IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.186 OF 2018

Mrs.Payal Sudeep Laad @ Payal Sharma,
Age 35 years, LTMMC, Sion Hospital, Sion,
Mumbai-400 022. Applicant

versus

1. Sudeep Govind Laad, Age 36 years,
R/o.3E/41,, Kalpataru Aura, Ghatkopar (W),
Mumbai-400 086.

2. The State of Maharashtra Respondents

Mr.Rohan Cama with Mr.Harish Adwant I/by Ms.Sapana Rachure for applicant.

Mr.Archit Jayakar with Ms.Trupti Khade and Ms.Nikita Panse I/by M/s.Jayakar & Partners, Advocate, for respondent no.1.

Mr.Y.M.Nakhwa, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 12th July 2018
Date of pronouncing the Judgment : 2nd November 2018

JUDGMENT :

1. By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicant seeks to challenge the order dated 3rd February 2018 passed by the Sessions Court, Mumbai rejecting the applicant's appeal filed under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (`D.V.Act') which was filed challenging order dated 5th January 2018 passed by Metropolitan Magistrate, 31st Court, Vikroli, Mumbai.

2. The relevant facts for determining the issues raised in this application are as follows :

a) The marriage between the applicant and respondent no.1 was solemnized on 7th May 2008. Out of the wedlock child Vihan was born on 14th September 2012;

b) On 17th July 2017 the applicant filed an application before the learned Metropolitan Magistrate under Section 12 of DV Act seeking relief under Sections 18, 19, 20, 21 and 22 of the DV Act. The said application was filed against respondent no.1 and his mother. The proceedings were numbered as CC.122/DV/2017;

c) The applicant left her matrimonial home on 2nd December 2017 with child Vihan and made separate residential arrangement along with her parents;

d) The applicant addressed a letter dated 6th December 2017 to the school authorities of Vihan. The respondent no.1 preferred application vide Exhibit-9 dated 20th December 2017 seeking access of Vihan;

e) The applicant filed her affidavit-in-reply before the learned Magistrate opposing the said application on the ground of maintainability;

f) By order dated 5th January 2018, learned Metropolitan Magistrate, 31st Court, Vikroli, allowed the application filed by respondent no.1 and he was allowed to exercise his visitation rights

and keep custody of his child for 48 hours for twice in a month i.e. on every second and fourth Friday from 6 pm to Sunday 6 pm i.e. on alternate week ends;

g) The applicant challenged the aforesaid order by preferring appeal before the Sessions Court. The applicant also preferred an application for stay of the order passed by the learned Magistrate. The Sessions Court by order dated 12th January 2018 granted interim stay to the order of the learned Magistrate pending hearing of the appeal. The respondent no.1 filed his affidavit-in-reply on 18th January 2018. The Sessions Judge by order dated 3rd February 2018 dismissed Appeal No.30 of 2018 filed by applicant and upheld the order dated 5th January 2018 passed by learned Magistrate.

3. Learned counsel for applicant submitted that the impugned orders are contrary to the provisions of law. The applicant was constrained to prefer an application under the DV Act seeking reliefs u/s 18 19, 20, 21 and 22 of the DV Act on 17th July 2017. The said application was preferred on account of immense verbal, emotional, physical, economical violence at the hands of respondents. The respondent no.1 did not file his written statement denying any charges against him on several dates and had threatened the applicant to withdraw the complaint. The applicant was constrained to lodge the NC complaints with police. Due to severe apprehension and scary atmosphere at the matrimonial house, the applicant had no alternative but to leave her matrimonial home on 2nd December 2017 with child Vihan and made separate residential arrangement along with her parents. It is further submitted that the applicant had to

address letter dated 6th December 2017 to the school authorities of Vihan as the respondent no.1 had threatened kidnapping of child, which is reflected in the NC dated 28th November 2017. Without filing written statement and after a period of about five months of filing the complaint under DV Act, the respondent no.1 had preferred an application for urgent interim relief vide Exhibit-9 on 20th December 2017. The applicant filed her affidavit-in-reply opposing the application on the ground of maintainability. It is submitted that the learned Magistrate vide order dated 5th January 2018 erroneously allowed the application preferred by respondent no.1 and granted relief to respondent no.1. The Sessions Court has also committed an error in rejecting the appeal preferred by the applicant. The learned Sessions Judge has passed the order in violation of principles of natural justice. The applicant was not given an opportunity to represent her by advocate and compelled to argue in person. The Sessions Court also refused to permit the applicant to file the rejoinder. The learned Sessions Judge failed to appreciate that Section 21 applies only when granting custody order during the hearing. The Courts below failed to appreciate that Section 21 does not permit the husband to move for relief under the DV Act independent of the application of the aggrieved person. The learned Sessions Judge failed to appreciate that the DV Act does not contemplate any person besides wife filing an application for custody. The learned Judge failed to appreciate that as per Section 2(a) of DV Act aggrieved person means any woman who is or who has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent and the provision under Section 21 is not applicable for any person other than the aggrieved person. The Courts below have

failed to appreciate the scope of Section 21 of DV Act and the scope of visitation rights. The visitation rights can only be for some hours in the Court premises or at some convenient place in presence of mother of the child, who is aggrieved person, as defined in the DV Act. The Sessions Judge has failed to take into consideration the judgments relied upon by the applicant. The child was disturbed after learning about the impugned orders passed by the Courts below. The preliminary objection with regards to the maintainability of the application preferred by respondent no.1 has not been considered in proper perspective by the subordinate Courts. The application was preferred without showing the provision under which respondent no.1 is entitled to file the application. Section 21 clearly expresses that the temporary custody of a child or children can be given to the aggrieved person or the person making an application on her behalf by making necessary arrangement for visit of such child or children by the respondent. The application preferred by respondent no.1 suffers from grave error. The husband cannot file such an application seeking interim custody of the child and the said right is given under the special enactment to the aggrieved person. The aggrieved person as contemplated under the DV Act would mean any woman who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence of the respondent and hence the said application was not maintainable in law. It is only when the aggrieved person prefers application for custody and the same is being adjudicated, the Court can consider grant of visitation right of husband. Applicant has filed additional affidavit dated 3rd May 2018 and brought on record certain subsequent facts. It is stated that applicant had never tried to keep vihan away from

respondent no.1 and made efforts to give access even during pendency of application. However, Vihan is not willing to go overnight with the respondent no.1.

