IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.133 OF 2014

1. Sham @ Navnath Vasantrao Kumbhakarna,
   Age : 38 years, Occup.: Business,
   R/o.: Grampanchyat Limit, Balapur (B),
   Gadhegalli, Ta. Shrirampur,
   District Ahmednagar

2. Sau. Ushabai w/o Vasantrao Kumbhakarna,
   Age : 50 years, Occup.: Household,
   R/o.: As above,

3. Vasantrao Baburao Kumbhakarna
   Age : 60 years, Occup.: Business,
   R/o.: As above,

4. Ramchandra Baburao Kumbhakarna
   Age : 52 years, Occup.: Business,
   R/o.: As above,

5. Mahesh Vasantrao Kumbhakarna,
   Age : 37 years, Occup.: Business,
   R/o.: As above,

6. Rakesh Vasantrao Kumbhakarna,
   Age : 36 years, Occup.: Business,
   R/o.: As above,

7. Shradha Mahesh Kumbhakarna,
   Age : 30 years, Occup.: Household,
   R/o.: As above,

8. Sunil Trimbak Raoandure,
   Age : 45 years, Occup.: Conductor,
   R/o.: Nandgaon, Dist. Nashik

9. Sau. Madhuri Sunil Raoandure,
   Age : 45 years, Occup.: Household,
   R/o.: Nandgaon, Dist. Nashik **..APPLICANTS**
   (Ori. Accused)

VERSUS

1. Sau Yogita w/o Sham Kumbhakarna,
Age : 33 years, Occup.: Household,
R/o.: Belapur (B), Gadhe Galli,
Ta. Shrirampur, Dist. Ahmednagar,
At present C/o Adv. Vishwanath
Keshav Adhe,
Municipal School No.21, Behind
Gavali Wada, Kanchan Nagar, Jalgaon,
Ta. and District Jalgaon

2. The State of Maharashtra .. **RESPONDENTS**
(Resp.No.1 Ori. Non-Applicant)

WITH

CRIMINAL APPLICATION NO.877 OF 2018
IN
IN CRIMINAL REVISION APPLICATION NO.133 OF 2014

Yogita w/o Sham Kumbhakarna,
Age : 38 years, Occup.: Household,
R/o.: Belapur (B), Gadhe Galli,
Tal. Shrirampur, Dist. Ahmednagar,
At present C/o: Adv. Vishwanath
Keshav Adhe,
Municipal School No.21, Behind
Gavali Wada, Kanchan Nagar,
Jalgaon, TaL & Dist. Jalgaon .. **APPLICANT**
(Ori.Resp.No.1)

VERSES

1. The State of Maharashtra

2. Sham @ Navnath Vasantrao Kumbhakarna,
Age : 41 years, Occup.: Business,
R/o.: Grampanchyat Limit, Belapur (B),
Gadhe Galli, Tal. Shrirampur,
District Ahmednagar

3. Sau. Ushabai w/o Vasantrao Kumbhakarna,
Age : 55 years, Occup.: Household,
R/o.: As above,

4. Vasantrao Baburao Kumbhakarna
Age : 65 years, Occup.: Business,
R/o.: As above,

5. Ramchandra Baburao Kumbhakarna
Age : 57 years, Occup.: Business,
R/o.: As above,

6. Mahesh Vasantrao Kumbhakarna,
Age : 42 years, Occup.: Business,
R/o.: As above,

7. Rakesh Vasantrao Kumbhakarna,
Age : 41 years, Occup.: Business,
R/o.: As above,

8. Shradha Mahesh Kumbhakarna,
Age : 35 years, Occup.: Household,
R/o.: As above,

9. Sunil Trimbak Raoandure,
Age : 50 years, Occup.: Conductor,
R/o.: Nandgaon, Dist. Nashik

10. Sau. Madhuri Sunil Raoandure,
Age : 45 years, Occup.: Household,
R/o.: Nandgaon, Dist. Nashik **..NON-APPLICANTS (No.2 to 10 Ori. Applicants)**

Mr. V.D. Sapkal, Advocate for the applicants in Cri. Revision No.133 of 2014 and for respondent Nos.2 to 10 in Cri.Application No.877 of 2018
Mr. S.P. Brahme, Advocate for respondent No.1 in Cri.Revision No.133 of 2014 and for the applicant in Cri.Application No.877 of 2018
Mr. S.B. Joshi, A.P.P. for respondent No.2/State

CORAM : SANGITRAO S. PATIL, J.

