

## Dinesh Kumar Yadav Vs State of Uttar Pradesh

**Court:** ALLAHABAD HIGH COURT (LUCKNOW BENCH)

**Date of Decision:** Aug. 2, 2016

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 397, 401  
Protection of Women From Domestic Violence Act, 2005 â€” Section 12 (5)(b), 29

**Citation:** (2016) 96 ACrC 824 : (2016) 9 ADJ 92 : (2016) 167 AIC 864

**Hon'ble Judges:** Rajan Roy, J.

**Bench:** Single Bench

**Advocate:** Lalji Yadav, Advocate, for the Revisionist; Govt. Advocate, for the Opposite Party

**Final Decision:** Allowed

### Judgement

Rajan Roy, J.â€”Heard.

Issue notice to opposite party no.2 .

2. This is a revision filed under Section 397/401 of the Code of Criminal Procedure, 1973 challenging the order passed by the Court of Sessions in

Appeal filed under Section 29 of the "Protection of Women from Domestic Violence Act, 2005" (hereinafter referred to as "the Act, 2005") and

an order passed under Section 12(5)(b) of the said Act, 2005, by the Magistrate, which has been upheld by the appellate court.

3. First and foremost, the question of maintainability of this revision is required to be considered specially as learned Additional Government

Advocate has raised such an objection based the decision of a Co-ordinate Bench of this court dated 27.01.2016 in Criminal Revision No. 4016

of 2015 (Nishant Krishan Yadav v. State of U.P. And another) which has been rendered after considering the decision of the Supreme Court in

the case of Shalu Ojha v. Prashant Ojha reported in 2015(2) SCC 99 and it has been held that revision under Section 397/401 of the Code of

Criminal Procedure, 1973 is not maintainable against an order passed by the District Judge under Section 29 of the Act, 2005 and while doing so

it has expressed its dis-agreement with the view expressed by Kerala High Court in the case of Baiju Chandran Nair and another v. Latha

Balan Nair and another reported in 2011 Cri. L.J. 4536 and the view expressed by Madras High Court in the case of K. Rajendran v.

Ambika Valmy in Criminal Revision Case (M.D) No. 482 of 2012.

4. Another Coordinate Bench of this Court hearing Writ Petition No. 7926 (MS) of 2015 (Mrs.) Manju Sree Robinson and 2 others v. State of

U.P. and others) has also taken the same view based on the decision of Shalu Ojha (supra) and has further held that a Writ Petition under Article

226 of the Constitution would also not be maintainable and appropriate remedy was only a petition under Section 482 of the Code of Criminal

Procedure.

5. This Bench had also earlier followed the decision in (Mrs) Manju Shree Robinson (supra), however, on being apprised of the contrary view in

the case of Chiranjeev Kumar (supra) and in Crl. Misc. Writ Petition No. 15337 of 2012 (Prabhu Nath Tewari & another v. State of U.P. &

another) as also the decisions of Kerala and Madras High Courts this Bench had a fresh look at the matter.

6. The Act, 2005 is a special enactment which has been promulgated, as is evident from its long title, to provide 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. It provides remedy in such matters under Sections 12, 18, 19, 20, 21, 22 and 23 as also a provisions for grant of

interim order or ex-parte order under Section 23. The proceedings under the aforesaid provisions are to take place before the Judicial Magistrate

1st Class or Metropolitan Magistrate, as the case may be, within whose local limits the contingencies mentioned in Section 27 arise. As per section

28(1), save as otherwise provided in the Act, 2005, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31

shall be governed by the provisions of the Code of Criminal Procedure, 1973. Sub section 2 of Section 28 provides that nothing in sub section (1)

shall prevent the court from laying down its own procedure for disposal of an application under Section 12 or under sub-section (2) of Section 23,

meaning thereby a procedure different from one provided in the Code of Criminal Procedure, 1973 could be laid down for the said purpose.

There is nothing on record to show that procedure other than the one prescribed in Code of Criminal Procedure has been prescribed for

proceedings under Section 12 and 23(2) of the Act, 2005.

7. Under Section 29 there shall lie an appeal to the Court of Session within 30 days from the date on which the order made by the Magistrate is

served on the aggrieved person or the respondent, as the case may be, whichever is later. Section 29 is not mentioned in Section 28.