4. Learned counsel for the applicant relied upon several decisions which are as follows :

(i) Board of Trustees of Port of Bombay Vs. Dilipkumar Raghvendranath Nadkarni and others 1983-1-SCC-124;
(ii) Prakashkumar @ Prakash Bhutto Vs. State of Gujarat 2005-2-SCC-409;
(iii) Pallavi Resources Limited Vs. Protos Engineering Co. Pvt.Ltd. 2010-5-SCC-196;
(iv) Judgment passed by Kerala High Court in the case of M.J.Shibin v/s K.C.Diji and others in MAT Appeal No.60/2015;
(v) Cotton Corporation of India Ltd. Vs.United Industrial Bank Ltd. And others (AIR 1983 SC 1272);
(vi) Payal Agarwal Vs. Kunal Agarwal, the decision of the High Court of Rajasthan 2014-Cr.L.J.-4281;
(vii) Decision of the Karnataka High Court in the case of Mrs.Girija Patel Vs. Vijay Rao delivered in Criminal Revision Petition No.1062 of 2014;
(viii) Prakash Kumar Singhee Vs Amrapali Singhee delivered by this Court in Writ Petition No.3553 of 2018 dtd.4.5.2018;
(ix) Dennision Paulraj and others Vs. Union of India 2009-DJLS (Madras)-818;
(x) Director, CBI and another Vs. D.P.Singh (2010)1-SCC-647;
(xi) Bharat Alumium Company vs. Kaisar Aluminium Technical Service Inc. (2012)9-SCC-552;

(xii) Roxana Sharma Vs Arun Sharma AIR-2015-SC-2232;

(xiii) Firm Amarnath Bashshwar Dass Vs Tekchand AIR-1972-SC-1548.

5. Learned counsel for respondent no.1 submitted that the complaint under the DV Act was filed by the applicant as a means to pressurize the respondent no.1. During pendency of the said complaint the parties were referred to mediation on 18th September 2017. On 5th October 2017 mediation proceedings took place. Apprehensive of the fact that the applicant may act on the threat to leave the house with Vihan, the respondent no.1 had addressed the letter to the Senior Inspector of Park Site Police Station narrating the state of events. On 23rd October 2017 mediation proceedings took place. On 3rd November 2017 mediation proceedings were conducted again and the mediator filed a failure report stating that mediation between both the parties had failed and the matter was adjourned to 2nd December 2017. On 1st December 2017 brothers of applicant had arrived at their house and began packing certain belongings. On 2nd December 2017 the matter was listed before the Court of learned Magistrate. However, the Court was not presiding. The respondent no.1 noticed that the applicant is loading her belongings in to a car. Being aggrieved by the development, the respondent no.1 went to Park Site Police Station to report the incident. The applicant was present at the police station along with her mother and filed NC complaint against respondent no.1. Police refused to entertain the complaint of respondent no.1 and hence he was constrained to file a written complaint with the Assistant Police Inspector and the DCP. The applicant left the matrimonial home on 2nd December 2017 with Vihan. The respondent no.1 made repeated

attempts to reach out to applicant and Vihan through phone and e-mails asking her whereabouts and where she has taken Vihan and why she was not responding. The respondent no.1 visited school where he was informed that Vihan had not attended school. The respondent no.1 then addressed an e-mail to the school authorities informing them that applicant and Vihan have left the house without informing him. On 6th December 2017 applicant had addressed a letter to the school that due to marital discord the applicant and respondent no.1 do not live together and that the respondent no.1 should not be granted access of Vihan without her permission. She also forwarded a letter to school bus authorities on 12th December 2017 informing them that Vihan should not be dropped at any location other than the one provided by applicant. She also stated that the respondent no.1 should not be allowed to take Vihan any where from the school directly without her prior permission. The respondent no.1 met the school authorities and expressed his concerns. The school assured that they will co-operate and all communications regarding Vihan will also be sent to him. As the applicant was not responding and also the police were not supportive, the respondent no.1 filed an application for child access u/s 21 of DV Act on 20th December 2017. The matter was heard by the Trial Court and by order dated 5th January 2018, the learned Magistrate partly allowed the application allowing access of Vihan to respondent no.1.

6. It is further submitted that the applicant then preferred an appeal before the Sessions Court which was heard at length. Both the sides were heard and case laws were tendered by both the parties. The Sessions Court was pleased to dismiss the appeal and

upheld the legality and validity of order dated 5th January 2018 passed by the learned Magistrate. It is further submitted that in spite of the aforesaid orders, the attempts to contact applicant to avail the access were futile. The respondent no.1 then visited Park Site Police Station and requested the Protection Officer to facilitate the access. On 15th February 2018, the police report was filed by the Protection Officer stating that applicant had refused to grant access as she has filed quashing petition in the High Court challenging the orders passed by the Courts below. It is submitted that there is no reason to interfere in the orders passed by the learned Magistrate and the Sessions Court.

