



2023/KER/67218

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 11<sup>TH</sup> DAY OF SEPTEMBER 2023 / 20TH BHADRA, 1945

OP (FC) NO. 539 OF 2022

AGAINST THE ORDER/JUDGMENT OP 220/2022 OF FAMILY

COURT, ERNAKULAM

PETITIONER/PETITIONER IN I.A./RESPONDENT IN O.P:

GEORGE VARGHESE  
AGED 39 YEARS

BY ADVS.  
SEBASTIAN CHAMPAPPILLY  
ABRAHAM P.MEACHINKARA  
GEORGE CLEETUS  
ANNIE GEORGE  
MARGARET MAUREEN DROSE

RESPONDENTS/RESPONDENTS IN I.A./PETITIONERS IN O.P:

1 TREESA SEBASTIAN  
AGED 37 YEARS

2 ,  
(DOB: 06-12-2011),

3



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2

AGED 9 YEARS,

4

(DOB: 23-12-2015),

BY ADVS.

V.K.BALACHANDRAN

DRISHYA K.PRAKASH(K/001576/2018)

THIS OP (FAMILY COURT) HAVING COME UP FOR FINAL  
HEARING ON 11.09.2023, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:

**AMIT RAWAL & C.S.SUDHA, JJ.**

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**O.P(F) No.539 of 2022**

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**Dated this the 11<sup>th</sup> day of September, 2023****JUDGMENT****Amit Rawal, J.**

Present petition is directed against order dated 27/07/2022 Ext.P5 whereby I.A.No.2009/2022 in O.P.No.220/2022 submitted by the petitioner/husband for return of the claim under Order VII Rule 10 CPC read with Section 10 of the Family Courts Act and Rule 50 of the Family Courts (Kerala) Rules, 1989 has been dismissed.

2. Succinctly, the facts in brief are – the respondent/wife along with the minor children preferred a petition under Order VII Rule 1 of the Code of Civil Procedure; under Section 7(1) of Explanation (c), (d) and (f) of the Family Courts Act and Sections 18, 19, 20 and 26 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter to referred to as '2005 Act'). Out of the wedlock performed on 08/01/2011, three children, i.e., respondent nos.2, 3 and 4 and petitioners in O.P.No.220/2022, were born on 06/12/2011, 17/09/2013 and 23/12/2015. In the year 2022, children were studying in 5<sup>th</sup>, 3<sup>rd</sup> and 1<sup>st</sup> standard, who were in permanent



care and custody of the respondent/mother.

3. It was alleged that the petitioner/husband/respondent in O.P., at the time of the marriage was working in a private firm and had after three months of the marriage, lost job but in order to gain employment, had gone to Gulf in the month of June, 2011. At the time of the marriage, the entire gold ornaments of the wife were entrusted to the mother of the husband and even at the time of the birth of the children, parents of the respondent/wife gifted gold ornaments which are in the custody and care of husband's parents. In the year 2012, the respondent/wife obtained a job as an Overseer in the Building Section of PWD in Chengannur. Husband in the month of March 2015, returned from abroad, but thereafter his behaviour changed and indulged into sufferings and harassment. Various acts have been attributed which we do not intend to venture or refer for, it would be a futile exercise may prejudice the rights of the parties in a pending petition as the question to be addressed by this Court is with regard to maintainability of the petition filed invoking the provisions of Section 7 of the Family Courts Act, can the provisions of Sections 18, 19, 20 and 21 of the 2005 Act be clubbed or not.

4. On appearance, petitioner/husband appeared and submitted an application under the provisions as referred to above for return of the



original petition on the ground that in case the respondent/wife is permitted to claim the relief as provided under the provisions of Sections 18, 19, 20 and 21 of the Domestic Violence Act, 2005, the provisions of Section 12 of the 2005 Act would not only be rendered redundant but the petition would also become not maintainable. It would create a very incongruous position for the reason that the order passed under the provisions of the Domestic Violence Act is appealable before the trial court whereas any leave granted under Section 7 of the Family Court Act is appealable before this Court.

5. It was further contended that the relief as sought for, cannot be claimed in the first instance but can be added by way of amendment.

