

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No. 819 of 2015

Smt. Soni Kashyap @ Lalli Kashyap W/o Pawan Kashyap Aged About 32 Years R/o Near Kumharpara School, Infront Of Mahamaya Lodge, Karbala Road, Thana City Kotwali, Tahsil And District Bilaspur Chhattisgarh.

---- Applicant

Versus

1. Pawan Kashyap @ Soni S/o Late Krishna Kumar Kashyap Aged About 39 Years R/o Near Tuteja Furniture, Telipara, Thana City Kotwali, Distt. Bilaspur Chhattisgarh.
2. Arun @ Pappu Kashyap S/o Late Krishna Kumar Kashyap Aged About 40 Years R/o Near Tuteja Furniture, Telipara, Thana City Kotwali, Distt. Bilaspur Chhattisgarh.
3. Smt. Rajdevi Kashyap W/o Late Krishan Kumar Kashyap Aged About 60 Years R/o Near Tuteja Furniture, Telipara, Thana City Kotwali, Distt. Bilaspur Chhattisgarh.
4. Shashi Devi Kushwaha W/o Raj Sajeeva Kushwaha Aged About 38 Years R/o Darrighat Village Tenka, Near Kanoee Paper Mill, Masturi Road, Tahsil And Distt. Bilaspur Chhattisgarh.
5. Raj Sajeevan Kushwaha Aged About 40 Years R/o Darrighat Village Tenka, Near Kanoee Paper Mill, Masturi Road, Tahsil And Distt. Bilaspur Chhattisgarh.

---- Respondents

For Appellant	:	Shri Parag Kotecha, Advocate.
For Respondent No.2	:	Shri Dharmesh Shrivastava, Advocate.
For Respondents No.1, 3 to 5	:	None present though served.

Hon'ble Shri Chandra Bhushan Bajpai, J.
Order on Board

15/02/2016

1. Heard on admission.
2. Facts in brief required for disposal of the instant criminal

revision are that the present applicant is the wife of Respondent No.1, Pawan Kashyap @ Soni. Out of their wedlock, a son namely Vashu Kashyap aged about 7 years and a girl child namely Ku. Shreyanshi Kashyap aged about 5 years were born. The Applicant had filed an application before the Judicial Magistrate, First Class, Bilaspur, Chhattisgarh under the provisions of Section 23 sub-section (2) read with Section 21 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter called 'the Act, 2005') for custody of the children. The said JMFC Bilaspur, in MJC No. 135 of 2015, after hearing both the parties vide order dated 12.8.2015 under the provisions of Section 23(2) of the Act, 2005 granted interim custody of the children till final disposal of the said MJC and ordered that Shreyanshi Kashyap and Vashu Kashyap be handed over in the temporary custody of the mother i.e. the Applicant. The said Court further ordered that Respondent No. 1, if he so wishes, may visit the children in the custody of the mother i.e. the Applicant. Being aggrieved by the said interim order, Respondents No. 1 to 3 had preferred Criminal Appeal No.134 of 2015 before the First Additional Sessions Judge, Bilaspur, Chhattisgarh under the provisions of Section 29 of the Act, 2005 against the present Applicant and Respondents No. 4 and 5. After hearing both the

parties, Learned Appellate Court allowed the appeal and set aside the interim order passed by the JMFC dated 12.8.2015 and held that the present Applicant/Respondent No. 1 in the said criminal appeal, i.e. the mother may visit her children every day in the house of the present Respondent No.1/ Appellant in the said criminal appeal and further ordered that custody of the children be given to Respondent No.1 herein till either of the parties may get an order under the provisions of the Guardians and Wards Act, 1890 (hereinafter called 'the Act, 1890').

3. Against the aforesaid order, the present Applicant preferred the instant criminal revision challenging the illegality and impropriety of the order passed by the Appellate Court on the ground that the same is illegal and contrary to the facts, as well as against the well settled principles of law. Further grounds taken in the revision petition are that Respondent No. 1 is behaving with the Applicant in a cruel manner as is evident from Annexure A/4; children being aged about 7 years and 5 years, respectively, it will be safe and proper that they be given in the custody of their mother; they will also get proper care and good atmosphere in the custody of the mother; Respondent No. 1 used to be in a drunken condition everyday and as such he is not taking proper care of the children.