7. It is submitted that the respondent no.1 is deeply concerned about his son's well being and safety. He had never stayed away from him or the house till 2nd December 2017. The applicant had forcibly and willfully kept Vihan away from him. The applicant is acting against Vihan's interest. It is in the interest of child's welfare that he received company of both the parents. However, the applicant has taken unilateral decision of removing him from the company of his father. The respondent no.1 being the natural guardian cannot be denied the access to his child and the said fact has been considered by the Courts below. The child needs the company and influence of both his parents. However, the applicant is not considering child's needs and is misusing her position as mother to forcibly keep him away from the respondent no.1. The impugned order passed by the learned Magistrate grants him over night visitation rights for 48 hours i.e. twice in a month as provided for in the said order. It is submitted that the respondent no.1 had specifically prayed for an equal and fair access of his child and has

also prayed for an over night week end access for his child. The respondent no.1 denies the allegations that the applicant had suffered any verbal, emotional, physical or economical violence or immense cruelty at his hands or his mother's hands. Since the child was forcefully and illegally removed from the company of respondent no.1, he was constrained to prefer an application u/s 21 of the DV Act which provides powers to Court to grant visitation rights to the father. It is submitted that the welfare of the child is paramount. It is established by Child Rights Foundation that equal and substantial access should be granted to both the parents. The applicant is trying to deprive over night access of the child and to the father which clearly shows that she is using the child as a tool and thus compromising the growth and well being of the child. As per Section 21 of DV Act, learned Magistrate has exercised his power to grant visitation rights to the respondent no.1 as per the prayer made in the application. The applicant is confusing the two concepts of custody and visitation rights. The Trial Court had allowed over night access to respondent no.1 to exercise his visitation rights. Hence, the order is proper and legal. Learned counsel for applicant relied upon the guidelines circulated by Child Right Foundation which has been accepted by the Government of Maharashtra and circulated to all the Courts across the State of Maharashtra. He placed reliance on clauses 28 and 31 of the said guidelines which are relevant for deciding access and visitation rights. It is submitted that the child was in exclusive custody of the applicant from 2nd December 2017 and in these circumstances the application preferred by the respondent no.1 u/s 21 of DV Act was maintainable. It is further submitted that applicant had appeared in person before the Sessions Court and has argued the matter. She has also relied upon the

decisions in support of her arguments and therefore in the circumstances it cannot be said that the principle of natural justice has been violated by not giving opportunity to her advocate to advance submissions before the Sessions Court. It is submitted that if the interpretation given by the applicant about maintainability of the application preferred by the respondent no.1 is accepted, it would defeat the whole purpose of the statute. The intent of the legislature and the aim and object of the act has to be taken into consideration. Thus, even if the applicant (wife) had not preferred any application u/s 21 of DV Act, the husband can prefer such an application seeking access to the child. It is submitted that the applicant had taken the child in her custody and in the circumstances she would not have preferred any application u/s 21 of DV Act and the respondent no.1 in such a situation would be rendered without any remedy. It is further submitted that apart from the aforesaid interpretation of law, it has to be noted that the applicant in her application u/s 12 of DV Act had prayed for the custody of the child i.e. sought reliefs u/s 21 of DV Act. Even in such circumstances the applicant was empowered to prefer the application for access.

8. Learned counsel for the respondent no.1 relied upon the following decisions :

(i) Decision in the case of Smt.Huidrom Ningol Ongbi Vs Mr.Inaobi Singh Maibam delivered by High Court of Manipur at Imphal in Cri.Revn.Petition No.16/2015;

(ii) Sandeep Kumar Thakur Vs Madhubala decided by High Court of Himachal Pradesh at Shimla 2016-SCC Online-HP-3354;

(iii) Deepti Bhandari Vs Nitin Bhandari and another decided by Supreme Court in Special Leave Petition (Cri) No.5213 of 2010;

(iv) Mrs.Mary Pinto Vs Cedric Pinto and another decided by this Court in Criminal Writ Petition No.353 of 2008;

(v) Ruchi Majoo Vs Sanjiv Majoo delivered in Civil Appeal No.4435 of 2011;

(vi) Decision of Supreme Court delivered in Civil Appeal No.4983 of 2016;

(vii) Dr.Parijat Kanetkar Vs Mallika Kanetkar 2017(2)-Mh.L.J.-218

9. The primary issue in these proceedings is whether an application preferred by respondent no.1 u/s 21 of DV Act was maintainable. The learned Magistrate has entertained the said application and allowed the access of the child to respondent no.1. The said order was upheld by the Sessions Court. The learned Magistrate has adverted to the child access and custody guidelines along with parenting plan placed before the Court by the respondent no.1. The factual matrix indicate that the applicant and the respondent no.1 are highly educated persons. The marriage was registered between them on 7th May 2008. It was a love marriage. Child Vihan was born on 14th September 2012. The applicant had preferred the complaint under the DV Act on 17th July 2017. In the said complaint she has narrated the purported acts amounting to domestic violence. During the pendency of said complaint, the applicant had left the matrimonial home on 2nd December 2017 with Vihan. According to applicant, on account of the atmosphere she was constrained to leave the matrimonial home along with the child and had to make residential arrangement with her parents. The respondent no.1 had preferred the application u/s 21 of DV Act on 20th December 2017. According to him, since the applicant had left the matrimonial home along with Vihan and the whereabouts were

