* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 28th March, 2017

\+ **CRL.M.C. 1755/2016 and Crl. M.A. No. 7418/2016**

AMIT KUMAR & ORS ..... Petitioners

Represented by: Mr. Prashant Mendiratta and Mr. Anirudh K. Mudgal, Advocates.

versus

CHARU MAKIN ..... Respondent

Represented by: Ms. Shradha Karol, Amicus Curiae with respondent in person.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The respondent filed a complaint case being CC No. 217/4/2014 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short 'PWDV Act') before the learned Metropolitan Magistrate inter alia seeking restraint against the petitioner from approaching or visiting the house of the respondent or her workplace and restraining him from committing any act of domestic violence. Prohibition was also sought against the petitioner from having any access to the minor child or coming to school of the child or to any other place where the minor child went for her extracurricular activity and also prohibiting the petitioner from removing the minor child from the custody of the respondent. In view of the interim relief sought vide order dated 19th November, 2014 the learned Metropolitan Magistrate restrained the petitioner from interfering with the custody of the minor daughter till the next date of hearing.

2. Served with the interim order passed by the learned Metropolitan Magistrate, the petitioner filed an application before the learned Trial Court for modification of the order dated 19th November, 2014 wherein on 26th November, 2014 an interim consent order was passed. As an interim measure the parties agreed that the minor child shall go to the place of the mother of the respondent on every Saturday till the next date from 10.00 AM to 10.00 AM Sunday and the petitioner shall be with the daughter for 24 hours.

3. The interim application filed by the respondent under Section 23 of the PWDV Act and that of the petitioner seeking setting aside of the ex-parte order dated 19th November, 2014 under Section 25 of the PWDV Act was decided by the learned Metropolitan Magistrate vide order dated 9th November, 2015. Vide order dated 9th November, 2015 the learned Metropolitan Magistrate noting that the minor child was aged six years and was in the custody of the respondent, restrained the petitioner from removing the minor child from the custody of the respondent or from having any access to the minor child or visiting the child in school or at any of the place where she went for her extra-curricular activity. It was further directed that the petitioner shall have visitation rights twice a week on every Saturday and Sunday between 5.00 PM to 9.00 PM at the place mutually decided by the parties.

4. The petitioner thereafter filed an application under Section 25 of the PWDV Act seeking modification of the order dated 9th November, 2015 which was decided by the learned Metropolitan Magistrate vide order dated 2nd January, 2016 with rest of the conditions remaining the same, the visitation rights were extended from 10.00 AM to 5.00 PM.

5. Aggrieved by the order dated 2nd January, 2016 the petitioner filed an appeal before the learned Additional Sessions Judge which was dismissed vide the impugned order dated 8th March, 2016. Hence the present petition.

6. Learned counsel for the petitioner submits that the petitioner being the father of the minor child is entitled to keep the child in custody even during night hours for the proper upbringing of the child so that the child can enjoy the company of the father as well.

7. Learned Amicus Curiae for the respondent points out that the petitioner has concealed material facts before this Court and that he has shifted to Dubai without informing the Courts. Thus there is no clarity as to where he would keep the child when he is not residing in Delhi. It is further submitted that the petitioner has filed a custody petition before the learned Family Court which is the court of competent jurisdiction and vide order dated 26th December, 2016 the learned Family Court was pleased to decline the overnight custody of the minor child as the child was unwilling to stay with the father without the company of her mother and maternal grandparents. It is contended that the decision of the Additional Principal Judge, Family Court in guardianship petition would have precedence on the orders passed by the learned Metropolitan Magistrate in the petition and interim applications under the PWDV Act.

8. A perusal of the order dated 26th December, 2016 passed by the learned Additional Principal Judge, Family Court in the Guardianship Petition No. 35/2015 on an application dated 3rd October, 2016 filed by the petitioner shows that having considered all the aspects, the learned Additional Principal Judge, Family Court declined to grant overnight custody of the child.

9. Section 21 of the PWDV Act provides as under:

> *"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."*

10. It is thus evident that notwithstanding anything contained in any other law as an interim measure in the best interest of the child and to avoid any harm to the interest of the child/children, the Court under Section 21 of the PWDV Act can pass order granting temporary custody of the child/children and/or make necessary arrangements for the visit of the child. However, PWDV Act is not a final remedy for the custody and guardianship issues of a minor child. Section 7 (g) of the Family Courts Act, 1984 vests jurisdiction in a Family Court to decide suits or proceedings in relation to the guardianship of a person or the custody of or access to any minor. Section 7 (g) of the Family Courts Act, 1984 provides for the remedy i.e.:

> *"7. Jurisdiction*
> *(1) …… .....*
>
> *(a) ... .*
>
> *(g) a suit or proceedings in relation to the guardianship of the person or the custody of, or*

access to, any minor."

11. The petitioner having already availed the remedy under the Family Courts Act and having lost in respect of the prayer made in the present petition cannot be permitted to continue with this remedy. Moreover, as stated by the learned counsel for the petitioner, he has already challenged the order dated 26th December, 2016 passed by the learned Additional Principal Judge, Family Court, West District before this Court in an appeal.

12. Similar issue came up for consideration before the High Court of Rajasthan where in the decision reported as 2014 LawSuit (Raj) 545 *Payal Agarwal vs. Kunal Agarwal* it was held:

> *11. Under section 21 of the Act 2005 independent remedy has not been provided to seek custody of the minor child and jurisdiction has been conferred on the Magistrate to grant temporary custody of such a child to the aggrieved person during the course of hearing of an application for grant of protection order or for any other relief under the provisions of Act whereas under the provisions of the Act of 1984 any person can file an independent suit or proceeding in relation to the guardianship of the person or custody of or access to any minor. Thus, the scope of Act of 1984 is much wider in comparison to Section 21 of the Act of 2005. As the non-obstante clause used in Section 21 of the Act of 2005 does not refer to any particular statute or provision or provisions of a particular statute and rather it is general in nature, the Court has to determine the scope of its use very strictly. The law is that when a non obstante clause is used in the aforesaid fashion, the extent of its impact has to be found out on the basis of consideration of the intent and purpose of insertion of such a clause. When a non obstante clause is used in such a blanket fashion the Court has to determine the scope of its use very strictly. Section 8 of the Act of 1984 confers exclusive jurisdiction upon the Family Court in relation to the suits and*

proceedings of the nature mentioned in explanation to Section 7 of the Act. Although, Section 21 of the Act of 2005 also contains the non-obstante clause, but the same has limited application and despite being subsequent legislation it cannot have overriding effect on the Act of 1984. When both the enactments have the non obstante clause then in that case the proper perspective would be that one has to see the subject and dominant purpose for which the special enactment was made and in case the dominant purpose is covered by the contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons. The Act of 1984 was specially meant for establishment of special Courts so that matters referred in explanation to Section 7 of the Act can be dealt by the special Courts established for that purpose whereas the object of enactment of the Act of 2005 was to protect the woman from being victim of the domestic violence and to prevent the occurrence of domestic violence in the society.

13. In view of the discussion aforesaid, the petition and the application are dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 28, 2017
'vn'