8. In Nishant Krishna Yadava (supra) the court was persuaded by the decision of the Supreme Court in Shalu Ojha (supra) wherein the Supreme

Court held that after the appeal under Section 29, the Act, 2005 does not prescribe any further remedy. In paragraph 13 the Supreme Court

observed that before we proceed to take any decision in the matter, we deem it appropriate to make a brief survey of the DV Act (Act, 2005)

insofar as it is relevant for the present purpose. After considering the provisions of the scheme of the Act, 2005 in paragraphs 14, 15, 16, 17, 18

and 19 it observed in paragraph 19 that "" it can be seen from the DV Act that no further appeal or revision is provided to the High Court or any

other court against the order of the Sessions court under Section 29. It is in this background of the above mentioned scheme of the DV Act this

case is required to be considered"". It went on to hold that when interim maintenance was granted by the Magistrate then the High Court should not

have lightly interfered with the same.

9. A perusal of the said judgment shows that the specific issue as to whether a revision under Section 397/401 of the Code of Criminal Procedure,

1973 can be maintained against an order passed in appeal under Section 29 of the Act, 2005 was neither involved, raised nor argued as, at no

stage was any revision filed against any order passed under Section 29 of the Act, 2005, but nevertheless on a consideration of the scheme of the

Act, 2005, an observation has been made in paragraph 19 which has already been quoted herein above. The question is whether this constitutes a

binding precedent on the issue involved in this case especially in view of the earlier decisions which find mentioned herein below, the ratio of which

is to the contrary.

10. Reference may be made in this regard to the decision of the Supreme Court in the case of Thakur Das v. State of Madhya Pradesh and

another reported in (1978) 1 SCC 27 wherein the question was regarding maintainability of a Revision under Section 439 and 435 of the Code

of Criminal Procedure 1898 (old Code) against an order passed by Sessions Judge under Section 6C of the Food and Essential Commodities

Act, 1955. Under Section 6C of the said Act, the State Government was empowered to appoint a judicial authority to hear the appeal as per

Notification of the State Government. The sessions Judge was appointed as the appellate authority. The Supreme Court considered the issue and

held that the Sessions Judge while acting as an appellate authority under Section 6C of the Act 1955 ""exercising judicial power of the State is an

authority having its own hierarchy of superior and inferior Court, the law of procedure according to which it would dispose of matters coming

before it depending upon the nature of jurisdiction exercised by it acting in judicial manner"". The Supreme Court further went on to hold in

paragraph 8 that Sessions Judge exercising power of appeal under Section 6C of the Act 1955 would only mean the Judge presiding over the

Session Court and discharging the functions of that Court constituted under Section 7 & 9 of the Code of Criminal Procedure 1898, therefore, the

conclusion is inescapable that he is not a persona designate which expression is understood to mean a person pointed out or described as an

individual as opposed to a person ascertained as a member of a class or as filling a particular character. Based on aforesaid reasoning the Supreme

Court further held in paragraph 11 that the Sessions Judge though appointed as an appellate authority by a Notification of the state Government

was the Sessions Court over which the Sessions Judge presides and that the Sessions Court is constituted under the Code of Criminal Procedure and

indisputably it is an inferior criminal court in relation to High Court, therefore, against the order made in exercise of powers conferred by Section

6C of the Act, 1955 a revision application would lie to the High court and the High Court would be entitled to entertain a revision application

under Sections 435 and 439 of the Code of Criminal Procedure, 1898 which was in force at the relevant time and such revision application would

be competent. The aforesaid provisions of the old Act are substantially similar to Section 397/401 of Code of Criminal Procedure, 1973

11. This decision covers the issue involved herein above on all its fours and has also been relied by a Coordinate Bench in the case of Chiranjeev

Kumar v. State of U.P. in Criminal Revision No. 879 of 2003 but has escaped the notice of two other Coordinate Benches in Nishant Krishna

Yadava (supra) and Mrs. Manju Shree Robinson(supra) which have taken a contrary view.