not known and in spite of attempts being made to contract the applicant and his son, he was constrained to prefer such an application before the Court. The application was opposed by applicant (wife) by filing reply. The learned Magistrate by order dated 5th January 2018 partly allowed the said application by granting visitation rights to respondent no.1. It was directed that the respondent no.1 is allowed to exercise his visitation rights and keep custody of his child Vihan for 48 hours for twice in a month i.e. on every second and fourth Friday from 6 pm to Sunday 6 pm i.e. on the alternate week ends. It was further directed that the applicant shall arrange the talk between Vihan and respondent no.1 on video call on each Thursday between 7 pm to 8 pm. The applicant was also directed to disclose her residential address and submit copy of said address to Senior Police Inspector, Park Site Police Station and Protection Officer. Any change in the address be intimated. She shall not change admission of Vihan from the school without consent of respondent no.1. The respondent no.1 shall not approach the child while he travels in school bus. Senior PI Park Site Police Station shall appoint Police Station Officer as Protection Officer, who shall keep the record of visitation by maintaining separate diary and to submit a report to the Court once in two months. Apparently the said order was challenged by preferring appeal before the Sessions Court. The respondent no.1 had opposed the reliefs prayed in the said appeal by filing reply. The learned Sessions Judge by order dated 12th January 2018 granted interim stay to the operation of the order dated 5th January 2018 passed by the Trial Court. The appeal was finally heard. The applicant had appeared in person and advanced her arguments. She also relied upon the decisions of the Court in support of her submissions. The learned Sessions Judge has

observed that the proceedings under the Act were filed in July-2017. The mother and father were residing together till 1st December 2017. Their son Vihan was living with them till that time. The mother along with son left the house. The father had only occasion to see his son once on 27th December 2017 in the Court of learned Magistrate. The Court also referred to the guidelines in respect of child access and custody along with parenting plan. In clause-31 it is provided that the Courts are under obligation to consider that the child shall spend equal and substantial time with each parent. In making the parenting order, the Court must consider that the child must spend equal time or if not substantial and significant time with each parent. The substantial and significant time means essential, week days and over night week ends and holidays which allow the parents to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parents to maintain or consolidate a secure attachment with the parent whose behaviour is oriented only to visiting rather than care giving. The Court further observed that the said guidelines further provides that the child has a right to spend time on regular basis with both parents and other people significant to their care, well fare and development. The over night access at home of non custodial parent should be encouraged at an early stage so that the children have a close and continuing relationship and get love and affection of not only the parents but also of grandparents and other family members. On the strength of the guidelines, the visitation rights of either of the parties to mean father or the mother to have access to their child cannot be denied. The application made therefore is thus tenable. It manifest that mother has excluded father from enjoying access to son. It transpires that attendance of the child in school has

decreased. Obviously it would affect on smooth and well development of the child. It can be against the interest of the child. The Court thereafter observed that in the instant case, the custody of the child is already with his mother. The father has merely sought visitation rights to see his son which right has been granted for limited days and limited period as apparent from the impugned order. In case the visitation right is not given to the father, the minor child would be deprived of father's love and affection. The paramount consideration is welfare of child. Irrespective of the facts for the well being and smooth development of the child, the father is entitled for visitation rights. The father made an application for grant of permission to have an equal and fair access to him. The prayer made by the father is just and proper and the same cannot be interfered with. It was further observed that the learned Magistrate has rightly done so. While passing the impugned order, learned Magistrate took all precaution. The order is reasoned and well thought. Thus, no flaw can be found in the impugned order. For the said reasons and discussion, the learned Sessions Judge was pleased to dismiss the appeal preferred by the applicant.

10. It would be relevant to extract Section 21 of DV Act. The said provision reads as follows :

> *"**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 arrangement for visit of such child or children by the respondent :*

> *Provided that if the Magistrate is of the opinion that any visit of the respondents may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit."*

According to learned counsel for applicant on reading the said provision it is apparent that the Magistrate 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 interest of the child or children, the Magistrate shall refuse to allow such visit. It is contended that the husband has no right to independently prefer an application for custody orders as contemplated u/s 21 of DV Act. The application can be preferred by the aggrieved person or any person on her behalf during the pendency of her application under for any reliefs under the DV Act. The respondent no.1 was therefore not empowered to prefer such an application. It is submitted that for seeking custody of the child, the respondent no.1 had other remedies available in law under the provisions of the DV Act. It is submitted that the respondent no.1 could have approached the Court under Section 26 of the Hindu Marriage Act seeking custody of the child. The remedy lies before other forum and the application before the Trial Court in the present case was not maintainable. The Trial Court had passed the order without jurisdiction. On perusal of the orders passed by the Courts below and child access and custody guidelines which were referred to by the said Courts, and for the reasons to be stated herein, I do not find any reason to interfere in the orders under challenge. The learned Magistrate and the learned

Sessions Judge has passed the well reasoned order which do not require any interference.

11. The factual matrix of the present case indicate that the child was in custody of mother (applicant) from 2nd December 2017. In the complaint under the DV Act preferred on 17th July 2017, the same indicate that the applicant had preferred the said complaint u/s 18, 19, 20, 21, 22 and 23 of DV Act. The form/complaint reflects that the applicant had sought relief under the various provisions including Section 21 which relates to custody orders. It is the contention of the applicant that unless the applicant prefers any application under Section 21 for custody order, the access cannot be granted to the husband on an independent application preferred by him. In the present case according to the applicant, she had not preferred such application and therefore the respondent no.1 ought not to have preferred the application seeking access and the same was not maintainable in law. When there is no provision under the law, the Court cannot infer existence of such provision and entertain the application. The scope and object of the DV Act is required to be taken into consideration. It is contended that since Section 21 does not provide any right to the husband to prefer such application, and since the legislature has not provided such right to the husband, except as stipulated in Section 21 of DV Act, the Court ought not to have entertained the application and granted relief as prayed by respondent no.1. If the interpretation advanced by the applicant is accepted, it would defeat the whole purpose of the statute. It is well settled principle of interpretation that Court must start with the presumption that legislature did not make a mistake and it must interpret so as to carry out the obvious intention of legislature and

that it must not correct or make up a deficiency nor the Court read into a provision any word which is not there particularly when literal reading does not lead to an intelligible result. The said proposition of law has been laid down in the case of **Rajender Prashad Vs. Darshana Devi (2001)7-SCC-69**. In the case of **Nathidevi Vs. Radhadevi Gupta (2005)2-SCC-271**, it was observed that in interpreting a statute, Court must, if the words are clear, plain, unambiguous and reasonable insusceptible to only one meaning, give to the words that meaning irrespective of the consequences.

