Court and the said view of this Court is binding under Article 141 of the Constitution."

85. 107. In a recent judgment in *Kunhayammed v. State of Kerala*, (2000) 6 SCC 359: AIR 2000 SC 2587, a three- Judge Bench of the Supreme Court elaborately considered the legal implications and the impact of an order rejecting the SLP under Article 136 of the Constitution of India, and laid down the law as under:

86. "A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, it is non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal..."

87. (emphasis supplied)

88. In view of the aforesaid decisions it can be evinced that the dismissal of a special leave petition by a non-speaking order which does not contain the reasons for dismissal does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-speaking order of dismissal without anything more only means that this Court has decided only that it is not a fit case where the special leave petition should be 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc granted. Such an order does not constitute law laid down by this Court for the purpose of Article 141 of the Constitution. Therefore, the contention of Mr Cama that the Supreme Court had confirmed the view (on account of dismissal of the appeals preferred from the judgements) in *MA Mony* (Supra) and *Abhijeet Jail* (supra) and having not considered the law laid down in these the judgments the subsequent judgements of this court were per incuriam is rejected. the contention of Mr Cama that the Supreme Court had confirmed the view (on account of dismissal of the appeals preferred from the judgements) in *MA Mony* (Supra) and *Abhijeet Jail*

(supra) and having not considered the law laid down in these the judgments the subsequent judgements of this court were per incuriam is rejected.

89. The judgement failed to also consider the Section 31 of the PWDV Act which essentially could be only done by the Magistrate. Thus, the wife would be prejudice if the proceedings were said to be merged with the Family Court proceedings as contemplated in the case of Dr. Sandip Chakrabarty v Mrs. Reshita Sandip Chakrabarty²⁸.

VESTED RIGHT OF APPEAL UNDER SECTION 29 OF PWDV ACT

90. He further contended that the learned Single Judge of this Hon'ble Court in Mr. Abhijit Bhikaseth Auti v State of Maharashtra & Anr.²⁹ had clearly held, prior to all the above judgments, that an order passed by the Family Court exercising powers under Section 28 DB Family Court A No. 31 of 2020 (Dhanuka J. & Bisht, J.)²⁹ judgement dated 16th September, 2008 in Criminal Writ Petition No. 2218 of 2007 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc 26 of the PWDV Act, would not be appealable under Section 29 of the PWDV Act. Thus, upon a transfer of the DV proceedings to the Family Court, the women, ipso facto, loses the vested right of Appeal under Section 29 of the PWDV Act. This judgement has not been noticed by any of the above judgments.

91. Mr Cama then drew my attention to the circular dated 20th April 2023 which clearly states and clarifies that along with matrimonial case "along with matrimonial petition and application under PWDV Act 2005 can be filed as per Section 26 of the PWDV Act" to submit that what is contemplated by the legislature are two different proceedings.

92. Mr Cama urged that the Full Bench of this Hon'ble Court in the judgement of Nandkishor Pralhad Vyawahare v Mangala³⁰ was considering whether the proceedings under the PWDV Act were to be treated as criminal proceedings for the purpose of quashing. While noting that the reliefs under the PWDV Act had a flavour of being civil / quasi civil and for redressing breach of civil rights, nonetheless the Full Bench held that an Application under Section 12 would be filed before the Magistrate to provide teeth to the powers of the Court (paragraph 31). The Full Bench further noted that it was to give an option to the wife as to the choice of forum in which she intended or desired to agitate relief, that the PWDV Act had been enacted (paragraph 31).

30 2018(3) Mh.L.J. 913 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

93. He contended that although the Full Bench held that the proceedings under the PWDV Act were predominantly of a civil nature and it was only upon breach of a protection order that the penal consequences in Section 31 and Section 33 assume the character of criminality, the Full Bench proceeded to hold that the proceedings under Sections 12 to 23 as also in respect of Section 31 were proceedings under the provision of the CrPC and therefore the Application under Section 12 could be quashed (paragraphs 53 /

56).

94. He submitted that, Section 27 of the PWDV Act read with Section 2(i) and Section 12 make it clear that an application under the PWDV Act is required to be filed only before a Magistrate, and such a Magistrate is only one as defined under the auspices of the Cr.P.C. If a PWDV Application could simply be filed in the Family Court or transferred to the Family Court, Section 27 would be rendered entirely otiose. Section 27 clearly shows that a proceeding under the PWDV Act has to be filed before a Magistrate as defined under Section 2(i) and can lie before no other Court / Forum.

