

**IN THE HIGH COURT AT CALCUTTA**  
**CRIMINAL REVISIONAL JURISDICTION**

**Present:**

**THE HON'BLE JUSTICE JAY SENGUPTA**

**C.R.R. 1600 Of 2020**  
**(IA NO: CRAN 1 of 2020)**

**Rima Roy Karmakar**

**Versus**

**The State of West Bengal & Ors.**

**For the petitioner** : Mr. Debasis Kar  
 Mr. Husen Mustafi  
 Mr. Subhajit Chowdhury

**For the Opposite Party No. 2** : Mr. Amitabha Ghosh  
 Mr. M.M. Roy

**For the State** : Mr. Imran Ali  
 Mr. M.F.A. Begg

**Lastly heard on** : 23.02.2021

**Judgment on** : 17.03.2021

**JAY SENGUPTA, J:**

1. This is an application challenging an order dated 20.10.2020 passed by the Learned Additional Sessions Judge, 4<sup>th</sup> Fast Track Court, Barrackpore, North 24 Parganas in Criminal Revision No. 247 of 2020, thereby, inter alia, extending the interim stay granted earlier and directing the petitioner to produce her minor child before the Court on 19.11.2020 at 2 p.m.

2. Learned Counsel appearing on behalf of the petitioner submits as follows. The petitioner is the mother of the infant baby, presently aged about two years. The petitioner had filed an application under Section 97 of the Code of Criminal Procedure before the Learned Additional Chief Judicial Magistrate at Barrackpore, North 24 Parganas being Complaint Case No. 372 of 2020, which was subsequently transferred to the Learned Judicial Magistrate, 4<sup>th</sup> Court, Barrackpore, North 24 Parganas for disposal. On 29.09.2020 the Learned Court was pleased to allow the prayer of the petitioner directing the Inspector-in-Charge of Titagarh Police Station to execute the warrant and produce the child before the Court on the next date. On 15.10.2020 the Learned Court further directed the use of essential force in order to comply with the order passed earlier. Because the infant child was a suckling baby, it was absolutely necessary that the petitioner being the mother of the child was given immediate custody of the child. She was the one who could give the best care and attention to the infant that the said infant so badly needed. The private opposite party no. 2/husband challenged this order in revision being Criminal Revision No. 247/2020 before the Learned Additional Sessions Judge, First Track Court, Barrackpore. On 12.10.2020 an interim stay on the operation of the impugned order was granted by the Learned Revisional Court and the matter was transferred to the Court of the Learned Additional Sessions Judge, 4<sup>th</sup> Fast Track Court, Barrackpore, North 24 Parganas for disposal. On 19.10.2020 after coming to know about the subsequent order dated 15.10.2020 passed by the Learned Magistrate, the Learned Revisional Court sought an explanation from the Learned Magistrate as to how such order

could be passed in spite of a stay granted by the Learned Revisional Court in the meantime. On 19.10.2020 the Learned Revisional Court recorded that there was no whisper in the photocopy of Lower Court's record about the receipt of the order of the Learned Revisional Court dated 12.10.2020 by which the order dated 29.09.2020 passed by the Learned Magistrate had been stayed. As the Learned Revisional Court found an apparent discrepancy in the said records, the original Lower Court's record was called for. Thereafter, on 20.10.2020 the Learned Revisional Court recorded that the Learned Judicial Magistrate had submitted his written answer, which had arrived along with the original Lower Court's record. The interim stay was extended. The matter was adjourned for hearing on 19.11.2020 and the minor child was directed to be produced in Court on that day at 2 p.m. It appeared that because of a clash of ego between the learned Sessions Court and the Learned Magistrate concerned, the well being of the two years' old child was being sacrificed. The anomaly of the records or the justification of the Learned Magistrate could have been decided without production of the child in Court. Even the issue of whether the custody of the child should remain with the mother could be decided without the production of the child in Court. It was obvious that an infant of two years' of age would not be able to express his mind about with whom he would like to stay. If the welfare of child is of paramount consideration, then it could well be decided without harassing the child by directing his production before a Court of law. Being aggrieved with the order dated 20.10.2020 passed by the Learned Sessions Court, the petitioner preferred the instant revisional application. By an order dated 12.11.2020 passed in this revision, this Court modified the order

dated 20.10.2020 to the extent that the child need not be produced before the Learned Sessions Court on 19.11.2020 at 2 p.m. because of the Covid-19 pandemic situation. Incidentally, the Covid-19 pandemic has not gone away as yet. Reliance was placed in Smt. Surinder Kaur Sandhu Versus Harbax Singh Sandhu & Anr. AIR 1985 SC 1224. In the said case the mother of a minor child filed an application under Section 97 of the Code claiming that the child was in the illegal custody of her husband and others and a search ought to be directed under Section 97 of the Code. The Hon'ble Apex Court held that although Section 6 of the Hindu Minority and Guardianship Act provided that the father was the natural guardian for a minor child, but such provision could not supersede the paramount consideration as to what was conducive to the welfare of the minor. For the reasons cited, the Hon'ble Apex Court directed the custody of the child to be handed over to the mother. Therefore, in the interest of justice and in exigent circumstances, the custody of a minor child could be handed over to the mother, whether by invoking of the power under Section 97 of the Code or otherwise.