12. In the present case, it is the grievance of the applicant that on 2nd December, 2017, on account of the circumstances referred to by her, the applicant had left the matrimonial home along with the child. The reliefs sought in the application enumerates the reliefs under Sections 18, 19, 20, 21, 22 and 23 of the said Act. The complaint also mentions that requisite orders under Section 21 with regards to the custody of the child are also sought. The said aspect is apparent from paragraph 5 of the complaint. The intent of the legislature as expressed under the proviso has to be taken into account keeping in view the aim and object of the Act. The application under Section 21 of the Act by the respondent could be made in the factual matrix of the present case. In the case of **Smt. Hudidrom Ningol Ongbi (supra)** relied upon by the counsel for the respondent the High Court of Manipur has observed that where there is no obscurity or ambiguity and intention of legislature is clearly conveyed, there is no scope for the Court to innovate or to take upon its task of amending or altering a statutory provisions which proposition of law has been laid down in several cases including in a case of **Institute of Chartered Accounts of India Vs. Price Water**

House and another – (1997)6-SCC-312. In that case it has been observed that the judges should not proclaim that they are playing the role of law makers merely for an exhibition of judicial valour. They should remember that there is a line though thin which separates adjudication from legislation. That line should not be crossed. This can be vouchsafed by an alert recognition of the necessity not to cross it and instinctive as well as trained reluctance to do so. However, where there appears to be obscurity, ambiguity, what the Court is supposed to do has been dealt with in the case of **Grid Corporation of Orissa Limited Vs. And others**. **Eastern Matters Ferros Allous and others** *reported in* **(2011)11-SCC-334** wherein it has been observed that the golden rule of interpretation is that the words of the statute have to be read and understood in their natural, ordinary and popular sense. Where however, the words used are capable of bearing two or more constructions, it is necessary to adopt purposive construction, to identify the construction to be preferred by posing the following questions. (i) what is the purpose for which the provision is made; (ii) what was the position before making the provision; (iii) whether any of the constructions proposed would lead to an absurd result or would render any part of the provisions redundant; (iv) which of the interpretations will advance the object of the provision. The answer to these questions will enable the Court to identify the purposive interpretation to be preferred while excluding others. Such an exercise is involving ascertainment of the object of the provision and choosing the interpretation that will advance the object of the provision can be undertaken only where the language of the provision is capable of more than one construction. It is further observed that Section 21 is amenable to two interpretations as is being highlighted by the

parties, in such event only that interpretation which advanced the object of the provision can be accepted. It is worthwhile to note that the Act enacted to prevent the occurrence of domestic violence in the society and keeping in view that several protection orders including the safety of the aggrieved person and the child have been contemplated to be passed. Therefore, the cause of the safety of the aggrieved person or the child is always warrants to be taken into account in interpreting the provision. In such situation if the interpretation given on behalf of the wife aggrieved parties accepted it will render the provision incomplete as in case where wife – aggrieved party seeks custody of the child, if the child is in custody of the husband and an order of custody is passed in favour of the aggrieved party, visitation right can be granted to the husband. But if custody lies with the wife – aggrieved party, than the husband will have no remedy of visitation right if the interpretation as contemplated by the wife – aggrieved party is given effect to and thereby it can easily be said that interpretation given by the aggrieved party – wife will never advance the cause of the child. On the other hand, if it is held that the husband, in absence of any application for grant of custody can maintain his application for visitation right will advance the object of the provision as in case of child being in custody of the husband, application for custody can be filed by the wife wherein the husband can have visitation right if order is of custody of child passed in favour of the aggrieved party. In other situation, when the custody of the child lies with the wife, there would be no occasion for the wife for filing an application for custody. In that situation, husband will have remedy to have visitation right by filing application to that effect. The said interpretation and observations can be applied in the present case.

As indicated above, the child was in custody of the applicant from 2nd December 2017. In these circumstances, there was no occasion for the applicant to prefer any application seeking relief under Section 21 of the Act.

13. Child access and custody guidelines along with parenting plan were accepted by the various High Courts and communication was sent to the subordinates Courts to enforce the recommendations in their respective divisions. The guardian judges of the family Courts in the State of Maharashtra have been pleased to approve the parenting plan as the best document to be modified as per the facts and circumstances of the case, the Hon'ble Chief Justice was pleased to direct circulation of the child access and custody guidelines among all the Hon'ble Judges of the Bombay High Court. The Hon'ble guardian judges of the Family Courts in the State of Maharashtra have been pleased to direct the circulation of the guidelines among the Family Court judges and the marriage councilors in the Family Courts across the State of Maharashtra. The interim child visitation guidelines indicates that the basic principles of the Court are to ensure that the child/children yet to spent equal or substantial significant time to be showered with love and affection from both the parents irrespective of parents conflict. Efforts should be made by parties and if necessary, Court should direct parties to mutually agree upon a visitation schedule to be drawn up along with the marriage councilor within a maximum period of 60 days pending finalization of mutual final overnight visitation agreement and interim access has to be worked out immediately. The guidelines assume that each parent has continuous presence in the children's life. In the event that a parent has at limited or no contact with his or

