

CAN A FATHER APPLY FOR VISITATION RIGHTS UNDER THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005?

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Abstract

The purpose of this article is to determine whether a father has the right to seek visitation rights under the Protection of Women from Domestic Violence Act, 2005 (Hereinafter referred to as the “Act of 2005”). For this purpose, section 21 of the Act of 2005 has been researched upon in light of judicial pronouncements on the same.

I. INTRODUCTION

As per the preamble of the Act of 2005, the main object of it is to provide for a more effective protection of the rights of women who are victims of violence of any kind sourced from within the family. Although the Act of 2005 provides myriad reliefs to an aggrieved woman, does it totally deny any relief to the “Respondent” (father/husband) who is desirous to meet his children who may temporarily be in his wife’s custody? This article seeks to answer this limited question.

II. HUSBAND’S RIGHT TO FILE A COMPLAINT UNDER THE ACT

It is interesting to note that in a recent judicial pronouncement, the Hon’ble Karnataka High Court in *Md. Zakir v. Smt. Shabana & Ors.*¹ held that even a husband can file a complaint or an application under the Act of 2005. The relevant part of the pronouncement has been reproduced below:

*“...In this connection, it is to be noticed that the said issue was subject matter of an appeal before the Apex Court in the case of **Hiral P. Harsora v. Kusum Narottamdas Harsora**,ⁱⁱ wherein the Supreme Court has struck down a portion of Section 2(a) on the ground that it is violative of Article 14 of the Constitution of India and the phrase “adult male” as appearing*

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in Section 2(q) stood deleted. If the said sub-section is read after deleting the expression 'adult male', it would appear that any person, whether male or female, aggrieved and alleging violation of the provisions of the Act could invoke the provisions under the Act."

However, upon perusal of the decision of the Hon'ble Supreme Court in *Hiral P. Harsora v. Kusum Narottamdas Harsora*ⁱⁱⁱ, it was found that the apex court has only struck down relevant portion of section 2(q) of the Act of 2005 which essentially means that an application under the Act of 2005 can be filed against a woman also. It however does not imply that a husband/man can file a complaint under the said Act of 2005. Contrary to what the Karnataka High Court had observed, the Supreme Court did not alter the definition of "aggrieved person" under section 2(a) of the Act of 2005. It is also pertinent to note that the said order of the Hon'ble Karnataka High Court was subsequently withdrawn by the concerned Judge on 28.04.2017 just before his retirement!

Therefore, it may be inferred that only a woman can file a complaint under the provisions of the Act of 2005.

III. FATHER'S RIGHT TO FILE FOR VISITATION RIGHTS UNDER THE ACT

Another question which arises is whether a husband/father can file an application under the proviso of section 21^{iv} of the Act of 2005 for visitation rights for the child or children, as the case may be.

Upon a plain reading of section 21 of the Act of 2005, one may assume that the Magistrate has the power to grant temporary custody of any child or children to the aggrieved person, or anyone making an application on behalf of the aggrieved person at any stage of hearing of any application or relief under the Act.

The proviso to section 21 of the Act also provides that the Magistrate may make arrangements for the respondent to visit the children although it may be done only when an application has been filed by or on behalf of the aggrieved party for custodial orders under the said provision.

However, there are certain judicial interpretations of the impugned provision which reads it in a very liberal, and to a large extent, logical sense. The Hon'ble Manipur High Court in the matter of *Huidrom Ningol Maibam Ongbi Omila Devi v. Inaobi Singh Maibam*^v has held that

a husband, even in the absence of an application filed by the aggrieved party (section 2(a)) for custodial orders can file an application under the proviso of section 21 of the Act of 2005 for visitation rights with respect to his child/children. The relevant portion of the decision of the Hon'ble High Court of Manipur is reproduced below:

“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 a 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 as it has happened in the instant case. In that situation, husband will have remedy to have visitation right by filing application to that effect. Under the circumstances, I do find that the appellate court was quite justified in holding that even in absence of application for custody being there, by the aggrieved party, application of visitation right in terms of the proviso to Rule 21 can be maintained.”

The reasoning for allowing such an application from the husband/father is that in case the wife already has the custody of the child, she will naturally not be required to file an application for custody under section 21 of the Act of 2005. In such a circumstance, the husband/father will not have any remedy under the Act of 2005 to even apply for visitation rights in relation to his child or children, as the case may be. However, as per the reasoning of the Hon'ble Court above, even in the absence of an application from the aggrieved party for custody under section 21 of the Act of 2005, the husband/father may apply for the visitation rights for himself.

Although the popular view with respect to judicial interpretation of law is that a piece of legislation should be read in its true sense when there seems to be no obscurity or ambiguity about the intention of the legislation and in such a case there is no scope of judicial intervention,^{vi} the Hon'ble Supreme Court in *Grid Corporation of Orissa Ltd. & Ors v. Eastern Metals and Ferro Allows & Ors*^{vii} has observed that where the words used in a statute are capable of bearing two or more interpretations, it is necessary to adopt a purposive construction, by posing the following questions:

- a. Whether any of the constructions proposed would lead to an absurd result or would render any part of the provisions redundant?
- b. Which of the interpretations will advance the object of the provision?

Upon testing section 21 of the Act of 2005 on the threshold of the questions mentioned hereinabove, it is found that if the impugned provision is read in its strict form, it would rather lead to an absurd result as in the event of the child already being in the custody of the aggrieved party and in the absence of an application for custodial order by her side, which is but natural, the husband will be left with no remedy whatsoever to even apply to the Court for visitation orders.

On the other hand, if the proviso of section 21 is read in such a way that it allows an application by the husband for visitation rights in relation to his child/children, it will only advance the object of the provision as it will in no way prevent the aggrieved party from enjoying the custody of the child and at the same time, allow the husband to at least be heard as to why visitation orders should be passed in his favour.

It also cannot be argued that it is not within the powers of the Court to allow the husband/father to file an application under the proviso of section 21 of the Act of 2005 for the visitation rights in relation to his children as section 28(2)^{viii} of the Act empowers the court to lay down its own procedure for the disposal of an application under section 12 of the Act. Therefore, if an application is filed by the aggrieved party under section 12, and an order for custody has not been sought, the husband, or the respondent, as the case may be can file an independent application for visitation under the proviso to section 21 of the Act, subject to the permission of the Court.

IV. CONCLUSION

Although upon a plain reading of the Act of 2005, it gives an impression that the sole intent of the legislature behind passing of it is the protection of women from any kind of violence emanating from the shared household or within the family, it does not necessarily mean that the Act of 2005 does not allow any application on behalf of the husband.

Hence, when required in the interest of justice, in the light of the arguments put forward above, it is but logical that the husband be allowed by the courts to file an application for visitation orders even in the absence of an application under section 21 of the Act of 2005 filed by or on behalf of the aggrieved party.

ⁱ Criminal Petition No. 2351 of 2017.

ⁱⁱ (2016) 10 SCC 165.

ⁱⁱⁱ *Id.*

^{iv} Custody orders.—Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit

^v 2017 (2) RCR (Criminal) 545.

^{vi} *Institute of Chartered Accountants of India v. Price Waterhouse and Anr.*, (1997) 6 SCC 312.

^{vii} (2011) 11 SCC 334.

^{viii} (2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.