

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 17 OF 2021

- 1) Digvijay s/o Pravin Gajkeshwar @ Joshi,
Age 26 years, Occ. Service, R/o. Joshi
Mohalla, Mahunaka, Near Sai Temple,
Chatripura, Indore (Madhya Pradesh).
 - 2) Pravin s/o Murlidhar Gajkeshwar @ Joshi,
Age 54 years, Occ. Mahant, R/o. Gurukul
Siddhanath Ashram, Joshi Mohalla, Mahunaka,
Chatripura, Indore (Madhya Pradesh).
 - 3) Padmini w/o Pravin Gajkeshwar @ Joshi,
Age 52 years, Occ. Nil. R/o. Gurukul Siddhanath
Ashram, Joshi Mohalla, Mahunaka, Chatripura,
Indore (Madhya Pradesh).
 - 4) Kanchan w/o Pranay Joshi, Age 31 years,
Occ. Nil, R/o. 30, Bhakti Niwas, Bank
Colony, Annapurna Road, Indore (M.P.)
 - 5) Pranay s/o Jayshree Joshi, Age 35 years,
Occ. Service, R/o. 30, Bhakti Niwas, Bank
Colony, Annapurna Road, Indore (M.P.).
 - 6) Gotam @ Gopi s/o Murlidhar Gajkeshwar,
Age 43 years, Occ. Service, R/o. 30, Bhakti
Niwas, Bank Colony, Annapurna Road, Indore
(Madhya Pradesh).
 - 7) Anita w/o Gotam Gajkeshwar, Age 34 years,
Occ. Business, R/o. 30, Bhakti Niwas, Bank
Colony, Annapurna Road, Indore (Madhya Pradesh).
 - 8) Master Devansh (Minor) s/o Digvijay Gajkeshwar,
Age 2.6 years, Occ. Nil. Through his Natural
Guardian – (applicant No. 1- father)
Digvijay s/o Pravin Gajkeshwar @ Joshi,
R/o. Joshi Mohalla, Mahunaka, Near Sai Temple,
Chatripura, Indore (Madhya Pradesh).
- ... **Applicants.**

VERSUS

Chaitali @ Varsha w/o Digvijay Gajkeshwar
@ Joshi, Age 23 years, Occ. Nil. R/o. C/o.
Gopinath Sonwane, Yeshwant Nagar, Sakri
Road, Dhule (Maharashtra).

... **Respondent.**

...

Advocate for the Applicants : Mr. V.D. Sapkal, Senior Advocate, i/b Mr.
Dhiraj R. Jethliya.

Advocate for the Respondent : Mr. Rajendra H. Wagh.

CORAM : **MANGESH S. PATIL, J.**

RESERVED ON : **20.07.2021.**

PRONOUNCED ON : **27.07.2021.**

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of admission.

2. This is yet another matter which demonstrate as to how a dispute between the married couple could land a minor child in trouble when the couple indulges in bitter fight over its custody.

3. The facts which lead to the filing of this revision, as are relevant, may be summarized as under:

(i) The marriage between the applicant No. 1 and the respondent was solemnized on 11.02.2017. The couple started cohabiting at Indore in his house. The applicants No. 2 and 3 are his parents. Applicant No. 4 is his married sister. Applicant No. 5 is the husband of the applicant No. 4. Applicant No. 6 is his paternal uncle. Applicant No. 7 is the wife of applicant No. 6 and the applicant No. 8 is the minor child aged 2 years. The respondent initiated a proceeding under Section 12 of the Protection of Women from Domestic Violence Act (hereinafter 'D.V. Act') against the applicants for various reliefs under that Act. Simultaneously, she preferred a

separate application under Section 21 (Exh. 4) seeking temporary custody of the child. The applicants opposed that application. The learned Chief Judicial Magistrate by the impugned judgment and order allowed the application (Exh. 4) and directed the applicants to hand over custody of the child to her within ten days of the decision. Simultaneously he also granted visitation rights to the applicant No. 1. He also directed for ad interim arrangement in view of the lockdown for an interaction between the father and the child through video conference.