her children and wishes to be reintroduce into the children's life, it is upto the parents to agree on the means by which this is to be accomplished if the parents are unable to agree the first alternative shall be to mediate the conflict. If mediation is unsuccessful, it shall be the responsibility of the Court to adopt a schedule. In the present case, the applicant has not asked for custody of child since the child is already in her custody. The paramount consideration shall be welfare of the child. The endeavor of the Court should be to ensure that child gets love and affection of both the parents. The smooth and proper development of the child requires affection of both parents. Clause-31 of the guidelines deals with overnight access. It is provided that the Courts shall consider that the child shall spend equal and substantive time with each parents. In while making parenting order the Court has to consider that the child must spend equal time or if not equal then substantial and significant time with each parent. Substantial and significant time has been defined to mean essentially, weekdays and overnight weekends and holidays which allow the parent to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parents to maintain or consolidated a secure attachment with a parent whose behavior is oriented only to visiting rather than care giving. It further provides that the children have right to know and be cared for by both their parents regardless of whether their parents are married, separated, divorced, have never married or have never leave together and children have a right to spend time on a regular basis with both parents and other people significant to their case, welfare and development including grandparents and family members. It is further provided that overnight access at home of the non custodial parents should be encouraged at an early stage, so that

the children have a closed and continuing relationships and get love and affection of not only parents but also a grandparents and other immediate family members like uncles, aunts, cousins etc. Both the Courts below had taken into consideration the aforesaid aspects. The Trial Court has also observed that the applicant has not disclosed her residential address where she resides along with the child. In reply, filed vide Exhibit-10, the address has been given that she had resided in rental flat at Nahar Complex. By issuing various letters to school it has been confirmed that the applicant has excluded the father of the child from enjoying access and company of the child. The absence of child in school has been increased. Obviously the behavior of petitioner would affect a smooth and well development of child. The Respondent No.1 is therefore entitled for visitation right and it is appropriate to 48 hours visitation rights on second and fourth Saturday and half of longer holidays be availed by the respondent No.1. The Trial Court has therefore taken into consideration the factual aspects and has passed the impugned order taking the broad view of the matter. During pendency of this application this Court by consent of both parties as interim measure had passed an order on 3rd May 2018 stating that every Sunday between 9 am to 9 pm, custody of child shall remain with respondent no.1.

14. Learned counsel for the applicant had relied upon the decision in the case of Board of Trustees of the Port of Bombay (supra), in support of his submission that there is violation of principle of natural justice. It was contended that the applicant was required to argue the appeal in person and the appellate Court deprive the applicant to contest her appeal with the help of the advocate. The applicant was compelled to argue the matter in person. The

application involved several legal issues and thus the applicant has to proceed with hearing of appeal without the assistance of the advocate which has resulted in violation of principle of nature justice. In the said decision the Government employee requested the Inquiry Officer to permit him to appear through a legal practitioner and even though trained public prosecutor was appointed as presenting officer, the request was turned down. When the matter had reached the Court, it was held that the inquiry was in breach of the principle of natural justice. The order of the Domestic Tribunal was to be sustained on the submission that Sub-Rule 5 of Rule 15 of the Central Civil Services Rules that the Government servant may present his case with the assistance of any Government servant approved by the disciplinary authority may not engage legal practitioner for the purpose of unless the person nominated by the disciplinary authority as aforesaid is a legal practitioner or unless disciplinary authority having regard to the circumstance of the case so permits. The ratio in the said decision is not applicable in the present case. On perusal of the order passed by the Appellate Court, it is apparent that the applicant had argued the matter in person. It can also be seen that the applicant was able to put forth her case and has even relied upon the judicial pronouncement in support of her submission advanced before the said Court. By referring to decision in the case of Prakash Kumar @ Prakash Bhutto (supra) learned counsel drew my attention to the observations made in paragraphs 20, 21, 22, 30 31 and 32 of the said decision. It was observed that it is trite law that the jurisdiction of the Court to interpret a statute can be invoked only in case of ambiguity. The Court cannot enlarge scope of legislation or intention when the language of the statute is plain and unambiguous. Narrow and padentic constructions may not

always be given effect to. Court should avoid a construction which would reduce the legislation to futility. It is well settled that the every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning, the Court would attempt to resolve ambiguity in the manner consistent with the purpose of the provision having regard to the consequence of the alternative constructions. The Apex Court had made reference to several other decisions wherein it was observed that the Court's jurisdiction to interpret the statute can be invoked when the same is ambigious. It cannot be revived and recast legislation. It is also necessary to determine that there exist a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of expression shall or may is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the Court will presume that the intention of legislature was that the provisions are mandatory in character. Even in relation to the penal statute any narrow and pedantic, literal and lexical construction may not be always given effect to. The law would have to be interpreted having regard subject matter of the offence and object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out the message of law. It is also observed that no part of the statute and no word of statute can be construed in isolation. It is trite that the Statute or Rules made thereunder should be read as a whole and one provision should be construed with reference to the other provisions to make the provision consistent with the object