ORDER : 03rd JULY, 2018

JUDGMENT :

The applicants have challenged the legality and correctness of judgment and order dated 16th May, 2014 delivered by the I/c. 2nd Additional Sessions Judge, Jalgaon in Criminal Appeal No. 59 of 2013, whereby he confirmed the judgment and order dated 14th May, 2013, delivered by the learned Judicial Magistrate, First Class, (Court No.6), Jalgaon in Criminal Misc. Application No.563 of 2011, directing applicant No.1 to pay maintenance to respondent No.1 at the rate of Rs.2000/- p.m. and further directing him to place the minor children namely Kalyani and Kunal, who were aged about 7 ½ years and 4 ½ years respectively in the year 2011, in the custody of respondent No.1 during summer vacations until they attain the age of majority and also to make necessary arrangements to facilitate respondent No.1 to meet her minor children during other holidays.

2. The learned counsel for the applicants, at the outset, submits that so far as the impugned order directing applicant No.1 to pay maintenance to respondent No.1 is concerned, applicant No.1 has no grievance. However, so far as the order passed by the

learned Magistrate under Section 21 of the Protection of Women from Domestic Violence Act, 2005 (“the Act”, for short) directing applicant No.1 to allow respondent No.1 to take the minor children into her custody during summer vacations and also to make necessary arrangements to facilitate respondent No.1 to meet the children during other holidays until they attain majority, which is permanent in nature, applicant No.1 has strong objections.

3. The learned counsel for the applicants submits that respondent No.1 herself left the house of applicant No.1 on 26th January, 2011 leaving both of the minor children at his house. Thereafter, she never cared for the children. Both the children are now taking education. Kalyani is studying in third Standard in Dahanukar English Medium School. She has obtained 99% marks in second Standard. She has been examined before the Trial Court. She herself states that she does not wish to reside with respondent No.1. Both the children were brought before this Court also, but they did not go with respondent No.1. Both the children are being maintained well by applicant No.1. He has taken every care to see welfare and safeguard the interests of the

minor children. Respondent No.1 was not at all entitled to get custody of the minor children. The learned Counsel submits that the impugned order has the effect of granting permanent relief in respect of the custody of the children in favour of respondent No.1, which was beyond jurisdiction of the learned Magistrate under Section 21 of the Act. He, therefore, prays that the impugned judgment and order, to the extent of the directions given by the learned Magistrate in respect of custody of the children, may be quashed and set aside.

4. The learned counsel for respondent No.1 submits that though the words “temporary custody” has been used in Section 21 of the Act, purposive and liberal construction of the said words has to be made. According to him, the word “temporary” includes permanent as well. In support of this contention the learned counsel relied on the judgments in the cases of **Reema Aggarwal Vs. Anupam and others**, (**2004) 3 SCC 199** and **Sandhya Manoj Wankhade Vs. Manoj Bhimrao Wankhade, (2011) 3 SCC 650.** He supports the impugned order as regards the directions given for the custody of the children and prays that the Criminal Revision Application may be dismissed.

5. The short question involved in this case is, whether the words “temporary custody” used in Section 21 of the Act, would refer to grant of custody of the children during pendency of the application filed under Section 12 of the Act or whether it could be granted permanently covering the period after disposal of that application as well.

6. Section 21 of the Act, reads as under:

> “***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.*”

7. The word “Temporary” has been defined in the Law Lexicon - 4th Edition, as “lasting or intended to

last only for a time", existing or continuing for a limited time, not of long duration, not permanent, transitory, changing, lasting for a short time.

8. The learned counsel for respondent No.1 has cited the judgment in the 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 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. ..... ”*

9. It is, thus, 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.

10. As per Section 21 of the Act, the Magistrate may grant temporary custody of any child or children to the aggrieved persons at any stage of hearing of the application for protection order or for any other relief under this Act. Thus, the application under Section 21 of the Act has to be filed in such pending proceedings. It follows that there cannot be independent application seeking the relief of temporary custody simplictor.

11. The learned Additional Sessions Judge has interpreted the expression “at any stage of hearing” to mean and include even the stage when the application is decided finally. According to him, the expression, “at any stage of hearing” cannot be given restricted meaning to limit it “during pendency of the application” and the Magistrate can grant temporary custody of child or children to the aggrieved person while deciding the main application.

12. The learned counsel for applicant No.1, relying on the judgment in the case of **Wasudeorao Babasaheb Sonone & another Vs. Jagannath Ramlalji Jugele, 1986 BCI 119**, submits that the stage of the judgment comes after completion of the hearing. Therefore, according to him, the stage of passing of final order cannot be included in the expression “at any stage of hearing”. I find substance in this contention. Once hearing of the proceedings is over, the application has to be fixed for judgment and order. At the stage of judgment and order, the order for temporary custody under Section 21 of the Act cannot be passed.