95. He referred then to judgment of the Hon'ble Supreme Court in Satish Chander Ahuja v Sneha Ahuja³¹ that according to him held:

"(i) the legislature envisaged two separate proceedings one under Section 12 of the DV Act and the other before the Civil Court or a Family Court by invoking Section 26 of the DV Act (paragraphs 139 to 142).

(ii) the proceedings under the DV Act are to be governed by the Code of Criminal Procedure, 1973 (paragraph 138).

31 (2021) 1 SCC 414 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

(iii) There is no conflict or potential for conflicting judgments as the finding / orders passed by one forum will have to be considered by another forum and vice versa."

96. Thus, he submitted that a woman is entitled to file proceedings before the Magistrate and also initiate proceedings before the Family Court [paragraphs 144 to 166 (both included)].

97. There is no doubt about the ratio of the judgment however it did not have to consider transfer of the case from Magistrate's Court to the Family Court and the power of the High Court to transfer the proceedings and thus would be of no assistance to Mr Cama in the present case.

98. Finally, Mr Cama submitted that there are three points conflict between the views of Badar, J in Abhijit Jail (supra) case and Borkar J in Kakade (supra) case. Firstly, that Section 28 was not considered. Secondly the option for initiating process was only that of the wife and thus nobody had the option as the same was not contemplated by the legislature. This aspect was directly conflicting with the view taken by Gupte, J. in Santosh Mulik v Mohini Choudhari³² case. Thirdly he submitted that there was a distinct difference between relief and proceeding thus whilst relief reliefs could have been granted by the Family Court or any other Court as contemplated under Section 28 the proceeding could only have been initiated before the Magistrate and thus the legislature never contemplated the transfer of the proceedings. This per se he submitted is the view taken by the other High Courts of the Country.

32 2019 SCC OnLine Bom 13101 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

99. In my view this submission of Mr Cama is misconceived. It is not the question before me as to whether an application under section 12 has to be filed before the Magistrate; that is unambiguous from the Section itself; but as to whether the application as filed before the Magistrate can be transferred to the Family Court. Thus, in view of the decision of the Division Bench of this Court (as extracted above) this contention cannot be sustained and thus is only to be stated to be rejected.

WOMAN DEPRIVED OF RIGHT TO APPEAL

100. Advocate Sarvate and Ms Irani contend that the judgment in the case of Abhijit Jail (supra) proceeded on the footing that by transferring the proceedings initiated by the wife under the PWDV Act before the learned Judicial Magistrate First Class ("JMFC") would certainly deprive the aggrieved woman from availing statutory right of appeal provided under Section 29 of the PWDV Act. He contended that the said judgment would be per incuriam as the judgment of Abhijeet Jail (supra) did not consider the judgment of the Supreme Court in the case of Kamlesh Kumar & Ors. v State of Jharkhand & Ors.³³. In the case of Kamlesh Kumar (supra) the Supreme Court was considering the transfer of cases under the provisions of FERA to the special Judge hearing fodder scam cases. In Kamlesh Kumar case it was contended that the transfer order was bad on various grounds, the principal amongst them been that the State Government had no jurisdiction to authorize the special judge to try these cases under FERA.

33 AIR 2014 SC Supplementary 160 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc "35. It was contended that assuming that at law the case could validly have been transferred to the Special Judge, the petitioners are seriously prejudiced inasmuch as their right of appeal from the decision of a Magistrate to a Sessions Judge is taken away. Due to this prejudicial action, which was taken by the High Court without hearing the petitioners, the notification conferring power on the Special Judge to try the case should be struck down.

36. The right of appeal available to the petitioners in the present case is not taken away by transferring the case from the Magistrate to the Special Judge. The petitioners continue to have the right to appeal, but it is only the forum that has changed. They can now prefer an appeal from the order of the Special Judge to the High Court. Therefore, it is not as if the petitioners are denuded of any right to agitate their cause in a superior forum by the transfer of the case to the Special Judge.

37. It is now well settled that a litigant has neither a right to appeal to a particular forum nor to insist on a particular procedure being followed in his case. This was settled way back in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1953 SCR 1188: (AIR 1953 SC 394) wherein a Constitution Bench of this Court held:

"A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved".