12. Section 28 makes the procedure prescribed in Code of Criminal Procedure applicable to proceedings under Sections 12, 18, 19, 20, 21, 22,

23 and 31 of the Act, 2005, but it does not refer to Section 29. It is well settled that if a special statute provides a remedy before an established

court without saying anything further to the contrary then the procedure followed before the said court automatically becomes applicable to the

proceedings even under a special Act. In the present case the reference to a Court of Sessions is to the Court constituted under Sections 6,7 and 8

of the Code of Criminal Procedure, 1973. The omission to refer Section 29 in Section 28 appears to be for the reason that section 29 follows

Section 28 and based on this, exclusion of the Code of Criminal Procedure to Section 29 cannot be inferred. Reference may be made in this

regard to the decision of the Supreme Court in the case of National Sewing Thread Co. Ltd, Chidambaram v. James Chadwaick and Bros,

reported in A.I.R. 1953 SC 357 wherein it was held that ""rule is well settled that when a statute directs that an appeal shall lie to a Court already

established, then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount

Haldane L.C. in *National Telephone Co. Ltd. v. Postmaster-General*, (1913) AC 546 (A), in the following terms:-

When a question is stated to be referred to an established court without more, it in my opinion, imports that the ordinary incidents of the

procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches".

The same view was expressed by Their Lordships of the Privy Council in - *Adalkappa Chettiar v. Chandrasekhara Thevar*, AIR 1948 PC

12 (B), wherein it was said:

Where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the Courts are governed by the ordinary rules of

procedure applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute

which does not, in terms confer a right of appeal.

13. The aforesaid consideration was made by the Supreme Court in the context of a Letter's Patent Appeal being maintainable from an order

passed by the learned Single Judge of High Court under the Trade Marks Act, 1913.. The Supreme Court in said the case also referred to the

case of *Secretary of State of India v. Chellikani Rama Rao* reported in A.I.R. 1916 PC 21 wherein it was held that Section 76 of Trade

Marks Act confers a right of appeal to the High Court "and says nothing more about it", that being so the High Court has to exercise its other

appellate jurisdiction by a Single Judge. Therefore, his judgment becomes subject to appeal under Clause 15 of Letters Patent Act, "there being

nothing to the contrary in the Trade Marks Act".

14. These judgments were also referred to and relied upon in the case of *Maharashtra State Financial Corporation v. Jayee Drugs &*

*Pharm* reported in (1991) 2 SCC 637, wherein a similar proposition has been laid down while considering the applicability of the Code of

Criminal Procedure to the proceedings before the District Judge under the State Financial Corporation Act, 1951.

15. Likewise in the case of *ITI Ltd. v. Siemens Public Communications Network Ltd.* reported in (2002) 5 SCC 510 the Supreme Court

while considering the question as to whether a revision under Section 115 of the Code of Civil Procedure, 1908 lies to the High Court as against

an order made by a Civil Court in an appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 specially when a Second

Appeal is statutorily barred under the Act and the Code of Civil Procedure, 1908 is not specifically made applicable, the Court opined in

paragraph 10 that "it is true in the present Act application of Code is not specifically provided for but what is to be noted is; is there an express

prohibition against the application of the Code to a proceeding arising out of the Act before a Civil Court. We find no such specific exclusion of the

Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable". Justice D.M.

Dharmadhikari concurring with the judgment of Justice N. Santosh Hegde in that very case in paragraph 19 held ""when a special Act on matters

governed by that Act confers a jurisdiction on an established court, as distinguished from a persona designata, without any words of limitation, then

the ordinary incident of procedure of that court including right of appeal or revision against its decision is attracted". Based on said reasoning and

following the judgments already referred to herein above the Court held that against an order passed under Section 37 of the Arbitration and

Conciliation Act, 1996 a revision under Section 115 of the Code of civil Procedure was maintainable.

The analogy of these judgments applies to the present case also for the reasons already mentioned herein above specially as a court of Sessions

mentioned in Section 29 is not a persona designate but a Court established under the Code of Criminal Procedure, without saying anything more,

and as there is nothing in the Act, 2005 excluding the applicability of Code of Criminal Procedure, therefore, the procedure followed before a

court of Sessions which includes a Revision under Section 397/401 of the Code of Criminal Procedure against its orders, will be maintainable.

(emphasis supplied)

As per Section 5 of the Code of Criminal Procedure, 1973 nothing contained in this Code shall, in absence of a specific provision to the contrary,

affect any special or local law for the time being in force or any special jurisdiction or power conferred, or any special form of procedure

prescribed, by any other law for the time being in force. The Act of 2005 does not prescribe any special form of procedure either for the

proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 or for appeal under Section 29; in fact Section 28(1) therein categorically mentions that

the proceedings under the aforesaid provisions including section 31 shall be governed by the Code of Criminal Procedure, 1973. Section 29 refers

to an appeal before the court of Sessions without saying anything more, therefore, the normal procedure applicable to it under Code of criminal

Procedure will apply. Reference may be made in this regard to Section 397 of the Code of Criminal Procedure, 1973 which is as under:-

397. Calling for records to exercise of powers of revision.--(1) The High Court or any Sessions Judge may call for and examine the record of any

proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as the

correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior

Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in

confinement, that he be released on bail or on his own bond pending and examination of the record.