sought to be achieved. The statute is best interpreted when we know why it was enacted. Reference was also made to the decision in the case of **Anwar Hassan Khan Vs. Mohd. Saffi (2001)8-SCC-540** wherein it was observed that it is cardinal principal of construction of a statute that the effort should be made in construing its provisions in avoiding conflict and adopting a harmonious construction. The statute and rules made thereunder should be read as a whole and one provision should be construed with reference to other provisions to make the provision consistent with the object sought to be achieved. While applying the said principles enunciated in the aforesaid decision, I do not find that both the Courts have committed any patent error of law in passing the impugned orders. The reasons stipulated in the said orders are in accordance with the aforesaid principles. It would be relevant to note that in the same decision in paragraph 14 it has been observed that more stringent the law, the less is discretion of the Court. Stringent laws are made for the purpose of achieving its objective. This being the intentment of the legislature the duty of the Court is to see that the intention of the legislature is not frustrated. If there is any doubt or ambiguity in the statute, the rule of purposive construction should be taken recourse to achieve to its objectives. Similar view was expressed in the decision of Pallavi Resources Ltd., (supra). In paragraph 17 to 19 and 24 of the said decision, it was observed that principle of statutory interpretation that the legislature is precise and careful in its choice of language. If the statutory provision is enacted in a certain manner, the only reasonable interpretation which can be resorted to by the Courts is that such was intention of the legislature and that the provision was consciously enacted in that manner. In the order passed by the Kerala High Court placed for consideration

by the learned counsel for the applicant, it was observed that after evaluating the facts and circumstances in the case the child is of tender age of four years and all of a sudden if fortnight custody is granted to the father who is not having much acquaintance with the child there are chances that welfare of the child will be affected. The said decision cannot be applied in the present case. In the case of Cotton Corporation of India Limited (supra) it was observed that interim relief can be granted only if the Court is empowered to grant final relief. In the case of Payal Agrawal (supra), the High Court of Rajasthan has dealt with the provisions of Section 21 of the said Act. In the said decision, it was observed that Section 21 does not provide independent remedy to seek custody of the minor child and the jurisdiction has been conferred.

15. In the above decision it was held that the Court had no jurisdiction to entertain such an application. On perusal of the factual matrix of the said decision, it can be seen that the wife had preferred an application under the Domestic Violence Act of 2005 for various reliefs against her husband and his family members. During the pendency of the aforesaid application, the husband filed an application under section 21 of the said Act praying that permanent custody of the minor child of the parties may be given to him and in the alternative it was prayed that visitation right may be granted to him to meet the minor child of the parties. A petition for grant of decree of divorce was also filed by the husband under Section 13 of the Hindu Marriage Act and the Family Court Jaipur with the consent of the parties passed an order regarding visiting rights of the Respondents to the effect that the petitioner will remain present along with the child on Second Saturday of every month and

Respondent will be entitled to meet the child during that period. For the reasons stated herein above, I do not agree with the said decision and it was dealt in the peculiar facts and circumstances of the said case. The learned counsel for the applicant has relied upon several other decisions which are stated herein above. The said decisions are on broad principles of interpretation which are referred to herein above and it is not necessary to analyze the ratio laid down in the said decisions.

16. Learned counsel for the respondent had relied upon the decision of High Court of Manipur at Imphal which has been referred to hereinabove. It was also submitted that the said decision was confirmed by the Apex Court. However, learned counsel for applicant had disputed the said fact and submitted that what was challenged before the Apex Court is a different order in relation to the same proceedings. In the case of Sandeep Kumar Thakur Vs. Madhubala (supra), the High Court of Himachal Pradesh has dealt with the provision of Section 21 of the said Act. In paragraph 6 of the said decision it was observed that Section 2(d) of DV Act defines the custody order as an order granted in terms of Section 21. Section 2(a) defines aggrieved person to mean any woman who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by respondent. Section 2(q) defines respondent to mean any adult male person who is or has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Section 21 is referred to in the said paragraph and it is observed that Section 21 starts with non-obstante clause. On plain reading of the said provision and the language

employed therein it can be said that Court may at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of child or children to the aggrieved person i.e. mother or the person making an application on her behalf and specify if necessary the arrangements for visit of such child or children by the father. The proviso attached to Section 21 stipulates that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interest of child or children, the Magistrate shall refuse to allow such visit. It was further observed that the child in the said case was already in custody of his mother. The respondent had not asked for custody of the child for the simple reason that the child is already in her custody. It is the respondent i.e. father who has sought merely visitation right to his son which right was granted to him by the Trial Court that too for limited days. In case the visitation right is not given to the petitioner, minor child would be deprived of father's love and affection. The paramount consideration is welfare of child. The petitioner could not be faced to seek remedy either under the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956, as observed by the Sessions Court as it would lead to multiplicity of litigation. The Act is a self contained code. The endeavour of the code should be to cut short the litigation and to ensure that the child gets love and affection of both parents i.e. mother and father. The approach of the Court should be practicable to work out the modalities in practical manner in evolving the process whereby the child suffers minimum trauma. The interpretation of the statute should be purposive. I find that the aforesaid observations of the Court deserves to be accepted and the impugned orders passed by the Courts below are within the aforesaid parameters which do no require interferance. The

respondent shall not be refused the visitation rights on the ground that remedies are available in the provisions of the other enactments. It would be pertinent to note that the respondent no.1 has not been granted permanent custody by the Court and the relief which was granted is visitation rights. In the case of Purvi Gada (supra), the Supreme Court has dealt with the issue of custody of minor child and elaborated the considerations for appointment of guardians/welfare of child etc. The Court has dealt with the relevant considerations in the interest of the welfare of the child. It was observed that custody battles are always regrettable not only for the spouses to resort to the kind of litigation, which is the offshoot of matrimonial discord and results in their separation from each other, but also for their child/ children who become the subject matter of this kind of dispute. Failure of marriage generally leads to disputes of varied nature, either in the form of divorce or enforcement of conjugal rights or maintenance etc and even criminal cases in the form of proceedings u/s 498A of IPC and so on. However, in those cases where their togetherness as spouses has resulted in procreation of children, the war is extended by laying respective claims on the custody of those children as well. These minor children for their proper upbringing, need the company of both the parents, mother as well as father, for financial reasons, security reasons, psychological reasons etc. The love of both their parents. Not only separation of their parents from each other deprives the children the company of both the parents when it results in legal battle of custody in the Courts, the situation becomes more traumatic for these children because of various obvious reasons. That is why such cases which seriously impact the children are most unfortunate. In the said decision it was further observed that it was incumbent upon High Court to find out the

welfare of the children as on that time when it was passing the order. Apart from discussing the welfare principle, the High Court has not done any exercise in weighing the pros and cons for determining as to which of the two alternatives namely giving custody to the appellants or to the respondent is better and more feasable.