3. Learned Counsel appearing on behalf of the State submitted as follows. There was no illegality in the impugned order. The Learned Magistrate erred in granting custody of the minor child to the mother in exercise of powers under Section 97 of the Code. Reliance was placed on the decision of the Hon'ble Apex Court in Ramesh versus Laxmi Bai (Smt.), (1998) 9 SCC 266 and it was submitted that Section 97 of the Code prima facie was not attracted to the facts and circumstances of the case when the

child was living with his own father. In the said case, the Hon'ble Apex Court went on to hold further that "nothing said hereinabove shall be construed as any expression of opinion on the merits of the controversy regarding the custody of Amit, which is pending adjudication in an application filed under the Guardians and Wards Act by the respondent". The question of custody of a minor could only be decided in an application filed under the said Guardians and Wards Act.

4. Learned Counsel appearing on behalf of the Opposite Party No. 2 submitted as follows. The opposite party no. 2 was the father of the minor child. This revisional application was not only about the welfare of the minor child in question, but also about the very concept of hierarchy of Courts and about the majesty of our Courts of law. In spite of an order of stay passed by the Learned Revisional Court, the Learned Magistrate went ahead with executing the order passed by him earlier and the police authority colluded in this. As a result, the minor child was forcibly taken away from the care of the petitioner father. This was a complete abuse of the process of Court.

5. I heard the submissions of the Learned Counsels appearing on behalf of the petitioner, the State and the opposite party no. 2 and perused the revision petition and the vacating application filed on behalf of the private opposite party.

6. At the outset, I would like to make it clear that the matter at hand is more about the immediate well-being of the two years old infant than about anything else.

7. Since the order of the Learned Sessions Court staying the operation of the order of the learned Trial Court and directing production of the infant baby in Court has only been challenged in this revision, this Court refrains from going into the merits of the main case or from pre-empting the outcome of the pending revision before the Learned Sessions Court. As such, it shall be open to the learned Sessions Court to hear out the revisional application and decide whether Section 97 of Code can be invoked in such cases and in case the original order is set aside merely because custody purportedly ought to have been sought under a different provision, whether setting aside of such order passed under Section 97 of the Code would automatically result in the transfer of custody of the child and whether there was any deliberate violation of the order of the Learned Revisional Court.

8. However, the child is aged about two years. He is a suckling baby. The basic tenets of humanity demand that ordinarily the mother of the child, who is indubitably the best person to give constant care and attention to the infant, ought to retain the custody of the infant till the question of custody is finally decided in a proceeding under the Guardians and Wards Act or otherwise, and in the circumstances of the present case, at least till the present revisional application is decided by the learned Sessions Court.

9. Moreover, it appears from the earlier order dated 12.11.2020 passed by this Court that the impugned order was modified to a certain extent. It was held that the child need not be produced before the Learned Court on 19.11.2020 at 2.00 p.m. because of the COVID pandemic situation. This modification does not appear to be merely an interim one. In view of the

same, this Court is reluctant to qualify the said modification any further. Besides, the effects of Covid-19 pandemic have not faded out completely as yet.

10. I am also in agreement with the submissions made on behalf of the petitioner that at present the two years old child is hardly in a position to indicate whether he would like to stay with the father or with the mother. At this stage, the production of the child in Court would be a futile exercise.

11. In view of the above and in the interest of justice, I set aside the impugned order and direct the learned Sessions Court to decide the revisional application upon hearing both the parties and without insisting upon the production of the infant baby in Court. During pendency of the revision before the learned Sessions Court, the petitioner mother shall retain the custody of the child. However, the learned revisional Court shall be at liberty to grant visitation right to the father of the child. It is needless to mention that the opposite party father shall also be at liberty to initiate a proceeding under the Guardians and Wards Act.

12. With these observations, the revisional application and the connected application are disposed of.

13. A copy of the order shall be transmitted forthwith to the Court of the learned Additional Sessions Judge, 4<sup>th</sup> Fast Track Court, Barrackpore, North 24 Parganas.

14. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

**(Jay Sengupta, J)**

SM