38. This dictum was followed in *Union of India v. Sukumar Pyne*, AIR 1966 SC 1206.

38A. Similarly, In *Maria Cristina De Souza Sodder v. Amria Zurana Pereira Pinto*, (1979) 1 SCC 92: (AIR 1979 SC 1352) it was held somewhat more elaborately: (Para 4 of 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc AIR) "It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof..... This position, has also been settled by the decisions of the Privy Council and this Court (vide *Colonial Sugar Refining Company Ltd. v. Irving* [1905] AC 369 and *Garikapatti Veeraya v. N. Subbiah Choudhury*, 1957 SCR 488 : (AIR 1957 SC 540) but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act."

39. In *T. Barai v. Henry Ah Hoe* (1983) 1 SCC 177: (AIR 1983 SC 150) it was observed in paragraph 17 of the Report that a person accused of the commission of an offence has no right to trial by a particular procedure. This view was followed in *M/s. Rai Bahadur Seth Shreeram Durgaprasad v. Director of Enforcement* (1987) 3 SCC 27: (AIR 1987 SC 1364).

39A. Therefore, it cannot be seriously urged that the petitioners were prejudiced by a change of the appellate forum."

101. Whilst considering the issue of the right of appeal the contention was that assuming that at law the case could validly have been transferred to the special judge, the Petitioners are seriously prejudiced as their right of appeal from the decision of the Magistrate to the Session's Judge is taken away. The Supreme Court 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc held that the right to appeal did continue and it was only the forum that had changed. Instead of an appeal to the special judge from the order of the magistrate the agreed would be able to prefer an appeal to the High Court from the order of the Special Judge thus, the party was not denuded of any right to agitate their cause in a superior forum by the transfer of the case to the Special Judge. The learned Advocate also contended that it is settled law that "a litigant has neither a right to appeal to a particular forum nor to insist on a particular procedure being followed in his case". This proposition was settled in the case of *Rao Shiv Bahadur Singh v State of Vindhya Pradesh*³⁴ where the constitution Bench held: "A person is accused the commission of an offence has no fundamental right to trial by particular court or by particular procedure except in so far as constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

102. Similarly, in the case of Maria Cristina Desouza Sodder v Amria Zurana Pereira Pinto³⁵ it was held more elaborately as under:

".... It is no doubt well settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commence in the court of the final instance and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof..... this position, has also been settled by the decision of privy council and this Court (vide colonial sugar refining company ltd. Vs. Irving (1905) AC 369 and 34 AIR 1953 SC 394 35 AIR 1979 SC 1352 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Garikapatti Veeraya vs. N Subbiah Choudhury AIR 1957 SC 450 but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which arisen under repeal Act, will have to be lodged a forum provided for by the repealing Act."

103. In other words the right of appeal for the aggrieved woman is not lost as it can be availed in a different forum. And as held by the Supreme Court a litigant neither has a right to appeal in a particular forum nor can insist on a particular procedure. Therefore, the contention of Mr Cama in this regard is rejected.

REFERENCE TO A LARGER BENCH

104. Learned counsel while dealing with the issue of whether it was necessary to refer this matter to a larger bench is concerned he submitted that it was raised and considered by this Court in the case of Vijay Suryakant Kakade v Anushka Vijay Kakade & Ors.

"10. I have given anxious consideration to the submissions made on behalf of both sides. On consideration of the judgments of this Court, it appears that this Court has consistently held that the proceedings under the provisions of the DV Act can be transferred to the Family Court as the relief sought before the learned Magistrate under DV Act can be effectively tried and granted by the Family Court. It is also consistently held by this Court that such transfer is necessary to avoid conflicting decisions, and the Family Courts are empowered to deal with the reliefs under sections 18 to 22 of the DV Act.

11. The sheet anchor of the respondent's submissions is based on the judgment of this Court in Abhijeet Prabhakar 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Jail (supra). It is, therefore, necessary to consider the said judgment in detail. In the facts of the said case, the petitioner/husband filed divorce proceedings before the Family Court, Pune. The respondent/wife filed proceedings under section 12 of the DV Act before the Judicial Magistrate First Class, Pune. The

husband, therefore, applied under section 407 of the Criminal Procedure Code, 1973, before this Court. Learned Single Judge, after considering the judgment in the case of Ujwal Singh Manhas v. Mrs. Jyostna Ujwal Shahi Manhas in Criminal Application No.561 of 2017, rejected the transfer request broadly on the following reasons:

- i) such transfer would take away the statutory right of appeal available to the wife;
- (ii) rejection of such an application would not cause any inconvenience to the husband as both proceedings are pending in Courts on the same campus;
- (iii) Because of the transfer of proceedings appeal against the judgment of the Family Court will lie before this Court, which would be inconvenient for the wife as she would have to travel to Mumbai, incurring huge expenses; and
- (iv) transferring such proceedings would take away the right of speedy justice conferred under the provisions of the DV Act.