6. Family Court had no original and direct jurisdiction to entertain the original petition for the reliefs under the 2005 Act as, in view of the provisions of Section 28 of the 2005 Act, the trial under the various provisions of the Sections shall be governed by the provisions of the Code of Criminal Procedure whereas the Family Court cannot, in such circumstances, decide a petition filed seeking comprehensive and combined relief.

7. The term 'Magistrate' has been defined under Clause (i) of Section 2 to include 'Judicial Magistrate of the First Class' or the 'Metropolitan Magistrate', exercising jurisdiction under the Code of



Criminal Procedure. The Magistrate is vested with the jurisdiction as per the provisions of Section 12 of the Act to try and to decide the petition. If such combined petitions are permitted, it would lead to a very anomalous situation.

8. In support of the contentions, the judgment of Single Bench of this Court in **Raju Narayana Swamy v. Beena M.D, 2017 (1) KHC 607** and judgment of the Chhattisgarh High Court in **Neethu Singh v. Sunil Singh, 2008 KHC 7567** have been cited.

9. On the other hand, the learned counsel appearing on behalf of the respondent/wife and the minor children countered the argument and raised objection that the manner and mode in which the relief sought in the application at the initial stage of the trial, would not be maintainable as it is a mixed question of fact and law to be decided at a later point of time. Petitioner/husband is at liberty to raise all pleas and press for hearing of the issues which can be left open and decided by the trial court at the final stage.

10. The language of Sections 12, 18, 19, 20 and 21 is entirely different. As per the provisions of Section 12, Magistrate, on the basis of the evidence, can determine compensation leaving right to party to claim damages and other amount of compensation in an appropriate forum,



whereas under Sections 18, 19, 20 and 21 the destitute wife is entitled to claim independent reliefs in terms of protection, residence, monetary and custody orders. The aforementioned reliefs have not been enshrined under Section 12 of the 2005 Act. Section 12 enables the parties to either claim a relief or any other relief. The expression 'any other relief' is at the discretion of the wife to be either claim in a petition under Section 12 or in the manner and mode as has been done. The expression 'in addition to or along with any other relief', would not prevent the aggrieved party to claim relief in any other suit or legal proceedings; in other words, it cannot impel/compel to raise such relief under Section 12 alone and urged this court on dismissal of the petition.

11. This Court had appointed Sri.M.Asok Kini as Amicus Curiae to render assistance to this Court. Amicus Curiae has submitted his report and had referred to the provisions of Section 9 of the Code of Civil Procedure and Sections 7(2) (a) and 7(1)(b) of the Family Courts Act. It was contended that Sections 18 and 19 of the 2005 Act are nothing but an order of injunction that can be granted by a Family Court, subject to the stipulations in Section 7(d) of the Family Courts Act, pertaining to a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship. Jurisdiction is generally understood as an authority to



decide and render a judgment by inquiring into the facts. Section 26 do not denude the Family Court from exercising jurisdiction in respect of the relief as sought under Sections 18, 19, 20 and 21 of the Act. Thus the petition seeking relief under Section 18 – 22 along with the relief under Section 7 (2)(a) and (2)(b) of the Family Court Act would be maintainable.

12. We have heard the learned counsel for the parties and the learned Amicus Curiae, it would be axiomatic for us to extract the reliefs sought in the pending original petition. The same reads thus:

*"i) Pass a judgment and decree allowing the petitioners to realize Rs.3,25,000/- (Rupees Three Lakhs Twenty Five Thousand only) from September 2021 to January, 2022 for 5 months @ Rs.65,000/- per month as past maintenance to the petitioners 2 to 4, from the respondent, personally and charging upon his movable and immovable properties, with 12% interest from the date of O.P.*

*ii) Pass a judgment and decree granting partition of the petition schedule property by meets and bounds, and allot ½ share by actual division and give separate delivery of possession thereof to the 1<sup>st</sup> petitioner.*

*iii) Pass a judgment and decree allowing the petitioner to realize Rs. 3,00,000/- (Rupees Three Lakhs only) with 12% interest per annum from the respondent, personally and charging upon his movable and immovable properties, from the date of marriage.*

*iv) Pass a judgment and decree allowing the petitioner to realize an amount of Rs. 5,00,000/- (Rupees Five Lakhs only) from the respondent charging upon his movable and immovable properties with*





