

GAHC010135452020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./277/2022

RIZWAN KHAN AND ANR.
S/O. MOHSIN ULLAH KHAN

VERSUS

ISBAH KHAN @ SAFEENA SULTANA @ GURIYA AND ANR. A
D/O. LATE NURUL ABRAR, R/O. AMIN MENSION, M.D. ROAD, P.S.
NAGAONSADAR, DIST. NAGAON, ASSAM

2:THE STATE OF ASSAM
REP. BY THE P.P.
ASSA

Advocate for the Petitioner : MR. S C BISWAS

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 02.01.2023

Heard Mr. S.C. Biswas, learned counsel for the petitioners. Also heard Mr. A.M. Bora, learned Senior counsel assisted by Mr. D. Gogoi, learned counsel for the respondent No. 1 as well as Mr. B. Sarma,

learned Additional Public Prosecutor for the State/respondent No. 2.

2. The petitioner No.1/husband has preferred this revision petition under Section 397/401 Cr.P.C. against the impugned judgment and order dated 21.09.2019 passed by the learned Additional Sessions Judge No.2, Nagaon, in Criminal Appeal No. 53(N)/2019 affirming the impugned order dated 20.05.2019, passed by the learned JMFC, Nagaon, in D.V. case No. 258/2019, granting the ex-parte interim custody of the minor daughters to the respondent No. 1.

3. The brief facts of the case is that the petitioner No. 1 got married to the respondent No. 1 on 11.04.2010 and after their marriage, they lived together as husband and wife in the house of the petitioner No. 1 in Delhi and out of their wedlock two female children were born. It is alleged by the respondent No. 1 that during her stay in her matrimonial home, she has been physically as well as mentally tortured by the petitioners and ultimately, she was compelled to leave her matrimonial home and took shelter in the house of her parents at Nagaon. But the petitioners deceitfully took away the daughters of the respondent No. 1 to Delhi and the respondent No. 1 is also not allowed to make contact with her children. Finding no alternative, she filed a case before the learned JMFC, Nagaon under the Protection of Women from Domestic Violence Act 2005 with a prayer for custody of her two minor children.

4. Accordingly, the learned Magistrate allowed the prayer of the respondent/wife and asked the petitioner No. 1 to hand over the

daughters to the respondent No.1. Interim custody of her children was thus allowed to the respondent No. 1. Against the said order of the learned JMFC, the petitioners also preferred an appeal before the learned Sessions Judge, which was also dismissed. The learned Additional Sessions Judge No.2 in his judgment considered the submissions of the parties and delivered the judgment observing the following facts-

“Moreover, both the parties are Mohammedans are also governed by their personal laws. The first and foremost right to have the custody of children belongs to the mother and she cannot be deprived to her right so long as she is not found guilty of misconduct. Mother has the right of custody so long as she is not disqualified. This right is known as right of hizanat and it can be enforced against the father or any other person. Father is entitled to the custody at the following two stages of the child’s minority.

- (a) In respect of a minor boy under the age of seven years, and a girl under puberty, the father is entitled to the custody of the child only in the absence (or disqualification) of mother and other female relations of the child.*
- (b) In respect of a boy over the age of seven years and an unmarried girl over the age of puberty (fifteen years) the father is entitled to the custody of the child as a natural guardian till the child becomes adult, i.e. attains the age of eighteen years.*

According to their personal law position is as given in Section 352 of the principles of Mohammedan Law by Mulla:- "The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven

years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.”

5. The learned counsel for the petitioners has argued that the learned trial court as well as the learned revisional court after considering and appreciating the facts and circumstances of the case, the welfare of the child was not taken into account. The learned trial court and revisional court failed to take into account the averments made by the petitioners and the written statement wherein various incidents were narrated which demonstrate that respondent No. 1 is not competent to maintain the custody of the children.

6. It is also submitted by the learned counsel for the petitioners that the petitioner No. 1 requires interim custody of the children for some period of time as the petitioner No. 1 being the father, purchased some cash certificates etc. which are about to mature and their presence and signatures are required in the said documents.

7. It is also alleged in the petition that the parental home of respondent No. 1 where she is staying along with two minor daughters is also a home of a serious mental patient i.e. her younger sister, who has been suffering from mental disorder for past 10 years and has been under constant medication. This poses a serious threat to the safety and security of the minor daughters.

8. Another contention raised by the petitioners in their petition that

the respondent No. 1 was maintaining illicit relationship with another person and had voluntarily left the house of the petitioner No. 1 as well as her children. As such, she is not legally entitled to the custody of her two minor daughters.

9. On the other hand, the learned counsel for the respondent No. 1 has submitted that the impugned orders are balanced and well reasoned, passed by the learned JMFC as well as learned Additional Sessions Judge. He has contended that under Section 21 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'DV Act'), the learned trial court is competent to award temporary custody of the minor children and the respondent No. 1 being the mother/natural guardian, is fully competent to look after the welfare of her daughters. During the course of these contentions, the learned counsel for the respondent No. 1 has prayed that the revision petition should be dismissed. However, it has been argued on behalf of the respondents that she has no objection in case some arrangement is made for the visitation rights of the petitioners and the petitioners may approach before the trial court to that effect.