Respondent No. 1 used to go out for earning his livelihood and as such no other person responsible is left there to take care of the children. Further it is prayed that the Appellate Court has not considered the matter properly and without considering the welfare of the children passed the illegal order which is not at all sustainable and liable to be set aside. Hence, it is prayed that the order passed by the Appellate Court may be set aside and the order passed by the Learned JMFC dated 12.8.2015 be restored in the interest of justice.

4. Despite service of notice and representation, no written response/objection has been filed in the matter.

5. Heard Learned Counsel for the parties on admission.

6. Learned Counsel for the Applicant duly relied upon the grounds taken in the instant criminal revision and submitted that the JMFC, Bilaspur has passed the order in favour of the Applicant looking to the welfare and age of the children i.e. 7 years and 5 years respectively. In a Criminal Revision filed by Respondent No.1 herein, the Court of First Additional Sessions Judge, Bilaspur by order dated 31.7.2015 ordered that the Children be kept in the custody of Respondent No.1 herein and the Applicant may meet her children every day evening for an hour and as the said order was

binding upon both the parties, the Appellate Court was influenced by the said order while deciding the Criminal Appeal No. 134 of 2015. It is further submitted that no specific findings have been given in the judgment passed by the Appellate Court while setting aside the order of the JMFC. It is further submitted that the Learned JMFC after hearing both the parties, after considering the age of the children and the fact that the father cannot take proper care of the children, passed the interim order till the disposal of the application under Section 21 of the Act, 2005. Respondent No.1 is cruel and there are also allegations regarding *maar-peet* against him. Hence, it is submitted that the instant revision may be allowed and the order passed by the Appellate Court may be set aside.

7. For the purposes of the arguments advanced, the instant criminal revision and the documents annexed are perused.

8. For the purposes of the instant criminal revision, Sections 21 and 23 of the Act, 2005 are relevant and they are as under:

“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 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.

23. Power to grant interim and *ex parte* orders,

- (1) in any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an *ex parte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.”

9. Section 7 of the Act, 1890 is also relevant in the instant case, which is as follows:

“7. Power of the Court to make order as to guardianship.- (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made -

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

10. On a close scrutiny of the entire facts and other materials and also as per the settled principles of law, in this case the welfare and proper custody of the children is the paramount issue for consideration. Learned JMFC has passed the interim order for temporary custody of the children till the disposal of the application under Section 21 of the Act, 2005. As per the facts, before filing of the MJC No. 135 of 2015, the children were in the custody of Respondent No. 1 and on an application filed by the present Applicant, the concerned Magistrate passed the said order dated

12.8.2015. On the other hand, Learned Appellate Court held that the Applicant has no source of income. On perusal of the appellate order, particularly paragraph 7, it reveals that documents have also been filed regarding admission of the children and the Applicant herself submitted that present Respondent No. 1 is earning Rs.15,000/- per month and also getting rent of Rs.15,000/- per month. It shows that there are sufficient funds available with Respondent No. 1 for maintenance and taking care of the children. As welfare of the children is the paramount issue, the Appellate Court held that looking to the entire facts, the order passed by the JMFC is not proper. The Appellate Court further held that custody of the children be given to Respondent No.1 herein till either of the parties may get an order under the provisions of the Act, 1890 and also directed that the present Applicant may every day at any time can go and meet her children in the house of the Respondents. Nothing has been shown or demonstrated whether this opportunity is being utilized by the present Applicant or not. Nothing is also demonstrated that there is any breach of the order passed by the Appellate Court at paragraph 9 or whether the Applicant had preferred any proceedings under Section 31 of the Act, 2005.

11. On due consideration, looking to the entire facts and circumstances, this Court is of the view that the order passed by the Appellate Court is not illegal or improper. Needless to mention that the ultimate custody can be prayed under the Act, 1890 as appreciated and observed by the Appellate Court. With this, I do not see any reason to interfere with the order of the Appellate Court.

12. Consequently, the instant criminal revision is dismissed at the admission stage itself.

Sd/-
(**Chandra Bhushan Bajpai**)
JUDGE