

MHKO120000802019



ORDER BELOW EXH.15

Applicant filed the present application under section 21 of the Protection of Women from Domestic Violence Act for temporary custody of her children namely Sidhant and Samip.

02. It is submitted that the applicant and respondent were married and from the wedlock Sidhant, age 07 years and Samip, age 03 years were born. According to the applicant, due to the harassment and domestic violence from respondents, she was residing with her parents. However, respondents illegally kept the children with them. It is further submitted that respondent also obstructed the applicant to meet her children. Hence, by this application she prayed for temporary custody of her children.

03. Respondent filed his say at Exh.31 and denied the contention of the application in toto. It is contended that the applicant is not mentally fit and medical treatment in that respect is also going on. It is also contended that she herself deserted the respondent and the children. So also the respondent also filed divorce petition before Civil Judge Senior Division, Kolhapur in which the applicant also filed the custody application and same is pending. It is also contended that the applicant is not competent to look after her children. Moreover, both the children are studying in *Kendriya Vidhyalay, Bhandup* therefore, if custody of children handed over the applicant, there will be huge educational loss to them. Hence, there is no question of illegally retaining the custody of children. Therefore, respondent finally prayed to reject the application.

04. Heard both the advocates. Perused the written arguments filed on record.

05. At the outset it is necessary to mention that order under section 21 of the Protection of Women from Domestic Violence Act is of temporary in nature and court has discretion to allow the application or reject the same considering the fact and circumstance of each case.

06. Advocate for the applicant argued that respondent illegally kept the children with them and as per the provision of the Protection of Women from Domestic Violence Act temporary custody of the children be given to the applicant. In order to support their argument they relied on *Dr. Parijat Vinod Kanetkar and others Vs. Malika Parijat Kanetkar and others.*(Cri. Writ Petition No.750 of 2016 dated 21/12/2016, Hon'ble High Court, Bombay, Nagpur Bench) In which it is held that Magistrate has jurisdiction to decide the custody application in accordance with the law.

07. Per contra, advocate for the respondent argued that the applicant is not mentally fit and medical treatment in that respect is also going on. It is also contended that she herself deserted the respondent and the children.

08. Prima-facie, upon perusal of the documents at Exh.34, Sr. No.10 and 11 on record it appears that the applicant was referred to Psychiatrist and Psychotherapist since January 2016. Prima-facie, upon perusal of main application and documents, it appears that since August 2018 applicant is residing with her parents and since then her children were residing with the respondent No.1. So also upon perusal of the document Exh.34, Sr. No.1 to 9, it appears that the children of the applicant were studying at Mumbai and their educational fees were

also paid by the respondent no.1. So also upon perusal of the progress card filed at Exh.34 it prima-facie appears that, the younger child Samip is of 05 years and not 03 years as mentioned by the applicant in application. Moreover, upon perusal of his progress report, photographs and other certificates filed at Exh.34, it prima-facie appears that respondent is properly looking after the children. Even though advocate for the applicant argued that, being a mother, applicant is the natural guardian of her children and hence, she is entitled for the custody of children. However, it is well settled that while granting the custody, welfare of the child is paramount consideration and it is for applicant to prove that she is the fit person to have custody. Moreover, under the Protection of Women from Domestic Violence Act court only grant temporary custody of children and this court has no power to grant final custody of children. For that purpose application needs to be filed under section 10 of Guardians and Wards Act 1980.

09. Prima-facie, it appears that since August 2018 children were residing with the respondent No.1. Therefore, in my view, at this stage prima-facie respondent is the fit person to have custody of children and prima-facie it appears that he did not illegally keep the children with him. Moreover, with due respect, in the citation cited supra, the application of custody was pertaining to the infant child and the core issue is that deficiency of the mother in breastfeeding her infant son. Therefore, the fact and circumstance of that case differs from this case. Hence, with the due respect said citation is not applicable to the case in hand.

10. Hence, in view of above discussion and reasons, application needs to be rejected. However, applicant being the mother of children has every right to meet her children. Hence, in the interest

of justice, I pass the following order,

ORDER.

1. The application stands rejected.
2. However, applicant is allowed to meet her children once in month as per the convenience of both applicant and the respondent.

Place : Gargoti.
Date : 06/01/2021.

(**A. S. Koshti**)
Judicial Magistrate F. C., Gargoti.