12. As rightly submitted by Dr. Chandrachud that in case of conflict of the opinion of Single Judges of the High Court, consideration of judicial propriety and decorum require that if Single Judge hearing a matter is inclined to take a view that the earlier Single Judge's decision needs to be reconsidered, he should not embark upon that inquiry sitting as a Single Judge but should refer the matter to the Division Bench or in a proper case, place relevant papers before the Hon'ble Chief Justice to enable him to constitute Larger Bench to examine the question. However, it is 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc equally settled that such a course would be necessary only when there is a conflict of ratio.

13. It is well settled that a judgment of a Court contains three parts: (i) finding of facts, (ii) statement of the principle of law applicable to the legal issue raised on the facts, based on which the case is decided; and (iii) decision which is based on the finding of fact, applicable principles of law, and in appropriate cases, the need to mould the relief in a particular manner. Out of the three parts, it is only the second part, which is ratio decidendi or statement of law applied and acted upon by the Court, that constitutes a binding precedent. Neither the finding on facts nor the ultimate decision in the form of the relief granted nor the manner adopted to dispose of the case is a precedent.

14. At this stage, it would be profitable to refer to the decisions of the Apex Court in the case of State of Gujarat v. Utility Users' Welfare Association reported in (2018) 6 SCC 21 wherein the principle of "inversion test" to find out ratio decidendi of the judgment has been laid down by the Supreme Court. The concept of "inversion test", succinctly laid down by the Apex Court in paragraphs 112 to 114, would be of significance which is as under: "112. It is undoubtedly true that the question which the Court was seized of, related to the interpretation of Section 86 of the said Act and certain other matters, which are not connected with the controversy herein. Thus, the issue arises, whether the observations made, albeit to be construed as advisory or suggestive qua the appointment of a Chairman and a Member are to be treated as ratio decidendi or obiter dicta.

113. In order to determine this aspect, one of the well- established tests is "the Inversion Test" propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic textbook called The Study of Cases [Eugene Wambaugh, The Study of Cases (Boston:

20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Little, Brown & Co., 1892)] in the year 1892. This textbook propounded inter alia what is known as the "Wambaugh Test" or "the Inversion Test" as the means of judicial interpretation. "the Inversion Test" is used to identify the ratio decidendi in any judgment. The central idea, in other words of Professor Wambaugh, is as under:

"In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the Court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also"

[Eugene Wambaugh, The Study of Cases (Boston: Little, Brown & Co., 1892)].

114. In order to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. This test has been followed to imply that the ratio decidendi is what is absolutely necessary for the decision of the case. "In order that an opinion may have the weight of a precedent", according to John Chipman Grey, [Another distinguished jurist who served as a Professor of Law at Harvard Law School.] "it must be an opinion, the formation of which, is necessary for the decision of a particular case".

15. The sum and substance of inversion test is that when a particular proposition of law can be considered to be ratio decidendi, one has to decide the same by considering as to what happens to the final conclusion made in the case after such a proposition of law is inversed or removed from the text of judgment as if it never forms the part of judgment. If the result of such exercise is that the final conclusion made in the judgment remains unchanged, such proposition of law could not be held to be ratio decidendi of the case.

16. In light of the principle of the inversion test, it is necessary to cull out the ratio of the judgment in the case of Abhijeet Prabhakar Jail (supra). It appears that the decision of the Single Judge of this Court was based broadly on four reasons i) such transfer would take away the statutory right of appeal available to the wife; (ii) rejection of such application would not cause any inconvenience to the husband as both proceedings are pending in Courts in same campus; (iii) Because of transfer of

proceedings, appeal against the judgment of Family Court will lie before this Court which would be inconvenient for the wife as she would have to travel to Mumbai incurring huge expenses; and (iv) transferring such proceedings would take away right of speedy justice conferred under the provisions of the DV Act.