13. The learned Counsel for respondent No.1 cited the judgment in the case of **Sandhya Manoj Wankhade (supra),** wherein the expression “respondent” defined in Section 2 (q) of the Act was interpreted to include female persons as well, though the word “female” has not been used and the word “male” only has been used in the said definition. The Hon'ble the Apex Court held that though expression “female” is not used in proviso to Section 2 (q), but no restrictive meaning can be given to expression “relative” nor has the said expression been defined to make it specific to males only. The Legislature never intended to exclude female relatives from ambit of complaint that could be made under the Domestic Violence Act 2005. Thus, considering the object of the Act and intention of the Legislature purposive and liberal interpretation was made to include female also in Section 2 (q) of the Act.

14. The learned counsel for respondent No.1 further placed reliance on the case of **Rima Aggarwal (supra),** wherein object behind enactment of Sections 498-A and 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act was explained. It was held that the expression “husband” would cover a person who enters

into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any purposes enumerated in Sections 304-B and 498-A of the Indian Penal Code, whatever be the legitimacy of the marriage itself for limited purpose of the said Sections. On the strength of these judgments the learned Counsel for respondent No.1 submits that the provisions of Section 21 of the Act may be liberally interpreted and the impugned orders may be upheld.

15. In order to understand the intention of the Legislature in using the phrase “at any stage of hearing of the application for protection order or for any relief under this Act”, it would be useful to refer to Sections 19 and 20 of the Act relating to “Residence orders” and “Monetary reliefs” respectively, which commence with the expression, “While disposing of an application.....”, the Magistrate may pass such orders. As such, the Legislature has thoughtfully and consciously used different expressions in Sections 19 and 20 on one hand and in Section 21 on the other. Therefore, the expression “at any stage of hearing“ used in Section 21 cannot be interpreted to mean “While

disposing of an application...“ as has been used in Sections 19 and 20 of the Act. The language used in Section 21 is clear and unambiguous. There is no reason to take resort to purposive and liberal interpretation of the expression used in Section 21 to extend the “interim stage” to “final” one as has been done by the learned Additional Sessions Judge.

16. Likewise, the expression “temporary custody” cannot be interpreted to mean “permanent custody”. The aggrieved person can get permanent reliefs under Sections 18, 19 and 20 of the Act. No such permanent relief was contemplated by the Legislature in the matter of custody of children vide Section 21 of the Act. Therefore, no provision has been made for filing independent application for custody of child or children. It is only when an application for protection order or for any other relief under this Act is pending, at any stage of hearing of such application, the aggrieved person has been given right to seek temporary custody of the child or children. The relief in respect of permanent arrangement for custody of child or children, which would have force even after disposal of the application for protection order or other reliefs,

cannot be said to be contemplated by the Legislature, while framing Section 21 of the Act.

17. Considering the distinguishing facts of the present case, the judgments cited by the learned counsel for respondent No.1 would be of no assistance to advance the case of respondent no.1.

18. The learned Magistrate was not empowered to grant permanent relief in respect of custody of children at the time of deciding the application filed by respondent No.1 under Section 12 (1) of the Act. The directions given by the learned Magistrate at the time of disposing the application under Section 12 (1) of the Act in respect of custody of the children are beyond the jurisdiction of the learned Magistrate. The learned Additional Sessions Judge did not properly and correctly interpret the expressions “at any stage of hearing” and “temporary custody” as used in Section 21 of the Act. The impugned judgment and order to the extent of directions given in respect of custody of children are not legal, proper and correct. They are liable to be quashed and set aside to that extent.

19. In the result, I pass the following order:-

O R D E R

(1) Criminal Revision Application No.133 of 2014 is allowed.

(2) The impugned judgment and order passed by the learned Additional Sessions Judge in Criminal Appeal No.59 of 2013 are quashed and set aside.

(3) The impugned judgment and order passed by the learned Judicial Magistrate, First Class in Criminal Misc. Application No.563 of 2011 to the extent of giving directions to applicant No.1 to give custody of the children to respondent No.1 during summer vacations and also to make necessary arrangement to facilitate respondent No.1 to meet the children during other holidays until they attain the age of majority, are quashed and set aside.

(4) Rest of the directions given in the impugned judgment and order are maintained as they are.

(5) Rule is accordingly made absolute in the above terms.

(6) The Criminal Revision Application is accordingly disposed of.

(7) In view of disposal of Criminal Revision Application, the pending Criminal Application No. 877 of 2018 is disposed of.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

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