

Karolin Jagdishbhai Macwan vs State Of Gujarat & on 5 May, 2017

Author: J.B.Pardiwala

Bench: J.B.Pardiwala

R/SCR.A/7475/2015

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 7475 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

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KAROLIN JAGDISHBHAI MACWAN....Applicant(s)
Versus
STATE OF GUJARAT & 1....Respondent(s)

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Appearance:

MR. JOHNSY MACWAN WITH MR SHASHIKANT PARMAR, ADVOCATE for the Applicant(s) No. 1

M/S PATEL ADVOCATES, ADVOCATE for the Respondent(s) No. 2

MS SHRUTI PATHAK, APP for the Respondent(s) No. 1

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Date : 05/05/2017

CAV JUDGMENT

1. By this application under Article 227 of the Constitution of India, HC-NIC Page 1 of 17 Created On Sat May 06 01:25:29 IST 2017 the applicant questions the legality and validity of the order dated 04/12/2015 passed by the learned Principal District & Sessions Judge, Kheda at Nadiad in the Criminal Appeal No.73 of 2015 filed by the respondent no.2 herein under Section 29 of the Protection of Woman from Domestic Violence Act, 2005, challenging the order passed by the Second Judicial Magistrate First Class, Nadiad below Exh.5 in the Criminal Misc. Application No.468 of 2015 decided on 07/09/2015.

2. The facts giving rise to this application may be summarized as under: 2.1 The applicant herein got married to the respondent no.2 on 24/03/2007 in accordance with the Christian Marriage Act at Vadodara. In the wedlock, a son named Aaron was born on 09/03/2012.

2.2 It appears from the materials on record that serious matrimonial disputes cropped up between the applicant and the respondent no.2. There are allegations and counter allegations at the end of the parties. Ultimately, a Memorandum of Understanding was arrived at dated 01/11/2014 reduced into writing duly signed by the parties. The Memorandum of Understanding reads as under: MEMORANDUM OF UNDERSTANDING THIS MEMORANDUM OF UNDERSTANDING MADE AND EXECUTED ON THIS 01.11.2014 AT BANGLORE BETWEEN:

KEROLIN JAGDISHBHAI MACWAN D/o. Jagdishbhai C. Macwan, W/o. Neil Sunil Aged about 29 years, R/at Site No.2, (Old Door No.4/4), Behind Reliance Fresh, Church Street Cross, Bangalore 560066 HC-NIC Page 2 of 17 Created On Sat May 06 01:25:29 IST 2017 Hereinafter called as FIRST PARTY of the One Part AND NEIL SUNIL S/o. Sunil Arthur John R/at. Site No.2, (Old Door No.4/4), Behind Reliance Fresh, Church Street Cross, Bangalore 560066 Hereinafter called as the SECOND PARTY of the other Part.

Whereas the Second Party is the husband of the First Party. The Marriage between the First Party and the Second Party was solemnized on 24.03.2007 at Hotel Surya Palace, Baroda as per Christian rites and customs. The said marriage is a love marriage. At the time of marriage there was no Demand of cash or kind by either side.

Whereas after marriage, both the parties have lived together as husband and wife at Bangalore. In the said wed lock a baby boy by name AARON JOHN was born on 09.03.2012.

Whereas both the Parties had frequent misunderstandings and mutual incompatibility between them for the certain reasons which in the interest of the family prestige are not mentioned. The marriage between the petitioners is irretrievably broken. Hence the elders and well wishers have made hectic attempts to pacify the differences between the Parties. But unfortunately, all their attempts failed. Hence, now the petitioners thought that no purpose will be served in continuing the marriage in such a condition and hence they have come forward to settle the issue between them.

Whereas during the meeting held on 01.11.2014 both First Party and the Second Party have agreed on certain terms and conditions and the same are put in to this Memorandum of Understanding.

TERMS AND CONDITIONS:

1. Both the parties hereby declare that the marriage between the First Party and the Second Party is a Love Marriage. And further the First Party declares that there was no demand of dowry or any of such nature either by the Second Party or by his family members.
2. The First Party and the Second Party hereby declare that they have not disclosed the real reason for the separation as it affects the prestige of the families.
3. The First Party and the Second Party have mutually agreed to separate from the marital bond from today i.e. from 1.11.2014. The First Party has agreed to move out of the matrimonial home and she will shift to her native place.