(ii) Being aggrieved and dissatisfied by such order, the applicants preferred an appeal under Section 29 of the D.V. Act and the learned Additional Sessions Judge by the impugned judgment and order dismissed it. Hence this Revision.

4 (i) Learned Senior Advocate Mr. Sapkal for the applicants would submit that welfare of the child should be the paramount consideration while deciding the issue regarding its custody. He would refer to catena of decisions to buttress his such submissions :

1. *Lahari Sakhamuri Vs. Sobhan Kodali; (2019) 7 SCC 311.*
2. *Satish Chander Ahuja Vs. Sneha Ahuja; 2020 SCC OnLine SC 841, (2021) 1 SCC 414.*
3. *Roxann Sharma Vs. Arun Sharma; (2015) 8 Supreme Court Cases 318.*
4. *Puran and Others Vs. Shrimati Angoori; ILR (1076) II Delhi 337.*
5. *Kamlesh Kumari Vs. Laxmi Kant; 1997(3) WLC 322.*
6. *Shaleen Kabra Vs. Shiwani Kabra; (2012) 5 SCC 355.*
7. *Soumitra Kumar Nahar Vs. Parul Nahar (2020) 7 SCC 599.*
8. *Vikram Vir Vohra Vs. Shalini Bhalla; (2010) 4 SCC 409.*
9. *Smt. Surinder Kaur Sandhu Vs. Habax Singh Sindhu*

Sandhu; (1984) 3 SCC 698.

(ii) He would further submit that in view of such trite legal position, the conduct of the respondent and her questionable character is a strong circumstance which disentitles her from claiming custody of the child albeit it is less than five years of age. He would further submit that since inception the conduct of the respondent was never above board. She was pregnant even before her marriage with the applicant No. 1 which fact was never disclosed. There were several telephonic conversations between one Amol Gondhali whom she pretended to be her collegemate and friend. With the intervention of community members the couple had separated by executing a customary divorce deed wherein she specifically admitted that her marriage with the applicant No. 1 was solemnized against her will and was never consummated. It is thereafter that she terminated her pregnancy without knowledge of the applicants. Thereafter the couple had reunited and she became pregnant. She went back to the parental home in 7 months of pregnancy and after delivery at the parental home she returned to Indore with the child. Out of sheer love and affection the great grand father of the child proposed to bequeath his property to the child and executed a registered will.

(iii) He would further submit that even thereafter, the respondent indulged in several telephonic conversations with one Budhabhushan Wagh of Dhule which revealed her questionable character. She was bold enough to allow that person even to enter into the applicant No. 1's bed room. Since the applicant No. 1 objected to her such behavior she left the home. All these circumstances would clearly indicate that she possesses a questionable character and it would not be in the interest of the child to be with her.

(iv) Learned Senior Advocate would then point out as to how the respondent made several attempts to harass the applicants by filing various

proceedings.

(v) Lastly, the learned Senior Advocate would submit that the impugned orders particularly one passed by the Appellate Court is perverse in as much as without there being any allegation about snatching of the child from her the learned Judge has referred to such a fact.

(vi) The learned Senior Advocate then submits that since it is a matter of custody of child, no order could have been passed without extending sufficient opportunity to the parties to substantiate their allegations on the basis of concrete material. The learned Senior Advocate would then point out that the applicants No. 2 and 3 have legitimately preferred a proceeding for custody of the child and the suit bearing Custody Case No. 53/2020 is pending in the Court of Indore and therefore no order could have been passed under Section 21 of the D.V. Act. He would therefore submit that both the Courts below have decided the application and the rival claims purely on the basis of illegitimate considerations, giving a complete go by to the welfare of the child and have grossly erred in directing the applicants to hand over its custody to the respondent.

5. The learned advocate for the respondent submits that since there is a concurrent finding and order of the two Courts below, this Court can interfere by invoking the powers of Revision under Section 397 of the Code of Criminal Procedure only in exceptional circumstances where the impugned orders can be demonstrated to be perverse or arbitrary. In the absence of which, there is no scope for this Court to interfere with the concurrent findings.

