

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side

Present:
The Hon'ble Justice Jay Sengupta

CRR 222 of 2021

PASUPATI MAHATO
Vs.
SMT. RUPALI MAHATO & ORS.

For the Petitioner : Mr. Arijit Dey

For the O.P. No. 1 : Mr. Pawan Kumar Gupta
Ms. Sofia Nesar
Mr. Santanu Sett

Heard on: : 19th February 2021

Judgment on : : 19th February 2021

The Court:

This is an application challenging the judgement and order dated 20.01.2021 passed by the learned Sessions Judge in Criminal Appeal No. 8 of 2020 thereby affirming the order dated 25.11.2020 passed by the learned Judicial Magistrate, 1st Court, Purulia in Misc. Case No. 126 of 2020 under the Protection of Women from Domestic Violence Act.

The learned counsel appearing on behalf of the petitioner submits as follows. The petitioner is the husband of the opposite party no.

1. The marriage between the couple took place on 13.06.2011. Two sons were born of the said wedlock. They are aged about two years and four years, respectively. In 2020 the wife left the husband and the two kids as she was having affair with another man. On 30.09.2020 the husband filed a suit for divorce on the ground of desertion, cruelty and adultery. Only thereafter the wife lodged an F.I.R. on 02.10.2020 under Sections 323, 498A of the Indian Penal Code. The husband was granted anticipatory bail in that case. On 20.11.2020 the wife initiated the present proceeding under the Protection of Women from Domestic Violence Act and on 25.11.2020 the impugned order was passed, *inter alia*, directing that the custody of two minors be with the victim lady in terms of Section 21 of the Protection of Women from Domestic Violence Act. First, the father is the natural guardian of two minor sons. Secondly, even in the F.I.R. lodged by the lady no details were given as to how the children were taken from the custody. In fact, from the charge sheet it appears that one Mr. Nakul Mahato against whom allegations were levelled of kidnapping the child could not be arraigned as an accused. Only in the application under the Protection of Women from Domestic Violence Act the wife came out with an improved version regarding taking forcible custody of the child by the father and his associates. The impugned order shows that the facts of the case and the question of welfare of the child were not gone into. There was no case made out by the wife to have the custody of the minor children handed over to her. The learned trial court erred in handing over the custody of the minor

children to the wife. The learned appellate court too erred in confirming the order of the learned Magistrate.

The learned counsel appearing on behalf of the opposite party no. 1 submits as follows. The wife gave birth of two children who are presently aged about two years, and four years respectively. The petitioner has not disputed the paternity of the children. However, he has gone on to allege commission of adultery by the wife. In fact, the petitioner had committed domestic violence on the opposite party no. 1 which compelled her to lodge the F.I.R. and initiate the proceeding under the present Act. As would be evident from the impugned order passed by the learned Magistrate, the welfare of the children was clearly taken into consideration. It was held that as the mother of the two minor children, she would be in the best position to give constant care and attention to the children. So far as the legality of the order is concerned, Section 21 clearly states that temporary custody of the minor children can be granted to any of the adverse parties. Section 23 states that an interim order may be passed even in respect of Section 21 of the said Act. Therefore, there is no illegality in the reasoned order passed by the learned appellate court.

I have heard the submissions of the learned counsels appearing on behalf of the petitioner and the opposite party no. 1 and have perused the revision petition.

Section 21 of the Protection of Women from Domestic Violence Act may be quoted 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 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.”

Therefore, notwithstanding any other law, temporary custody of a minor child can be granted to an aggrieved person by the learned Court in terms of Section 21 of the said Act.

Section 23 further states that an interim order can be passed also in respect of Section 21 of the said Act.

Therefore, there is no illegality whatsoever on the question whether temporary custody of the minor children can be handed over to one of the adverse parties under the said act.

The allegations levelled by the adverse parties have to be adjudicated in the respective proceedings initiated by the respective parties.

However, welfare of the minor children is to be of paramount consideration in deciding who should get temporary custody of the said children even in respect of an application under Section 21 of the said Act.

Here, it has been categorically recorded by the learned Magistrate as follows:-

“Appreciating the same in light of the facts and circumstances of the instant matter, it needs to be noted that both the children of the aggrieved person are under five years of age and hence, it is not incomprehensible that they require the constant care and attention of their mother. Although this is an interim stage where only the petitioner is present, however, considering the age of the children and the fact that as per the submission of the aggrieved lady that she is completely in the dark as to the whereabouts of her own children, I am of the opinion that this is fit case for the intervention of this Court at this Stage. So, considering the above stated facts and circumstances, I am inclined to hold that this is a fit case for allowing the instant petition of the aggrieved person.”

The learned appellate court also took into consideration the tender age of the minor children in affirming the impugned order.

It has been rightly held that the mother would be in the best position to give constant care and attention to the minor children aged about two and four years.

Furthermore, I do not find that the petitioner has made out a clinching case that the wife will not be in a position to take care of the two children.

In view of the above and in the interest of justice, I do not find any merit in this application. Accordingly, the same is dismissed.

However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, is to be given to the parties upon usual undertakings.

(Jay Sengupta,J.)

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