*12% interest per annum, towards the marriage and betrothal expenses of the 1<sup>st</sup> petitioner.*

*v) Direct the respondent to release the 1<sup>st</sup> petitioner from the status of guarantor in his KSFE Chitty bid by him from the Kazhakkootam Branch.*

*vi) Pass a judgment and decree of mandatory injunction restraining the respondent from entering into her place of office PWD Road's Section, Aluva and interfering with the peaceful employment of the 1<sup>st</sup> petitioner.*

*vii) Pass an order in favour of the petitioners prohibiting the respondent from committing any act of Domestic Violence against the petitioner as per Section 18 of the Protection of Women from Domestic Violence Act, 2005.*

*viii) Pass an order directing the 1<sup>st</sup> respondent to pay Rs.20,000/- (Rupees Twenty Thousand only) per month towards the rental/accommodation charges of the petitioners under Section 19 of the Protection of Women from Domestic Violence Act, 2005.*

*ix) Pass an order directing the respondents to pay Rs. 1,00,00,000/- (Rupees One Crore only) as compensation for the mental distress, physical injury, emotional trauma etc. suffered by the 1<sup>st</sup> petitioner due to the physical and mental torture, emotional abuse and other acts of Domestic Violence. committed by the respondent, charging upon his movable and immovable properties as per Section 22 of the Protection of Women from Domestic Violence Act, 2005.*

*x) Direct the respondent to return her Godrej Steel Alamarah (worth Rs.30,000/-), Washing Machine (worth Rs.30,000/-), Drier (worth Rs. 25,000/-), Teak Wooden Cot (worth Rs. 25,000/-), Teak Wooden Office*



*Table (worth Rs.20,000/-), Fridge (worth Rs. 20,000/-), Grinder (worth Rs. 10,000/-), Mixi (worth Rs. 5,000/-), Gas Stove with Cylinder (worth Rs.15,000/-) and Kitchen utensils (worth Rs. 50,000/- to the 1<sup>st</sup> petitioner and in the alternate allow the petitioner to realize an amount of Rs.2,30,000/- (Rupees Two Lakhs Thirty Thousand only) from the respondent with 12% interest per annum personally and charging upon the movable and immovable properties of the respondent towards the value of the belongings of the 1<sup>st</sup> petitioner.*

*xi) Allow the petitioner to recover her entire costs from the respondents and*

*xii) Pass such other reliefs, as this Hon'ble Court may deem fit and necessary to meet the ends of justice in this case."*

13. On perusal of the extracted reliefs, it would be evident that the petition is not confined to primarily relief under Sections 18, 19, 20 and 21 of the Act but also for realisation of amount due from the husband as past maintenance, partition of the schedule property and various other reliefs. It would be also appropriate to extract the provisions of Section 7 of the Family Courts Act, which reads as under-

*"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.”*

14. On perusal of the aforementioned provision, it is evident that by virtue of the aforementioned Act, various reliefs including reliefs with regard to marriage, property, injunction, guardianship as well as the validity of the marriage, had been clubbed to avoid multifariousness of the litigation. Prior to the aforementioned Act, for claiming partition or right in the property, any aggrieved person was required to invoke the provisions of Section 9 of the Code of Civil Procedure, whereas for the purpose of dissolution of marriage, if parties are governed by Hindu Law under the Hindu Marriage Act otherwise under Special Marriage Act or Divorce Act. We would be failing in our duty in not extracting the provisions of Section 12 of the 2005 Act, which reads as follows -

*" 12. Application to Magistrate – (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:*

*Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.*



*(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:*

*Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.*

*(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.*

*(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.*

*(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.”*

15. On a plain and simple reading of the provisions of the aforementioned Act, the aggrieved party or a Protection Officer or any other person on behalf of the aggrieved person is at liberty to seek either '**one**' or '**more**' reliefs under this Act and before any order could be passed, the Magistrate is enjoined upon an obligation to consider the domestic incident



report received by the Protection Officer. Sub-section (2) of Section 12 empowers the Magistrate while entertaining the application either to include a relief for issuance of an order for payment of compensation or damages 'without prejudice to the right of such person' to institute a suit for compensation and damages for the injuries caused by the acts of domestic violence committed by the respondent, with a proviso that in case any decree for an amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount if paid or payable in pursuance of the order passed by the Magistrate shall be set off against the amount payable; in other words, there cannot be any double benefit or compensation to be awarded to the aggrieved persons.