17. In the case of Dipti Bhandari (supra), the apex Court has dealt with a situation wherein the complaint under the DV Act was filed by wife. The husband preferred an application u/s 21 of DV Act for visitation rights which was dismissed by the Family Court. The husband filed an appeal against the said order before the District Judge, which was also dismissed. The husband then preferred an application u/s 482 of Cr.P.C for quashing the charge sheet in FIR u/s 498A of IPC. The High Court stayed the said proceedings. The husband also preferred petition challenging the proceedings under the DV Act. The same was also stayed by the High Court. The Court requested both the parties to consider settlement of the matter. The High Court also passed orders allowing visitation rights to respondent no.1 husband in respect of minor child. The order dismissing application for visitation right was challenged before the appropriate Court. The application for visitation rights was allowed and the petitioner therein was directed to arrange for the meeting of the respondent no.1 with the petitioner and their minor daughter. The Apex Court in the said decision modified the said order and disposed off the petition. The contention of the counsel for the respondent is that while deciding the said petition, the Apex Court did not observe that the application preferred by the husband u/s 21 of DV Act is not maintainable.

18. In the case of Mrs.Merry Pinto decided by this Court, it was observed in paragraph 8 of the said decision that it is well settled law that while deciding an application for custody of minor child, the only paramount consideration is welfare of minor child and the legal rights of the parties or the parents are not relevant.

In the case of Ruchi Majoo (supra), the Apex Court has dealt with the basic rules with regards interpretation of statutes and liberal interpretation. It was observed that the first and foremost rule of interpretation is the literal meaning of the words has to be taken into consideration. In the case of Manoj Reberro the father of the minor child had sought visitation rights. The High Court had declined to grant the relief to the father. The Apex Court observed that whatever may be the background of the case, it cannot be so acrimonious so as to deny the right of the father to see his daughter. In the case of Dr.Kanetkar (supra), this Court has observed that the welfare of the child is paramount consideration It was observed that jurisdiction of the Family Court under the both the parts of Section 7 do not cover the jurisdiction exercisable by Judicial Magistrate, First Class in respect of grant of interim custody u/s 21 of the DV Act and therefore there is no question of jurisdiction of the Magistrate u/s 21 of DV Act, 2005 being inconsistent with the provisions conferring jurisdiction upon the Family Court and as such the DV Act of 1984 will not have any overriding effect upon 2005 Act. Reliefs available u/s 18, 19, 20, 21 and 22 of DV Act, 2005 are in the nature of help, which is extended to an aggrieved person in addition to the assistant that the aggrieved person may have under any other law for the time being in force whether civil or criminal. This is clear from the provision of Section 26 of 2005 Act which lays down that any relief

available u/s 18, 19, 20, 21 and 22 of DV Act may also be sought in any legal proceedings before the Civil Court, Family Court or a Criminal Court. In other words, the relief available under the 2005 Act are supplementary in nature and do not exclude similar reliefs available under the other laws. This is further re-affirmed by the provisions of Section 36 of 2005 Act prescribing that the provisions of this Act shall be in addition to and not in derogation of provisions of any other law for the time being in force.

19. It was also observed that the application filed under Section 21 of the Domestic Violence Act seeking interim custody is maintainable before a Magistrate exercising jurisdiction in relation to area where family Court is established and the Magistrate has jurisdiction to decide such an application in accordance with law. Irresistible conclusion further would be that the application filed under Section 21 before the Court of Judicial Magistrate First Class Amravati in the instant case is tenable and impugned order cannot be assailed on the ground of want of jurisdiction.

20. For the reasons stated herein above, I do not find that the order passed by the Courts below suffers from any legal infirmity and petition is therefore devoid of merits and same deserves to be dismissed. Hence, I pass the following order.

ORDER

(i) Criminal Application No.186 of 2016 stands dismissed;

(ii) the impugned orders are confirmed;

(iii) Parties to comply the order dated 5th January 2018 passed by learned Metropolitan Magistrate, 31st Court, Vikroli, Mumbai.

(PRAKASH D. NAIK, J.)

21. At this stage learned Counsel for the applicant submits that the applicant would take a decision whether to challenge the order passed by this Court before the Apex Court. It is prayed that the operation of the Trial Court's order be stayed and the interim arrangement made vide order dated 3rd May, 2018 by this Court be continued for a period of six weeks. It is also submitted that the applicant had given access to the respondent No.1. The applicant had complied the interim order dated 3rd May, 2018 and in the vacation the access was given for two days every week. Learned counsel for the respondent No.1 vehemently opposed the prayer of the applicant. It is submitted that the respondent No. 1 is entitled for access of the child. Although the order was passed by the trial Court on 5th January, 2018 the said order is not complied. It is submitted that on account of the vacation and Diwali festival, the respondent No.1 is entitled for overnight custody of the child. Considering submissions advanced by both the parties, interim arrangement in accordance with order dated 3rd May, 2018, shall continue for a period of two weeks from today.

(PRAKASH D. NAIK, J.)

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