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4. The Custody of the minor child AARON JOHN will remain with the Second Party and the First Party will have no objections for the same. The First Party will have visitation rights of the minor child with prior intimation/consent of the Second Party. The First Party declares that under no circumstances she will claim for the custody of the minor child.

5. Both the Parties hereby agree that they will not file any Complaint with Police against each other in future.

6. The First Part hereby declares that she is well educated and has studies BBA and has also completed her professional training in food production. And she is capable of maintaining herself in future. As such she will not claim any Monthly maintenance / Permanent Alimony from the

Second Party. The First Party will not have any right to claim any share in the immovable properties of the Second Party. Both the Parties have no claims against each other.

7. The First Party has this day took all her belongings and gold, silver articles and other articles which belong to her including her clothes / bags / baggage from the matrimonial home and she will not have any claim against the Second Party in respect of the same.

8. The First Party and the Second Party hereby declare that there is no force, coercion, undue influence in entering to this Memorandum of Understanding. Both the parties have signed this Deed out of their free will and wish.

9. Both the Parties hereby agree that they will abide by the terms and conditions of this Memorandum of Understanding.

In witness whereof having agreed to the above terms and condition both the First and the Second Parties have affixed their respective signature before the understading witness on the day, month and year, first above mentioned.

WITNESS:

1. Nirmalaben J. Macwan First Party (N.J. Macwan)

2. J.G. Macwan Second Party (J.G. Macwan) 2.3
In view of the Memorandum of Understanding referred to above, the custody of 'Aaron' was taken over by the father. 'Aaron' remained in the custody of his father for the period between 01/11/2014 and 07/09/2015. It appears that the applicant herein initiated proceedings HC-NIC Page 4 of 17 Created On Sat May 06 01:25:29 IST 2017 under the Domestic Violence Act by filing the Criminal Misc. Application No.468 of 2015. The applicant invoked Section 23 of the Act and prayed for custody of her son 'Aaron'. The learned Magistrate vide order dated 07/09/2015 partly allowed the application filed by the applicant and directed the respondent no.2 to hand over the custody of the child to the applicant. However, visitation rights were given to the respondent no.2 as the father of the child.

2.4 The respondent no.2 being dissatisfied with the order passed by the learned Second Judicial Magistrate First Class, Nadiad, preferred a Criminal Appeal No.73 of 2015 in the Court of the learned Principal District & Sessions Judge, Kheda at Nadiad. The Principal Sessions Judge, Kheda at Nadiad took into consideration the Memorandum of Understanding and other materials on record and ultimately, allowed the appeal and quashed and set aside the order passed by the learned Second

Judicial Magistrate First Class, Nadiad. While allowing the appeal, the learned Principal District & Sessions Judge has observed as under:□

20. As a Sessions Judge, I have to take into consideration the document of Memorandum of Understanding, which is produced vide Mark□4/5 in Criminal Miscellaneous Application No.468/2015, which is duly signed and prepared by the parties and as per the terms and condition No.8, the said Memorandum of Understanding is prepared without force, coercion and undue influence. The parties, who have signed in the Memorandum of Understanding are major and have the knowledge about the writing of Memorandum of Understanding. Both the parties are educated parties and who have signed as witnesses are also educated persons and the witnesses are the mother and father of Carolin D/o. Jagdishbhai Macwan and hence the Domestic Violence Application filed after the preparation of Memorandum of Understanding and the Family Suit No.142/2015 filed at Family Court at Anand, the Ld. Trial Magistrate has not mentioned any reasons how he overlooked the Memorandum of Understanding, which is produced vide Mark □ 1 4 / 5 in Criminal Miscellaneous Application No.468/2015, and passed the order below Ex.5 and partly allowed the application, which is required to be HC-NIC Page 5 of 17 Created On Sat May 06 01:25:29 IST 2017 quashed and set□ aside, keeping in mind the authority cited by the Ld. Advocate of the Appellant - 2011 (3) GLR 1965 (Supra). As per the said authority, it was decided as per the provisions of the Protection of Women from Domestic Violence Act, 2005, and as per the said authority the child was remained with the father for more than 3 ½ years since the separation and Hon'ble High Court of Gujarat was pleased to pass an order to keep the custody with the father. The facts and circumstances of the present case are similar and the said authority is applicable in the present case. Against the said authority, the Ld. Advocate of the Respondent cited an authority - LAWS (GJH)□982□8□2 (Savitben Lagharbhai V/s. Manjibhai Ramjibhai Chavda). The said authority is as per the provisions of Guardian And Wards Act, 1890, Section□25. The Ld. Advocate of the Respondent also relief upon LAWS□SC□2015□2□59 (Roxann Sharma Vs. Arun Sharma). The said authority is decided as per the provisions of Hindu Minority and Guardianship Act, 1956. And the authority LAWS□GJH□2011□2□31 (dhaval Rajendrabhai Son V/s. Bhavinin Dhavalbhai Soni). And as per the judgment in Criminal Misc. Application No.12567 of 2010 of the Hon'ble High Court of Gujarat (Labhubhai Babubhai Desai V/s. State of Gujarat), as per the said authority the question of paramount interest and welfare of minor child is required to be considered by the Court while deciding the application of the