6. Time and again the Supreme Court has reiterated as to how in the matter of custody of a child best interest of the child is to be borne in mind. Welfare of the child should be the paramount consideration for deciding the issue regarding its custody. One can gainfully refer to the number of decisions cited on behalf of the applicants.

7. Needless to state that it is a delicate issue and all the attending facts and circumstances will have to be borne in mind while deciding these rival claims. However, simultaneously one cannot forget the fact that apart from the substantive provisions in the Hindu Minority and Guardianship Act, 1956 and the Guardians and Wards Act, 1890, Section 21 of the D.V. Act empowers the competent Court to decide the dispute regarding custody of a child. Obviously, since any enquiry under the D.V. Act is considered to be a summary enquiry it would have its own limitations. It would therefore be apt for rival parties to invoke the provisions of the Hindu Minority and Guardianship Act and the Guardians and Wards Act as the case may be while putting up a claim for custody of a child. However, simultaneously an aggrieved person may for the time being resort to an express remedy in the form of Section 21 of the D.V. Act which is happening in the matter in hand. Though the applicants Nos. 2 and 3 seem to have preferred a proceeding in the Family Court at Indore seeking custody of the child, for the reasons best known to the applicant No. 1 and the respondent they do not seem to have taken recourse to a substantive remedy for claiming custody or substantiating it. It is in view of such state of affairs that we are left with an inevitable situation where the rival claims will have to be considered with a limited scope of scrutiny of material available in the present matter which arises in a proceeding initiated under Section 12 of the D.V. Act.

8. The applicants have put up grave and serious allegations against the respondent touching her character, which she has flatly denied. It would be a matter of further investigation which can happen at the trial of the complaint in the proceeding initiated by her under Section 12 of the D.V. Act. Though the applicants are relying upon several telephonic conversations and photographs, those will have to be substantiated by leading cogent evidence which is absent for the time being. This Court while invoking the powers under Section 397 of the Code of Criminal Procedure would be loath in entering into the realm of disputed questions of fact.

9. As can be demonstrated by referring to the catena of decisions of the Supreme Court (supra) in the ordinary course custody of a child which is less than five years of age should normally be with the biological mother. There could be exceptions where it can be demonstrated as to how such a custody would undermine the welfare of the child. But again it takes us to the disputed questions of facts touching the character of the respondent. When the matter before the Magistrate was at a nascent stage and it was called upon to decide the application of respondent under Section 21 of the D.V. Act, no fault can be found with the impugned order passed by the Magistrate in upholding her right to claim custody of the child. Both the Courts below have proceeded on the basis of the admitted facts while concluding that the child being less than five years of age the normal course will have to be followed and have directed custody to be handed over to the respondent.

10. It has been vehemently agitated that there are no allegations about snatching of the child and still the learned Judge of the Appellate Court has made such an observations and it is being alleged that therefore those are perverse and arbitrary. However a careful perusal of the application (Exh. 4) preferred by the respondent under Section 21 of the D.V. Act would clearly show that in paragraph No. 12 she has specifically alleged about applicant No. 1 having snatched the child from her custody. Therefore the submission of the learned Senior Advocate that the observations of the Appellate Court to this extent are perverse is not tenable.

11. Having considered all the aforementioned aspects, in my considered view neither of the orders of the two Courts below can be said to be either perverse or capricious so that this Court can legitimately cause any interference under the revisional powers under Section 397 of the Code of Criminal Procedure.

12. The Revision is dismissed. The Rule is discharged.

13. It is clarified that the observations made herein above are restricted to the decision of the present matter and the Trial Court shall not get influenced by those.

(MANGESH S. PATIL, J.)

14. After pronouncement of the judgment the learned advocate Mr. Jethlia for the applicants submits that since there is ad-interim relief operating in favour of the applicants till date, the same may be continued to enable them to challenge the order.

15. Considering the fact that it is a serious matter regarding custody of a child barely 2-3 years old, wherein the respondent who is the biological mother has been fighting for its custody, coupled with the facts that there has been a consistent conclusion drawn by the two Courts below it would not be in the best interest of the child to allow it to remain in the custody of the applicant no. 1 father instead of the respondent-mother. The request is rejected.

(MANGESH S. PATIL, J.)

mkd/-