

CUSTODY ORDER U/S 21 D.V.ACT, 2005



Custody of Child under Protection of Women from Domestic Violence Act, 2005

Section 21. Custody orders. Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

“The first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.”

NATURE & EXTENT OF CUSTODY SEC. 21

The custody order passed under section 21 of the DV Act is temporary in nature. The section reads 'the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant **temporary custody** of any child or children to the aggrieved person'. By clear reading of the section it is found that it is only the temporary custody which can be granted by the court and no permanent orders for custody can therefore be passed under the DV Act. Therefore by plain reading it is understood that such order of temporary custody can be passed only during the pendency of application u/s 12.

In a case where subsequent proceeding under GWA was pending before another court, the court passed custody order beyond the life of the proceedings before him. In **Dhaval Rajendrabhai Soni vs. Bhavini Dhavalbhai Soni and Ors. MANU/GJ/1082/2011**, it was observed by the High court of Gujarat that “the Legislature has therefore, used words temporary custody and not interim custody. This is important since by virtue of Section 23 of the Act in any case, learned Magistrate has power to pass interim order which he otherwise can pass finally. Term temporary custody in Section 21 is used in juxta position to the term interim order used elsewhere in Section 23 of the Act . It thus becomes clear that learned Magistrate can pass an order of custody in favour of an aggrieved person by way of temporary measure not necessarily in the nature of interim order which can have life only upto life of the proceedings before him. Having said so, the court cannot lose sight of the fact that nowhere under the Act learned Magistrate is permitted to pass final order of custody and any order that learned Magistrate can pass must have limited validity either in terms of time or happening of an event. Learned Magistrate cannot pass order granting permanent custody of the child to the aggrieved person. With above clarity, learned Magistrate in context of the custody, provided that child would remain with the mother till the proceedings under the Guardian and Wards Act are concluded. To that extent therefore, directions issued by the learned Magistrate do not suffer from lack of jurisdiction or power”

However in the recent case of **Dr. Parijat Vinod Kanetkar & Ors. Vs. Mrs. Malika Parijat Kanetkar & Anr., (2017) All MR (Cri) 368**, wherein the nature of custody of the child under Section 21 of the Act was under consideration with respect to the jurisdiction of the Judicial Magistrate, First Class. While interpreting the scope and ambit of Section 21 of the Act, it has been observed by the High Court of Bombay as under:

“14.....The purpose that this Section seeks to achieve is protection of the aggrieved person, for the time being from domestic violence, which is discernible from the condition prescribed for exercise of the interim custody power under Section 21 of the DV Act. Pendency or filing of an application for protection order or any other relief under the DV Act is must and in such proceeding the issue of interim custody can be raised. The reason being that it is also an issue of domestic violence as it harms the mental health of an aggrieved person who maintains a perception and is capable of demonstrating at least in a prima facie manner, that welfare of the child is being undermined. The nature of the power is temporary and coterminous with the main application filed for protection or any other relief. It begins with filing of such main application and comes to an end with disposal of the main application or may merge with the final decision rendered in the proceeding.”

Thus, it is clear that the custody of children under Section 21 of the Act is temporary and the order for custody can be passed during the pendency of the application under Section 12 of the Act before the Magistrate.

The facts and circumstances in both the cases were different. Though the Gujarat High court gave temporary custody to the aggrieved but it extended its duration beyond the DV proceedings before the court. On the other hand the Bombay high court limited the time period of temporary custody till the proceedings before the DV Court were concluded.

FATHER'S VISITATION RIGHTS U/S 21 of DV ACT

Section 21 of the Act states that the court can specify the arrangements for visit of such child or children by the respondent and the proviso to the section states that 'if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.'

Therefore the court has the discretion to grant or not to grant any visitation rights to the respondent/father keeping in mind the best interest of the child. If the court feels that the welfare of the child might be hampered it may restrain the respondent/father to meet the child.

Excerpt from Payal Sudeep Laad v. Sudeep Govind Laad & Anr., (2019) 1 AIR Bom R (Cri) 215, Bombay High Court judgment: *“The proviso attached to Section 21 stipulates that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interest of child or children, the Magistrate shall refuse to allow such visit. It was further observed that the child in the said case was already in custody of his mother. The respondent had not asked for custody of the child for the simple reason that the child is already in her custody. It is the respondent i.e. father who has sought merely visitation right to his son which right was granted to him by the Trial Court that too for limited days. In case the visitation right is not given to the petitioner, minor child would be deprived of father’s love and affection. The paramount consideration is welfare of child. The petitioner could not be faced to seek remedy either under the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956, as observed by the Sessions Court as it would lead to multiplicity of litigation. The Act is a self contained code. The endeavour of the code should be to cut short the litigation and to ensure that the child gets love and affection of both parents i.e. mother and father. The approach of the Court should be practicable to work out the modalities in practical manner in evolving the process whereby the child suffers minimum trauma. The interpretation of the statute should be purposive.”*

Excerpt from Manoj Anslem Rebeiro vs Candace Elizebath Rebeiro, 2016 SCC OnLine SC 537, Supreme Court of India judgment: .. *“we find that whatever be the background of the case, it cannot be so acrimonious so as to deny the right of the father to see his daughter.”*

“Welfare Principle” in Child Custody Matters

WELFARE OF THE CHILD

While deciding the custody orders the welfare of the child is of utmost priority of the courts and the courts are inclined to do what is in best interest of the child. The courts would not generally do anything which will hamper the child's wellbeing. The court may even deny the temporary custody to an aggrieved person if it is of the view that such person will not have a good influence over the child or that they will not be able to take good care of the child.

In **Mrs. Girija Patel vs Mr. Vijay R Rao MANU/KA/0360/2015** the lower court granted custody to the husband. The Sessions Court also upheld the order. Hon'ble High Court of Karnataka observed that welfare of the child which is at paramount consideration has not been appreciated by the courts below. The Sessions Court did not consider the fact that the child is a girl nearing the age of puberty and that she has to be with her mother for proper care during this period. The Sessions Court also failed to appreciate that the respondent/husband had psychological problems, for which he was being treated, which fact was admitted by him before the Superior Court of California.

In **Payal Sudeep Laad Alias Payal vs Sudeep Govind Laad And Anr MANU/MH/3050/2018** the court observed that The paramount consideration shall be welfare of the child. The endeavor of the Court should be to ensure that child gets love and affection of both the parents. The smooth and proper development of the child requires affection of both parents. It is further provided that overnight access at home of the non custodial parents should be encouraged at an early stage, so that the children have a closed and continuing relationships and get love and affection of not only parents but also a grandparents and other immediate family members like uncles, aunts, cousins etc

THANK YOU.

REGARDS

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