custody of the minor child. In the present case, father is serving at Bangalore, mother is residing at Anand, father is serving in reputed company at Bangalore and can earn a handsome amount and keeping in mind the terms and conditions of Memorandum of Understanding, which is produced vide Mark 14/5 in Criminal Miscellaneous Application No.468/2015, condition No.4, Carolin D/o. Jagdishbhai Macwan has voluntarily waived the right to obtain the custody of minor son in favour of her husband and after lapse of one year, she preferred application as per the provisions of The Protection of Women from Domestic Violence Act, 2005. At this stage, I have only to decide the question about the minor son namely, Aaron, who is only three years old, as there are allegations about the adultery against the mother and against the father allegations of homo sexual relation and keeping in mind the terms and conditions of Memorandum of Understanding, which is produced vide Mark 14/5 in Criminal Miscellaneous Application No.468/2015, the welfare and paramount interest is remained with the father so far as the, minor male child Aaron, who is three years old is concerned, and hence my answer to the Points No.1, 2 & 3 are in the affirmative accordingly.

POINT NO.4:

21. There is allegation of the Appellant against the Ld. Trial Magistrate that the Ld. Trial Magistrate has not pronounced the order after hearing by both the parties within a stipulated time and after filing the application at Ex.17, dated 7/9/2015, in Criminal HC-NIC Page 6 of 17 Created On Sat May 06 01:25:29 IST 2017 Miscellaneous Application No.468/2015, to take the case on board, the order was passed on 7/9/2015 and date was give to the Appellant was 1/10/2015. The Ld. Trial Magistrate heard the argument of application at Ex.5 on 12/8/2015 and next date of hearing was fixed on 18/8/2015 for the order and order was not pronounced on 18/8/2015, and thenafter date of order was fixed on 4/9/2015, although order was not declared on 04/09/2015 and date of 1/10/2015 was fixed for the order and the Ld. Advocate of the Respondent filed an application at Exh.17 to take the case on board on 7/9/2015, which was granted and order was pronounced below Ex.5 without the prior intimation to the opponent. The appellant got the knowledge on 19/9/2015 at the Family Court at Anand in divorce petition proceedings while the Ld. Advocate of the Respondent make representation about it. I have called for the original record & proceedings of the Ld. Trial Magistrate and on referring the proceedings dated 12/08/2015, it is written that the arguments are heard and matter is kept to produce the authority and next date was fixed on 18/8/2015. On 18/8/2015, opponent filed documentary list vide Ex.15 and matter was fixed to produce authority on 27/8/

2015. On 27th 08/2015, the Ld. Advocate of the applicant submitted written arguments with authorities and matter was fixed for order below Ex.5 on 4th 09/2015. On 4th 09/2015, both the parties are not present and hence the matter was fixed on 1st 10/2015 for the pronouncement of the order. On 7th 09/2015, the Ld. Advocate of the Appellant filed an application to take the case on board vide Ex.17 and the order pronounced below Ex.5 on 7th 09/2015 and matter was fixed for the recording of evidence of the applicant on 1st 10/2015. The submission made by the Appellant so far as on the fixed date the Ld. Trial Magistrate has not pronounced the order is not true and correct. For the sake of authorities produced by the Ld. Advocate of the parties, the matter was prolonged and there is no fault on the part of the Ld. Trial Magistrate that he has not prepared the order within the stipulated time and hence my answer to the Point No.4 is in the negative accordingly.

