

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.121 OF 2016**

Mr. Girish N. MahalePetitioner

V/s

State of Goa & Ors.Respondents

Ms. Asha Desai, Advocate for the Petitioner.
Shri R. Gawas, Advocate for Respondent No.2.

CORAM : C.V. BHADANG, J.

DATE : 29th AUGUST, 2016

ORAL ORDER:

Heard Ms. Asha Desai, the learned Counsel for the petitioner and the learned Counsel for the respondent no.2.

2. The petitioner, who is the opponent before the learned Magistrate, in a proceeding under Domestic Violence Act, is challenging the judgment and order dated 12/08/2016 passed by the learned Sessions Judge in Criminal Appeal No.85/2016 by which the learned Sessions Judge, has confirmed the order dated 2/07/2016 passed by the learned JMFC at Mapusa in case

no.28/DVA/2016/E. By the said order, the learned Magistrate has directed the custody of the minor child Miss Apurva Mahale, who was at the relevant time aged about three years and ten months to be handed over to the respondent/mother. This order was passed on concession given by the respondent.

3. It is contended on behalf of the petitioner that the consent given by the petitioner was not a conscious consent. He submitted that reply which was filed by the petitioner, was without instructions from the petitioner. The contention is that the Counsel was not instructed to give consent. The learned Counsel has placed reliance on the decision of this Court in the case of **Mr. Abhijit Bhikaseth Auti V/s. State of Maharashtra & Anr., 2009 ALL MR (Cri) 1005**, in order to submit that before granting interim relief an opportunity of hearing is to be granted to the respondent.

4. On the contrary, it is submitted by the learned Counsel for the respondent no.2 that the impugned order is passed by consent of the parties. The learned Counsel points out from the order sheet dated 2/07/2016 that the Presiding Magistrate had verified, when the petitioner (respondent no.1 before the learned Magistrate) had confirmed that he does not have any objection, if custody of the girl child is given to the present respondent no.2. He submits that even otherwise looking to the age of the child, the custody has to be with the mother and no case for interference is made out.

5. I have carefully considered the circumstances and the submissions made. I do not find that any case for interference is made out. The record clearly bears out that the petitioner had filed a reply before the learned Magistrate stating that he has no objection for the custody of the child being handed over to the respondent no.2 herein. A perusal of the

order sheet dated 2/07/2016 further shows that the learned Magistrate had verified this aspect from the petitioner. Had there been any misrepresentation by the Counsel for the petitioner, nothing prevented him from pointing out to the learned Magistrate. Normally, when there is a record of the Court, available, the same cannot be lightly brushed aside. In the present case, it is also not possible to give a finding about any misrepresentation having been practiced by the advocate who was appearing for the petitioner, behind the back of the said advocate as he is not the party herein. The learned Sessions Judge has inter alia placed reliance on the decision of the Supreme Court in the case of **Salil Datta V/s. T.M. and M.C. Pvt. Ltd., 1993 SCC (2) 185** wherein the Hon'ble Supreme Court has held thus:

"The Advocate is the agent of the party. His acts and statements made within the limits of authority given to him are the acts and statements of the Principal, i.e. the party who engaged him. It is true that in certain situations, the Court may, in

the interest of justice, set aside a dismissal order or an ex-parte decree not withstanding the negligence and/or misdemeanor of the Advocate where it finds that the client was an innocent litigant, but there is no such absolute rule that a party can disown its Advocate at any time and seek relief. No such absolute immunity can be recognized. Such an absolute rule would make the working of the system extremely difficult."

6. The learned Sessions Judge has thus rightly found that the petitioner cannot be allowed to wriggle out of the consent on the ground that there was misrepresentation. In para 13 of the judgment, the learned Sessions Judge has found that looking to the age of the minor who was then aged 3 years and 10 months and considering the welfare of the child it is reasonable that the custody of the child is with the mother.

7. It is difficult to envisage how the decision in the case of **Mr. Abhijit** (supra) can come to the aid of the petitioner. Reliance is placed on para 25 (ii) which reads thus:

25. Thus the conclusions which can be summarised are as under:

(i)

(ii) Under sub-section (2) of section 23 of the said Act, the learned Magistrate is empowered to grant an ex-parte ad-interim relief in terms of sections 18 to 22 of the said Act. The power under sub-section (1) is of granting interim relief in terms of sections 18 to 22 of the said Act. Before granting an interim relief under sub-section 1, an opportunity of being heard is required to be granted to the respondent.

(iii)

(iv)

There cannot be any dispute with the proposition as laid down. In the present case, the petitioner, had remained present before the Magistrate and had given consent for handing over of the custody of the child to the respondent no.2. Thus, this is not a case where there was no opportunity granted.

8. In that view of the matter, no case for interference in the supervisory jurisdiction of this Court is made out. The petition is without

any merits and it is accordingly dismissed, with
no order as to costs.

C.V. BHADANG, J.

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