Explanation.--All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be

inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry,

trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by

the same person shall be entertained by the other of them.

16. Under Section 397 of the Criminal Procedure Code the High Court may call for examination of the record before any inferior court situate

within its or his local jurisdiction for the purpose to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order,

recorded or passed. The Court of Sessions referred to in Section 29 of the Act, 2005 is a Criminal Court inferior to the High Court and in the

present case it is situated within its limits or local jurisdiction of this High Court. In Thakur Das"s Case (supra) the Supreme Court has already held

it to be so in the context of appointment of the District Judge as appellate authority by the State Government under the Essential Commodities Act,

1955. The ratio of this decision as also the decision rendered in the case of National Thread sewing Co. Ltd (supra); Challikavi Rama Rao (supra);

Maharashtra State Financial Corporation (supra); ITI Ltd (supra), as noted earlier, apply to the present case also, which have escaped the

attention of the coordinate Bench in Nishant Krishna Yadav (supra) and in the case of (Mrs) Manju Shree Robinson (supra).

17. A coordinate bench of this Court in Criminal Misc. Writ Petition No. - 15337 of 2012 (Prabhunath Tiwari and another v. State of U.P. And

another) opined, after perusal of the provisions contained in Sections 28, 29, 30 and 31, that it did not find any provision under the Act which may

attach finality to an order passed in exercise of power under Section 29 of the Act. Moreover as the proceedings under Section 31 of the Act,

2005 are governed by the provisions of the Code of Criminal Procedure, 1973, a revision would be maintainable before the High Court against an

appellate order passed by a Court of Sessions in exercise of power under Section 29 of the Act, 2005.

18. Another coordinate bench in the case of Chiranjeev Kumar (supra) after considering a conspectus of judgments of the Supreme Court, a

Division Bench of this Court in the case of Shafaat Ahmad v. Smt. Fahmida Sardar reported in AIR 1990 Alld. 182 and the judgment of

Kerala High Court in the case of Baiju Chandran Nair(supra), the judgment of Madras High Court in the case of Chiranjeev Kumar (supra) has

also come to the conclusion that the Court of Sessions being a Court inferior to the High Court, a Revision under Section 397/401 of the Code of

Criminal Procedure, 1973 would be maintainable against an order passed under Section 29 of the Act, 2005. It has also considered Shalu Ojha's

case and has opined that this issue was not directly involved in the said case before the Supreme Court. Chiranjeev Kumar (supra) also takes into

consideration the judgment of the Supreme Court in Thakur Das (supra).

19. In view of the above the legal proposition laid down in Nishant Krishna Yadav (supra) and (Mrs.) Manju Shree Robinson (supra) requires

reconsideration and the conflicting opinion expressed by coordinate Benches also require a clarification so as to bring certitude on the issue

involved.

20. As a Coordinate Bench in Chiranjeev case (supra) has relied upon the Division Bench in the case of Shafaat Ahmad (supra) which related to

the provisions of the Muslim Women Protection of Rights on Divorce) Act, 1986 it would be appropriate that the matter be placed before a

Larger Bench.

21. In view of above the following questions are being referred for consideration by a larger Bench:-

(i) whether a revision under Section 397/401 of the Code of Criminal Procedure, 1973 is maintainable before the High Court challenging an order

passed by the Court of Sessions under Section 29 of the Act 2005?

(ii) whether the decisions in the case of Nishant Krishna Yadav (supra) and Manju Shree Robinson (supra) lay down the law correctly on the

question of maintainability of a Revision under Section 397/401 of the Code of Criminal Procedure before the High Court against an order passed

by the Court of Sessions under Section 29 of the Act 2005 in view of the earlier decisions of the Supreme Court in the case of Thakur Das

(supra); National Sewing Thread co. (supra); Maharashtra State Financial Corporation (supra); and ITI Ltd., (supra) ?

22. Let the office place the record of this Criminal Revision before the Hon"ble Chief Justice in terms of Chapter V, Rule 6 of the Allahabad High

Court Rules, 1952 for constituting a bench of such strength as he deems fit and necessary for considering the above reference.

23. Referred to Larger Bench.