POINT NO.5:

22. As per the final order.

ORDER

1. Criminal Appeal No.73/2015 is hereby allowed.
2. The order passed by the Ld. 2nd Judicial Magistrate First Class, Nadiad (Arvind Sardarsinh Patel), below Ex.5 in Criminal Miscellaneous Application No.468/2015, dated 07th 09/2015 is hereby quashed and set aside.
3. It is hereby clarified that the mother of minor child Aaron, namely, Carolin D/o. Jagdishbhai Macwan have the visitation right HC-NIC Page 7 of 17 Created On Sat May 06 01:25:29 IST 2017 with a condition to give a prior intimation to the concerned parties. The Police help be provided to take the custody of minor child Aaron.
4. The application filed at Ex.4 in Criminal Appeal No.73/2015 shall stand disposed of accordingly.
5. The Registry is hereby ordered and directed to certify the Writ of the Hon'ble High Court of Gujarat in connection with the Special Criminal Application (Direction) No.6402 of 2015, immediately.
6. The true copy of the judgment and the record & proceedings of Criminal Miscellaneous Application No.468/2015, be sent back to the Court of Ld. 2nd Judicial Magistrate First Class, Nadiad, (Arvind Sardarsinh Patel), immediately.

7. Judgment signed and pronounced today on 4th day of December, 2015 in the open Court at Nadiad."

2.5 Being dissatisfied with the order passed by the learned Principal District & Sessions Judge, Kheda at Nadiad, the applicant has come up with this application invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

3. On 21/12/2015 the following order was passed: □
Rule. Mr. Shah, the learned APP, waives service of notice of rule for and behalf of the respondent No.1. The respondent No.2 be served directly through the investigating officer of the concerned police station.

Let there be an ad interim order in terms of para 5(C).

Direct service is permitted.

4. Mr. Macwan, the learned counsel appearing for the applicant submitted that the learned Principal Sessions Judge committed a serious error in passing the impugned order. The Memorandum of Understanding arrived at between the parties reduced into writing duly signed by both the sides is not in dispute. However, according to Mr. Macwan, whatever may be the understanding between the parties, the HC-NIC Page 8 of 17 Created On Sat May 06 01:25:29 IST 2017 fact remains that 'Aaron' as on date, is just about 04 years of age and needs love, care and affection of his mother. According to Mr. Macwan, the Memorandum of Understanding was signed by the applicant at a point of time when she was in lot of mental stress and depression on account of the matrimonial disputes. Mr. Macwan submitted that the husband has levelled very filthy allegations against the wife, thereby, causing lot of social stigma. According to Mr. Macwan, whenever the question arises before the Court pertaining to the custody of minor child, the matter is to be decided not on consideration of the legal rights of the parties, but on the sole and pre dominant criteria of what would best serve the interest and welfare of the minor.

5. Mr. Macwan in support of his submissions has placed reliance on the following decisions: □

1) Scale 2015 (2) 488 (SC) Roxann Sharma Vs. Arun Sharma

2) LAWS (MPH) 2014 - 10 96.

Leela Bai Vs. Ganpati

3) 2011 (3) GLR 1965

Dhaval Rajendrabhai Soni Vs. Bhavini Dhavalbhai Soni & Ors

4) LAWS (GJH) - 2010 - 4 - 15 Sujit J Munshi Vs. Shilpa R. Shinde

5) Criminal Misc. Application No.12567 of 2010;

decided on 25/10/2010.

Labhubhai Babubhai Desai Vs. State of Gujarat & Anr.

6) AIR 2009 SC (Supp) 732 (1)
Nil Ratan Kundu & Anr. Vs. Abhijit Kundu

7) AIR 2001 SC 2179

Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha HC-NIC Page 9 of 17 Created On Sat May 06 01:25:29 IST 2017

8) AIR 1999 SC 3821 N. Nirmala (Smt) Vs. Nelson Jeyakumar

9) AIR 1987 SC 3 (1) Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw & Anr.

10) AIR 1977 SC 1359 Smt. Mohini Vs. Virender Kumar

6. On the other hand, the learned counsel appearing for the respondent no.2 has opposed this application and submitted that no error, not to speak of any error of law, could be said to have been committed by the learned Principal Sessions Judge in passing the impugned order. According to Mr. Patel, no interference is warranted in the facts of the case. Mr. Patel submitted that the applicant is suffering from bipolar disorder. Considering the ailment, with which, the applicant is suffering, the custody of the child should remain with the father. Mr. Patel levelled allegations of an extra marital affair.

7. In such circumstances referred to above, Mr. Patel prays that there being no merit in this application, the same be rejected.

8. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the Court below committed any error in passing the impugned order.