16. What is discerned from the provisions of Section 12 is that an aggrieved person is free to elect any of the reliefs. The legislature in the wisdom has framed the Act by taking into consideration the doctrine of election. The parties are free to elect either a remedy under Section 12 or reserve the right to claim other reliefs as provided under Sections 18, 19, 20 and 21 in the manner and mode as has been done. The plain and simple reading of the provisions of Section 26 left the question clear and unambiguous that a party seeking a claim under any provisions of the civil or criminal court much less a family court can always claim relief in



addition as provided under Sections 18, 19, 20, 21 and 22 of the Act.

17. There is no quarrel to the *ratio decidendi* culled out in the following judgments which reveal that Section 26 of the Act do not denude family court to deal with a petition in a claim under Sections 18, 19, 20, 21 and 22 of the Act. For the sake of brevity, paragraphs 6 and 7 of the Division Bench decision of the Orissa High Court in **Brundaben Patra and Another v. Rajalaxmi Patra, 2011 (4) KHC 740** and paragraph 12 of the Single Bench decision of this Court in **Raju Narayana Swamy v. Beena M.D., 2017(1) KHC 607**.

**Paragraphs 6 and 7 of Brundaben Patra (Supra)**

*“ 6. Thus, a plain reading of the provisions of the Act reveals that the Indian Parliament in its wisdom thought that the existing law governing the field was inadequate to protect women from domestic violence and, therefore, enacted this particular piece of legislation for more effective protection of rights of women which is granted under the Constitution, who are victims of any kind abuse occurring within the family and for matters connected therewith or incidental thereto. This is a piece of progressive legislation and the provisions of the Act has to be interpreted accordingly. From the different provisions discussed above, it is seen that the Indian Parliament has left no scope for refusing any relief on technical grounds. However, since the question of lack of jurisdiction is raised in this case, we come to the conclusion that the learned Judge, Family Court has jurisdiction under*



*this Act to grant relief to the victim of domestic violence only if there is an existing legal proceeding before it. In other words, the original and independent proceeding under the Domestic Violence Act cannot be initiated in the Family Court. An independent and original proceeding under S. 12 of the Act for various reliefs as described in the preceding paragraph is maintainable before the Judicial Magistrate, First Class and thus, the application filed before the learned Judge, Family Court is not maintainable.”*

*7. However, keeping in view the very objective of the Act itself and the fact that the Court should not take recourse to hide behind technicalities and refuse substantial relief to the parties and its order should be tampered with the concept of justice, this Court comes to the conclusion that instead of quashing the entire proceedings, it shall be proper to transfer the proceedings pending before the learned Judge, Family Court to the Court of JMFC, Bhubaneswar with a direction to try and dispose of the application filed by the opposite party as early as possible, preferably within a period of one month from the date of appearance of the parties before it. Since the interim order has been passed, this Court is of the opinion that such order is just and proper though without jurisdiction. The Civil Proceeding No.480 of 2011 be transferred from the Court of Judge, Family Court to the Court of JMFC, Bhubaneswar who is trying UTP cases. The parties are directed to appear before the said Court on 20/05/2011. The learned Judge, Family Court shall transmit the record so as to reach the Court of JMFC at least three days prior to the appearance of parties on the aforesaid date. The Magistrate may change the nomenclature and register it as a criminal case.*



*The writ petition is accordingly disposed of. This judgment be communicated to the lower Court immediately.”*

### **Paragraph 12 of Raju Narayana Swamy(Supra)**

*"12. S.26 of the PWDV Act has been inserted with an objective that in addition to the provisions of S.12, the aggrieved person is entitled to any relief available under S.18, S.19, S.20, S.21 and S.22 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 the PWDV Act. Sub-section (2) of S.26 further envisages that 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. Sub-section (3) obliges the aggrieved person to disclose the nature of the reliefs, if any, obtained in any proceeding other than a proceeding under the Act. The intention of the Legislature was to enable the aggrieved person to secure the same relief in other proceedings before the Civil, Family or Criminal Court, whether it was instituted prior to or after the commencement of the PWDV Act. This would enure to the convenience of the aggrieved person as well as the respondent and would also prevent multiplicity or proceedings and conflict of orders. However an application under S.12 seeking various reliefs under S.18 to 22 cannot be filed as an original or independent application before the Family Court as the Act expressly stipulates that a proceeding under S.12 of the PWDV Act has to be filed before the Magistrate competent to entertain the application. The Family*