10. I have considered the submissions of learned counsels for the parties and perused the order of the learned trial court as well as the judgment passed by the learned Additional Sessions Judge, Nagaon No.2.

11. The relevant part of the impugned order has been passed by the learned trial court under Section 21 of the DV Act which reads as

follows-

“S.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 interest of the child or children, the Magistrate shall refuse to allow such visit.”

12. The reading of Section 21 makes it clear that it has an overriding effect on any other law as the provision starts with the wordings “notwithstanding anything contained in any law for the time being in force.” Therefore, there is no merit in the argument that the temporary custody of the child could not be dealt with in the proceedings under DV Act. The trial court while dealing with the petition under the DV Act was fully competent to pass orders on the custody of the child. Section 21 of the Act specially empowers the court to pass orders on the temporary custody of the child. Section 23 of the Act provides that the Magistrate dealing with the petition can even pass ex-parte orders. Under such backdrop, I am of the view that the learned trial court has rightly observed, in its orders, that it was competent to grant temporary custody of the child under Section 21 of DV Act.

13. Now, coming to the argument of the petitioners that the

petitioners are suited to take care of the minor daughters of the respondent No. 1. The learned counsel for the petitioners argued that keeping the children in the custody of the respondent No. 1, would cause undue hardship to the children and the same would have adverse effect on their growth. It is also argued that the financial position of the petitioner No. 1 is better than the respondent No. 1 and he further argued that the trial court failed to take into account that the respondent No. 1 has voluntarily abandoned the children at her matrimonial home and left her parental house. Beside this, the learned counsel for the petitioners has also argued that the medical condition of the respondent No. 1 is not fit to take care of both the minor daughters because the respondent No. 1 is suffering from Schizophrenia. Due to her illness, she was not in a position to take care of her daughters. I do not find any merit in this contention.

14. No doubt, the financial well-being of a parent is one of the factors for deciding the custody of a child but it is perhaps not the only factor on the basis of which the custody of the child needs to be decided. While deciding the custody of the child, the welfare of the child is of utmost importance and the custody order should be passed in the best interest of the child. The custody order should not hamper the well-being of the child.

15. In the present case, it was observed by the learned trial court that at the tender age, care of mother is extremely essential for development of the child. As per record, one daughter is about 9 years

old and the other one is about 7 years old. Both the petitioner No. 1 and the respondent No. 1 are Muslim couple and as per Mohammedan law, mother is the custodian of the female child till their attainment of puberty. The provision is certainly an indicator for deciding the custody of a minor female child. It is a matter of common understanding that a child of a tender age feels more attached to the mother. The learned trial court has rightly taken note of the fact that since both of them being minors, it would better serve their welfare and interest, if their temporary custody is granted to the mother.

16. Although, it has been alleged by the petitioners that the respondent No. 1/wife is not competent to take care of the children but nothing is available on record to substantiate their statement. The petitioners have contended that respondent No. 1 had voluntarily abandoned her children and started to live at her matrimonial home. The respondent No. 1 has given a counter narrative that she was thrown out of the matrimonial home and the children were taken away by her husband. The allegations and the counter allegations shall be tested during the trial. Each party would get an opportunity to establish its case. However, at the stage of granting the interim relief, it is only called upon the court to decide the temporary custody of the child keeping in view their best interest on the basis of material available on record.

17. There could be no straight jacket formula for deciding the custody of a minor child. It is not in dispute that two minor daughters

at such tender age require love, affection, emotion, care and maintenance by the mother. The paramount consideration is the welfare of the child.

18. The learned Additional Sessions Judge has made his observation in the judgment which is reproduced as follows-

“Importantly, it is necessary to highlight that, this court while hearing the appeal also personally interacted with both the minor daughters Miss. Reega Khan and Reem Khan at the chamber and during the course of interaction, both the minor daughters expressed their willingness to stay with their mother i.e. the aggrieved/respondent at Nagaon and are also willing to study here at Nagaon district by living with their mother.”

19. On going through the impugned order dated 20.05.2019 as well as the impugned judgment dated 21.09.2019 passed by the learned JMFC, Nagaon and learned Additional Sessions Judge No.2, Nagaon, respectively, I do not find any infirmity in the line of reasoning given by the said courts while awarding the interim custody of the children to the respondent No. 1. The children of a tender age definitely need care and protection of their mother and they equally require the warmth and love of their father.

20. Section 21 of the Act specifies that the Magistrate may grant temporary custody of a child to the aggrieved person and specify, if necessary, the arrangements for the visit of such child by the respondent. The learned Magistrate has also passed the order in that way by stating that the petitioner No. 1 has the liberty to meet his

daughters once in a week and the respondent No.1 to make necessary arrangements.

21. The learned counsel for the petitioners has submitted that in some of the documents, the signatures of her daughters are required for which, the petitioner No. 1, who is the father of the children may approach before the trial court to do the needful and the learned trial court will pass the order accordingly on the basis of the prayer of the petitioner No.1.

22. In view of above observation, the criminal revision petition stands dismissed and disposed of at the admission stage.

JUDGE

Comparing Assistant