Even if reason (iv) is taken away, the learned Single Judge in the facts of the case could have arrived at the same decision based on factual reasons (ii) and (iii). Rejection of transfer application is based on the cumulative effect of all four factors referred to above. Applying the concept of 'inversion test' to cull out the ratio from= the judgment of a single Judge of this Court, in my opinion, reason (iv) would not constitute the ratio of the judgment in the case of Abhijeet Prabhakar Jail (supra).

17. In so far as the reason (i) that 'such transfer would take away the statutory right of appeal available to wife' is concerned, the Division Bench of this Court in Sandip 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc Mrinmoy Chakrabarty (supra) has approved the judgment of the learned Single Judge of this Court in Santosh Sanjeev Mulik (supra). The learned Single Judge of this Court in Santosh Sanjeev Mulik's case held that transfer of DV proceedings to the Family Court would not take away the wife's right of appeal, but what is lost is a further right of revision, and such reason is no ground to deny transfer of proceedings. The Division Bench, in paragraph 45, repelled submission on behalf of the husband that the order passed by the Family Court after transfer of proceedings under the DV Act would be composite and, therefore, an appeal under section 19 of the Family Courts Act, 1984 would not be maintainable. It is held that the moment both proceedings are clubbed by judicial order of this Court, the jurisdiction of the Family Court becomes abundantly clear over the proceedings under DV Act, and it would be a fallacy and myopic to term part of the order pertaining to the reliefs under DV Act as an order amenable to the writ jurisdiction. The Division Bench, therefore, concluded that the Family Court Appeal challenging the common order arising out of provisions of the DV Act and Family Court Act would be maintainable. Thus, in my view, reason (i) of the learned Single Judge in Abhijeet Prabhakar Jail (supra) no longer holds ground in view of the judgment of the Larger Bench of this Court in Sandip Mrinmoy Chakrabarty (supra).

18. The consistent view of various Single Judges of this Court that proceedings under the DV Act can be transferred to the Family Court constrains me to hold it is unnecessary to refer the matter to the Larger Bench because the position of law on the point appears to have been settled by the aforesaid decisions."

With this observation made by this Court, he submits that the same point being raised again would be a bar under provisions to res 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc judicata.

105. Mr Bhabhda in Criminal Application No. 95 of 2023 supported the view to refer the matter to the larger bench. He referred to the full bench judgment of this Court in the case of Dr Parthsarthi v Medical Council³⁶ to submit that the matter should be referred to the larger bench since the issue in

this case, namely, whether the application filed before the Magistrate can be transferred to the Family Court is not only lie but also of national importance and since there were conflicting views referring to the case of Abhijeet Jail (supra) and the case of Kakde (supra) with a view to avoid prospective litigation this matter should be referred to a larger bench.

106. As held by the Hon'ble Supreme Court in *Sundeep Kumar Bafna v State of Maharashtra & Anr.* 37 a decision or a judgement which does not note a statutory provision or a binding judgement previously pronounced, of a co-equal or larger bench, is *ex facie per incuriam*. The Hon'ble Court would have no option but to apply the earlier view as the succeeding views fall in the category of *per incuriam*. In *State of U.P. & Anr. v Synthetics and Chemicals Ltd. & Anr.* 38, the Hon'ble Supreme Court while dealing with the aspect of *per incuriam* was pleased to hold that while there should be restraint in dissenting or overruling, rigidity beyond reasonable limit is inimical to the growth of law.

36 2021 (2) Mh.L.J. 37 (2014) 16 SCC 623 38 (1991) 4 SCC 139 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc

107. Having considered the case law in detailed above, I do not find any conflict of decisions, thus there is no need to refer this matter to a larger bench.

FAMILY COURT CAN TRY PROCEEDINGS TRANSFERRED FROM MAGISTRATE

108. In my view, there is no specific bar on the Family Court to try PWDV proceedings, considering the objective of the Family Court. In fact, Section 26 of the PWDV Act empowers any Civil Court including Family Court to grant reliefs u/s 18 to 22 of the PWDV Act.

109. It is important to note that the PWDV Act is promulgated with an intent to bring relief within the reach of an aggrieved woman. Magistrates are appointed in all areas as decided by the State in consultation with the High Court as stated in Section 11 of the CrPC whereas family courts are presently established in areas having population more than one million.