*Court will have jurisdiction under the PWDV Act to grant relief to the victim of domestic violence only if there is an existing legal proceeding and the application under S.26 of the Act seeking relief under S.18 to 22 is filed in that proceeding. The same view has been taken in Neetu Singh (supra) and Kumari Behara (supra). Accordingly. I hold that the Family Court Emakulam is having no jurisdiction to entertain MC No. 367 of 2015 on the files of the said Court. The same is quashed. However, the respondent will be at liberty to approach the learned Magistrate having jurisdiction under S. 12 of the PWDV Act or alternatively, before the competent Court under S.26(1) of the PWDV Act, where any legal proceeding affecting the parties are pending. The petition is disposed of as above."*

18. The apprehension expressed by the petitioner by submitting an application for return of the original petition, in our view is far-fetched and a figment of imagination; rather ought to have pressed the issue of maintainability and lead evidence by leaving the question open for the Trial/Family Court to decide at an appropriate stage. Similarly, the argument that the relief under Sections 18, 19, 20, 21 and 22 cannot be granted by the trial court is also untenable much less opaque, capricious and hereby rejected. The whole purpose of carving out the Family Court Act is to club various provisions by confining the jurisdiction of one court to prevent multifariousness. This is precisely what has been sought in this



case. The order of the trial court rejecting the application based on the appreciation of the provision, is perfectly legal and justified and do not suffer from any illegality or perversity warranting any interference of this Court under Article 227 of the Constitution of India.

19. At this stage, we have been apprised of the judgment of a co-ordinate Bench of this Court in **Vineet Ganesh v. Priyanka Vasan** 2023 (5) KHC 372. In the aforesaid matter, prayer was sought under Section 12 of the 2005 Act for transfer of a petition to the family court. Petition was considered with sections 18 to 22, empowering the family court to grant relief akin to provisions of 2005 Act and the court, finding that relief sought can be granted by either civil court but with a caveat that it shall be reported to the jurisdictional Magistrate, rejected the prayer for transfer of the petition under Section 12 governed by section 407 of the Cr PC. One more reason was assigned that in case the proceedings/applications under section 12 of the 2005 Act are permitted to be transferred to the family court, that will result in an indiscriminate classification in as much as the family court is empowered to entertain disputes between the parties to a marriage only. However while dealing with the facts as noticed above, we have also noticed the doctrine of election to be exercised by the parties to confine the prayer only under section 12 of 2005 Act or under sections 18 to



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22 of the Family Courts Act, 1984. Thus the ratio would not be applicable for adjudication of the present case.

20. Original petition is without any merit, accordingly dismissed.

We are thankful to the exercise undertaken by the Amicus Curiae for rendering assistance to us. We appreciate the effort and endeavor made by the Amicus Curiae in submitting a detailed report.

**Sd/-  
AMIT RAWAL  
JUDGE**

**Sd/-  
C.S.SUDHA  
JUDGE**

Jms



**APPENDIX OF OP (FC) 539/2022**

PETITIONER EXHIBITS

- Exhibit P-1 TRUE COPY OF O.P. NO. 348 OF 2022 FILED BEFORE THE FAMILY COURT AT ALAPPUZHA BY THE PETITIONER
- Exhibit P-2 TRUE COPY OF O.P NO. 220 OF 2022 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT AT ERNAKULAM
- Exhibit P-3 TRUE COPY OF THE OBJECTION RAISED VIDE I.A. NO.2009 OF 2022 IN O.P. NO. 220 OF 2022 ON THE FILE OF THE FAMILY COURT, ERNAKULAM
- Exhibit P-4 TRUE COPY OF THE ORDER IN O.P.(F.C.) NO.299 OF 2022 DATED 30-06-2022
- Exhibit P-5 TRUE COPY OF THE ORDER PASSED BY THE FAMILY COURT, ERNAKULAM DATED 27-07-2022 IN I.A. NO. 2009 OF 2022 IN O.P. NO. 220 OF 2022