



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 399 OF 2024

PANKAJ MADHAVRAO DESHMUKH
VERSUS
DIVYANSHA W/O PANKAJ DESHMUKH

...
Advocate for the Petitioner: Mr. Hemant Surve
Advocate for Respondent: Mr. Sachin S. Deshmukh
...

CORAM : S. G. MEHARE, J.

DATE : 06-08-2024

PER COURT:-

1. Heard the learned counsel for the petitioner and the learned counsel for the respondent on the point of tenability of the writ petition.
2. The petitioner has impugned the order of the learned Judicial Magistrate First Class, Kandhar, District Nanded, passed in PWDV Application No.46 of 2022 below Exhibit-44 dated 09.02.2024, directing the presence of petitioner along with the child Riyansh in the Court at Kandhar.
3. Learned counsel for the respondent has raised the objection that the impugned order is appealable under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (for short, "the Act"). The alternate remedy is available to the petitioner before the appellate authority.

4. Since the objection as to tenability is taken, this point is heard first.

5. Mr. Surve, learned counsel for the petitioner, argued that the impugned order is an interlocutor order and an appeal would lie only against the final order. Referring to Sections 21 and 29 of the Act, he submitted that no protection or custody orders were prayed for in the main petition. He also argued that it would be most inconvenient for a child to take him to the Court every time. Since the term "order" has not been defined in the Act, it should be understood from the nature of the order. Every order passed under this Act is not appealable, more particularly, interlocutory orders. Therefore, the impugned order is correctly impugned before this Court.

6. Per contra, the learned counsel for the respondent submits that for temporary custody or visit of the child, the prayer in the main petition is not essential. The concept of D.V. Act is to protect women and children from domestic violence. Reading Section 21 of the Act, he argued that the section begins with a non-obstante clause. Therefore, the Court has every jurisdiction to pass such orders at any stage of the hearing of the application or for any other relief under the Act. He also referred to Section 29 of the Act and argued that everywhere, the expression 'order' has been used. Therefore, it must be understood that each order is included

in the term 'order' expressed in the Act. Section 21 of the Act is comprehensive. Hence, the Appeal would lie against the impugned order.

7. Section 21 of the Act provides for custody orders. It begins with a non-obstante clause and empowers the Magistrate to grant the temporary custody of a child or children. Such powers can be exercised at any stage of the hearing of the application order or any other relief under the Act. The language of the section is plain and unambiguous. It gave vast powers to the Magistrate to pass appropriate orders to protect the interest of a child. That section also took care of the respondent. The Magistrate may pass the order making arrangements for visits to such child by the respondent. Therefore, there is no force in the argument of the learned counsel for the petitioner that the order being covered under the Guardian of Wards Act, the D.V. Court is not empowered to pass the order for custody in the absence of an application for the custody orders. Section 21 indicates that the Court may exercise the jurisdiction even in the absence of any prayer for custody of a child in the main petition on an application filed at any stage of hearing.

8. Section 29 of the Act provides for Appeal, which reads thus;

“29. Appeal. There shall lie an appeal to the Court of Session within thirty 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.”

9. Mr. Surve, learned counsel for the petitioner, is correct in arguing that the term ‘order’ is not defined in the D.V. Act. However, everywhere, the term ‘order’ has been used. Section 12 of the Act is comprehensive, and various sections have been enacted for different reliefs. It appears that Section 29 of the Act is comprehensive and covers each and every order passed by the learned Magistrate at any stage of hearing of the application under the Act. Though, Mr. Surve, learned counsel, tried to convince the Court that it was an interlocutory order, the Court does not agree with him for the reason that Section 21 of the Act provides for an application for custody of a child at any stage of the application.

10. As pointed out by Mr. Surve, learned counsel, it provides that while exercising the power, the Magistrate has to consider whether granting the visit is harmful to the child or children. The grievance of the petitioner appears to be that the visits were harmful to the child. In Section 29 of the Act, the term ‘order’ has been used. That covers every order passed by the Court under the D.V. Act at any stage of hearing. Therefore, it can not be accepted that only the orders passed on merits are appealable, and other orders passed under the said Act are interlocutory. This Court is also of the view that causing any harm to the interest of the child or

children by visiting orders may be examined by the appellate Court. An order protecting the interest of a child could not be said to be an interlocutory order. The orders under section 21 of the Act are temporary and do not affect the civil rights of the parties.

11. In view of the above discussion, this Court is of the view that the impugned order is appealable under Section 29 of the Act. The law is well settled that where the efficacious remedy is available, the High Court should avoid exercising powers under Article 226 or 227 of the Constitution of India unless there are exceptional circumstances.

12. Accordingly, the writ petition stands dismissed.

13. The petitioner is at liberty to prefer an appeal under Section 29 of the Act, if any.

14. Time spent here may be excluded for delay.

(S. G. MEHARE)
JUDGE

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