110. With regard to the proposition that the Family Court does not become a Magistrate, it would be worthwhile analysing the provisions of both Acts.

111. It is pertinent to note that whilst Section 7 (1) deals with Family Court's jurisdiction over matters of civil nature, Section 7 (2) deals with matters of criminal nature. Furthermore, Section 8 deals with exclusion of jurisdiction and pending proceedings both 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc with regard matters of civil and criminal nature which have to be transferred to the Family Court.

112. It would be pertinent to note that Chapter IX of the CrPC is transferred to Family Court u/s 8 of the Family Court's Act, 1984. It would mean that the Family Court is empowered to pass orders

covered under Chapter IX of the CrPC and also enforce the breach thereof as provided therein.

113. Apart from these, Rule 6 (5) of The Protection of Women from Domestic Violence Rules, 2006 ("DV Rules" for short) deals with applications to the Magistrate and reads as under:

"Rule 6 (5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974)"

114. It would be profitable to analyse Rule 15 which reads as under:

"15. Breach of Protection Orders. - (1) An aggrieved person may report a breach of protection order or an interim protection order to the Protection Officer. (2) Every report referred to in sub-rule (1) shall be in writing by the informant and duly signed her. (3) The Protection Officer shall forward a copy of such complaint with a copy of the protection order of which a breach is alleged to have taken place to the concerned Magistrate for appropriate orders.

(4) The aggrieved person may, if she so desires, make a 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc complaint of breach of protection order or interim protection order directly to the Magistrate or the Police, if she so chooses.

(5) If, at any time after a protection order has been breached, the aggrieved person seeks his assistance, the protection officer shall immediately rescue her by seeking help from the local police station and assist the aggrieved person to lodge a report to the local police authorities in appropriate cases.

(6) When charges are framed under section 31 or in respect of offences under section 498A of the Indian Penal Code, 1860 (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of Protection Order under section 31, in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, 1973 (2 of 1974).

(7) Any resistance to the enforcement of the orders of the Court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.

(8) A breach of a protection order or an interim protection order shall immediately be reported to the local police station having territorial jurisdiction and shall be dealt with as a cognizable offence as provided under sections 31 and

32. (9) While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the court, which may include--

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- (a) an order restraining the accused from threatening to commit or committing an act of domestic violence;
- (b) an order preventing the accused from harassing, telephoning or making any contact with the aggrieved person;
- (c) an order directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit;
- (d) an order prohibiting the possession or use of firearm or any other dangerous weapon;
- (e) an order prohibiting the consumption of alcohol or other drugs;
- (f) any other order required for protection, safety and adequate relief to the aggrieved person."

115. An analysis of Rule 15 of the PWDV Rules more particularly sub-rules (1) to (6) evinces that an aggrieved woman would have to report a breach of an order by a separate application in writing and the Court may separate the proceedings for such offences and try them in the manner prescribed under the CrPC summarily u/s 31 in accordance with the provisions of Chapter XXI of the CrPC

116. To broadly summarise, my conclusions are as follows:

- (a) An Application filed u/s 12 of the PWDV Act can be transferred to the Family Court;
- (b) The Judgements in the case of Sandip Chakrabarty (supra) and those following it are not per incuriam;

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- (c) There are no conflicting views that require reference to a larger bench.

117. Now reverting to the present lis between the parties to get a clear conspectus of the matter, it would be pertinent to note the prayers in the DV Application which are as under:

"(a) This Hon'ble Court be pleased to pass a Protection Order u/s 18 and prohibit the Respondent from committing and/or aiding/abetting the commission of any act of domestic violence as against the Applicant and minor daughter.

(b) That this Court restrain the Respondent and or anybody on his behalf and at his instance from selling/alienating/transferring and/or creating third party rights and/or encumbering any asset, operating any bank locker/account used or held by him singly and/or jointly with the Applicant and/or alienate any other movable and/or immovable property held by the Respondents singly or jointly without the leave his behalf and at his instance from selling/alienating/-transferring and/or creating third party rights and/or encumbering any asset, operating any bank locker/account used or held by him singly and/or jointly with the Applicant and/or alienate any other movable and/or immovable property held by the Respondents singly or jointly without leave of the Court.

(c) That this Hon'ble Court restrain the Respondent from alienating/selling/disposing the Applicant's property viz. Stridhan, jewellery, valuables, etc. lying in illegal possession and further direct them to allow the Applicant to return the and/all of the said belongings to the Applicant.