9. As noted above, both the sides have levelled allegations against each other. Unfortunately, sufferer is the minor son. This petition is a classical example of how much bitterness and bad blood can be created out of a failed marriage. It is also an example of how much a young

innocent child would suffer on account of bitter fights between his/her HC-NIC Page 10 of 17
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10. I tried my best to persuade the parties to reconcile keeping in mind the interest of the minor son. I also asked the applicant to remain present with her minor son 'Aaron'. I found the child to be too fragile and disturbed. I wonder if 'Aaron' would in a position to once again adjust himself at the house of his father. Since 'Aaron' is of a very tender age, the advisability of determining his wishes is not relevant at the present stage; he is not old enough to form an intelligent reference. Aaron is in custody of the applicant from 20/10/2015. He remained in custody of his father for the period between 01/11/2014 and 07/09/2015. I do not say for a minute that the father is unfit or will not be able to take care of his son, but at the same time, considering the age of the child and the circumstances, I am of the view that the child will need the care and protection of his mother.

11. Whenever a question of custody of minor children arises, the Courts have always approached the issue with more humanitarian rather a legal problem. In case of infants, Courts have always leaned in favour of the mother taking care of extremely young impressionable children unless it is brought on record that the mother suffers from some disqualification by virtue of her character, total inability to take care of the child or such other handicap. Question of custody of minor children is never a static problem and the issue can be re-examined at any stage. In a Division Bench judgment of this Court dated 23.04.2010 in the case of Sujit J. Munshi vs. Shilpa R. Shinde rendered in the Letters Patent Appeal No.889 of 2009, it was observed:

7. xxx xxx xxx We feel so because in our opinion in a case where question of custody of minor child is concerned, it is the welfare of the minor alone which HC-NIC Page 11 of 17 Created On Sat May 06 01:25:29 IST 2017 should be of paramount consideration. No other factor can have overriding effect over the welfare of the minor. So much has been well laid down in a series of decisions of this Court as well as Apex Court.

In case of Nil Ratan Kundu and another v. Abhijit Kundu reported in 2009(9)Supreme Court Cases 413, the Apex Court observed that :

39. The principles in relation to custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the welfare of the child and not rights of the parents under a statute for the time being in force.

In case of Athar Hussain v. Syed Siraj Ahmed and others reported in (2010) 2 Supreme Court Cases 654, the Apex Court observed with approval the observations in case of R. V. Srinath Parasad v. Nandamuri Jayakrishna reported in (2001) 4 SCC 71, to the effect that custody orders by their nature can never be final. However, before a change is made, it must be proved to be in the paramount interest of the children. It was further observed that strict parameters governing an interim injunction do not have full play in matters of custody. With respect to the wish of minor, the Supreme Court observed that :

52. The High Court had relied heavily on the preference made by Athiya Ali who then was 10 to 11 years' old. In the opinion of the High Court, she was capable of making intelligence preference. It may be true that 11 years is a tender age and her preference cannot be conclusive. The contention of the appellant in this respect is also supported by the decision in Bal Krishna Pandey case. But as we are not dealing with the question of guardianship, but only with the issue of the interim custody, we see no reason why the preference of the elder child shall be overlooked.

12. Mr. Macwan invited my attention to an order passed by this Court dated 25/10/2010 in the Criminal Misc. Application No. 12567 of 2010 in the case of Labhubhai Babubhai Desai Vs. State of Gujarat. He relied on the following observations:□

8. Despite above conclusion, it is not that wife is remediless or that she would have to fight unending legal battle to secure custody of two children barely aged 5 years. Law provides for sufficient remedies taking care of such situation. Under the Protection of Women from Domestic Violence Act, 2005 (for short the Act), the competent HC-NIC Page 12 of 17 Created On Sat May 06 01:25:29 IST 2017 Magistrate has enough powers to pass appropriate orders under such circumstances. Whenever wife or woman complaining of domestic violence approaches the learned Magistrate and also seeks appropriate relief for custody of minor children who are separated from her, it is well within domain of learned Magistrate to pass interim order and in a given case, even ex parte ad interim order. In particular, under Section 21 of the Act, it is open for the learned Magistrate at any stage of hearing of the application to grant temporary custody of the child or children to aggrieved person. Section 21 of the Act reads as follows:

Section 21 - 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.