(d) This Hon'ble Court be pleased to pass a Residence Order u/s 19 and direct the Respondent to continue to incur 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc the rental expenses of the house where the Applicant is presently residing and further incur rental expenses along with brokerage and security deposit towards any house that the Applicant may occupy in the future on a rental basis of her choice and commensurate to the houses she has been residing in along with the Respondent.

Or in the alternative, This Court direct the Respondent to buy a 3 BHK house in the name of the Applicant in an area/locality of her house and commensurate to her matrimonial house and/or the house she was previously residing in at NCPA Apartments "(a) That this Court be pleased to pass a Monetary Order u/s 20 and direct the Respondent to pay an amount of . 3,50,000/- per month as and by way of monthly maintenance for herself and the minor daughter.

(b) That this Court direct the Respondent to restore any and all facilities/amenities and funds available with the Applicant including but not limited to servants, cars, drivers, credit cards etc.

(c) That this Hon'ble Court be pleased to direct the Respondent to incur any and all educational and related expenses of both the children, including overseas education and related expenses which may be paid by the Respondent on actuals and over and above the monthly maintenance.

(d) This Hon'ble Court be please to direct the Applicant as well as the Respondent to file their Affidavit of Assets and Liabilities in accordance and in compliance with the guidelines/format laid

down by the Hon'ble Supreme Court in the case of Rajnesh vs Neha & Anr in Criminal Appeal No. 730 of 2020 arising out of SLP No. 9503 of 2018 for an equitable decision of the Applicant prayer u/s 20.

(e) That this Hon'ble Court be pleased to pass a custody 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc order u/s 21 and grant temporary custody of both minor daughter to the Applicant.

(f) This Hon'ble Court be pleased to pass a compensation order u/s 22 directing the respondent to pay an amount of ₹.7,00,00,000/- towards compensation/damage.

(g) This Hon'ble Court be pleased to pass an order directing the Respondent to pay ₹ 30,00,000/- towards the Applicant's litigation expenses.

(h) for ad-interim and interim reliefs in terms of prayer clauses (a) to (I)

(i) that pending the hearing and decision of the present Application, this Court be please to pass ad-interim and interim orders u/s 23 in terms of prayer clauses (a) to (I)

(j) such other and further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of this case.

118. It can be seen that all the reliefs sought are in regard to Sections 18 to 23 of the PWDV Act. Thus, no prejudice would be caused to the Respondent - wife if the proceedings are transferred to the Family Court. In fact, the parties would save time, effort and money if the proceedings are permitted to be transferred to the Family Court.

119. In the light of the law laid down in the case of Sandip Chakraborty (supra) upheld by the Division Bench and followed by the Judgements Santosh Mulik v Mohini Choudhari (supra), Hitesh Mehta v Aashika Mehta (supra) Sanket Khanolkar v Surabhi Sanket Khanolkar (supra), Ronit Gundesha v Gayatri Shah (supra), Dr Sandeep Shetty v Dr Sarika Shetty (supra), Anirudh Garg v State 20th December 2023 Rohan Shah vs. Nishigandha Shah MCA-477-2022 This Order is modified/corrected by Speaking to Minutes Order dated 23/02/2024 J.doc (supra) and Vijay Kakade v Anushka Kakade (supra), the pleadings and materials on record and the totality of the facts and circumstances of this case, and particularly that the Applicant will suffer undue hardship and expense, I am inclined to exercise the discretionary powers of this Court under Section 24 of the Code of Civil Procedure and allow the application for transfer.

120. In view of the above, I allow the transfer Application, Misc. Civil Application No. 477 of 2022 as under:

"Transfer Application No. 107 of 2022 filed by the Respondent before the Metropolitan Magistrate's 62nd Court at Bhoiwada Mumbai under Sections 12 and 18

to 23 of the PWDV Act."

121. The transfer may be effected within a period of 4 weeks and upon receipt of the papers and proceedings the Family Court, Bandra shall give notice to the parties, preferably within 3 weeks, to proceed with their respective matters.

122. In view of the above view taken that the transfer is permissible, the other Misc. Application No. 475 of 2022 be placed for directions to be heard on merits.

123. All concerned to act on the authenticated copy of this order.

(Kamal Khata, J) 20th December 2023