13. Finding any fault with the impugned order or not finding one is not going to solve the problem. It is true that there is a Memorandum of Understanding, but I really wonder in what circumstances, the applicant signed the same and agreed to hand over the custody of the child to the father. In the case of Dhaval Rajendrabhai Soni Vs. Bhavini Dhavalbhai Soni & Ors. reported in 2011 (3) GLR 1965, a learned Single Judge of this Court has held as under:□

9. At the outset, I may notice that Section 12 of the said Act pertains to application to the Magistrate that the aggrieved person or the protection officer may file seeking various reliefs under the Act. The Act provides for various reliefs that an aggrieved person can seek from the Magistrate including right to reside in a shared household, protection orders, residence orders, monetary reliefs, compensation etc. Section 21 in particular, pertains to custody order and reads as follows :

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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."

Section 23 of the Act clarifies that the Magistrate has power to grant interim as well as ex□parte order as deemed just and proper.

10. Question is, in the proceedings under the said Act can a Magistrate pass custody order beyond the life of the proceedings before him.

11. On one hand, as already noted, counsel for the petitioner suggested that since Section 21 of the Act empowers learned

Magistrate to pass only temporary custody orders, such order can have the effect only during the pendency of the proceedings before the Magistrate and not beyond. On the other hand, counsel for wife submitted that term used in Section 21 is temporary custody and not interim custody and that therefore, Magistrate can pass an order which can operate also beyond life of proceedings under Section 12 before him.

12. Said Act was enacted with following objects in mind:

"2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society:□.."

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13. From the preamble of the Act, it can be seen that to achieve the above object the said Act was enacted to provide for more effective protection of right for woman guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected thereof and incidental thereto.

14. With above objects, Legislature has provided number of reliefs that wife can claim under the said Act by filing application under Section 12. Magistrate is vested with wide powers not only for granting different orders, as already noted such as protection order, residence order etc., is also clothed with power to pass interim as well as ex□parte interim orders.

15. Viewed from this angle, the power of the Magistrate under Section 21 of the Act, becomes crucial which empowers learned Magistrate notwithstanding anything contained in any other law for the time being in force, to grant temporary custody of the child to the aggrieved person at any stage of hearing of the application for protection order or for any other reliefs under the Act. In essence, therefore, in any proceedings under the Act, Magistrate is empowered to grant temporary custody of the child to the aggrieved person. It can be easily appreciated that said power assumes significance when looked from angle of wife or any other woman approaching the Magistrate seeking protection against the domestic violence by

husband, his family members or other relatives. A small child to a mother is extremely precious. If mother is separated from her child, her resistance is most likely to break down. It is in this regard that learned Magistrate is empowered to pass custody orders, notwithstanding anything contained in any other law for the time being in force. Such powers of Magistrate read with Section 23 of the Act would include power to pass interim as well as ex parte orders. It is therefore, of great significance and importance that Magistrates while dealing with the application of an aggrieved person seeking custody of her child deal with the situation promptly and bearing in mind the objects and purpose of the Act and also bearing in mind that mother when separated from child is likely to agree to any terms and conditions, not to resist domestic violence from husband or other family members.

16. Significantly, 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 HC-NIC Page 15 of 17 Created On Sat May 06 01:25:29 IST 2017 can pass finally. Term temporary custody in Section 21 is used in juxtaposition 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.

14. In the case of Roxann Sharma Vs. Arun Sharma reported in Scale 2015 (2) 488, the Supreme Court observed as under:□

9.....We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play.

15. There is nothing on record except the allegation that the custody of 'Aaron' with her mother will not be in his interest. The allegations levelled by the husband against his wife as regards the ailment of bipolar disorder also appears to be quite vague.

16. In the overall view of the matter, I have reached to the conclusion that the impugned order needs to be disturbed. In the result, this

application succeeds and is hereby allowed. The impugned order passed by the learned Principal Sessions Judge, Kheda at Nadiad is hereby quashed. The custody of 'Aaron' shall remain with the applicant. As pointed out earlier that the Magistrate is not permitted to pass final order of custody and any order that the Magistrate can pass, must have limited validity either in terms of time or happening of an event. The Magistrate cannot pass order of permanent custody of the child to the aggrieved person.

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In such circumstances, the custody of 'Aaron' shall remain with the applicant i.e. the mother atleast till the time the respondent no.2 deems fit to initiate proceedings under the Guardian and Wards Act or any other legal proceedings and appropriate orders are passed in such proceedings. Liberty is reserved for the respondent no.2 to initiate appropriate proceedings as regards the custody of the child in accordance with law. The father shall have the visitation rights as ordered by the Magistrate.

Rule is made absolute to the aforesaid extent. Direct service is permitted.

(J.B.PARDIWALA, J.) aruna HC-NIC Page 17 of 17 Created On Sat May 06 01:25:29 IST 2017