

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 60 OF 2021

1. Swapnil s/o Dinesh Adhyapak,
Age : 30 years, Occu. Service
2. Hemlata w/o Dinesh Adhyapak,
Age : 60 years, Occu. Pensioner

Both r/o Shakhambhari Niwas,
Near Rukhmini Mangal Karyalaya,
Vishal Nagar, Barshi Road, Latur

PETITIONERS

VERSUS

Mansi w/o Swapnil Adhyapak,
Age : 28 years,
At present R/o c/o Dipak Keshavrao Bharne,
Sundarwadi, Aurangabad

RESPONDENT

Mr. Sachin S. Deshmukh, Advocate for the petitioners
Mrs. Minakshi L. Sangeet, Advocate for the respondent

CORAM : MANGESH S. PATIL, J.

DATE : 17.07.2021

ORDER :

Heard both the sides.

2. The husband is before this Court impugning the judgment and order passed by the Appellate Court reversing the order passed by the

learned Magistrate on the application (Exh-4) filed by respondent/wife, seeking custody of a minor child as contemplated under Section 21 of the Protection of Women from Domestic Violence Act, 2005 (“DV Act”, for short) in a substantive proceeding initiated by her under Section 12 of that Act against petitioner No.1/husband for various reliefs under the Act.

3. The learned Advocate for the petitioners would vehemently point out that though the welfare of the child is of a paramount consideration, he should be allowed to make an intelligible choice, which procedure has not been adopted by the Appellate Court while setting aside the order passed by the Magistrate refusing to handover the custody of the child to the respondent/wife. Without resorting to such a procedure mandated by law, the order ought not to have been reversed.

4. The learned Advocate would further point out that there was enough material before the Appellate Court to demonstrate that even the respondent/wife is suffering from Spastic Diplegia C.P. and the extent of her disability is to the tune of 40%. If this be so, one could easily comprehend that she is physically and may be mentally incapable of maintaining the child, who is barely three years of age. He would further submit that the revision petitioner No.1 is the biological father and obviously natural guardian of the child. His mother is also staying with him and both of them can conveniently look after the welfare of the child. Since the respondent/wife has deserted matrimonial home on her own, she cannot be now allowed to take advantage

of the situation.

5. Lastly, the learned Advocate for the petitioners would point out that the very fact that the respondent/wife has been claiming ad-interim maintenance for maintaining herself, it would be difficult for her even to maintain the minor child, when she herself is hand to mouth. All these aspects have been ignored by the Appellate Court while passing the impugned order, which is grossly erroneous and illegal and may be quashed and set aside.

6. The learned Advocate for the respondent/wife supports the impugned judgment and order. She submits that though the respondent/wife has been suffering from some ailment, the learned Judge of the Appellate Court has taken into consideration various aspects while pointing out as to how such disability would not constitute impediment in maintaining the child. She would point out that the plea of her such disability is now being conveniently put forth to face the situation. Admittedly, the couple had put in atleast two years of marital life and has begotten a child and at no point of time had the petitioner/husband faced any difficulty on account of her disability.

7. The learned Advocate would further point out that though the petitioner/husband is now pretending to be capable of maintaining the child, in fact, he is jobless and is fully dependent on the pension earned by his

widowed mother. Therefore, even practically it is difficult for him to maintain the child.

8. Lastly, the learned Advocate for the respondent/wife would rely upon various judgments of the Supreme Court and the judgment of this Court referring to the decisions of the Supreme Court while deciding ***First Appeal No. 393 of 2021 Ratnamala w/o Pandurang Zate Vs. Pandurang Udhav Zate, dated 03.07.2021.***

9. I have considered the rival submissions and the papers as also the case law. Suffice for the purpose to remind ourselves at the inception that it has been consistently held that the welfare of the child is a paramount consideration while deciding such requests and disputes pertaining to its custody. Obviously, while considering such welfare, even the inclination of the child is to be taken into consideration. It is also true, as laid down in catena of cases namely ***Roxann Sharma Vs. Arun Sharma (2015) 8 SCC 318, Yashita Sahu Vs. State of Rajasthan and others (2020) 3 SCC 67***, etc. that as far as a child below five years of age is concerned, in the ordinary course, it should be in the custody of its mother.

10. Bearing in mind these principles, if one examines the matter in hand, admittedly the child is less than five years of age. It is, therefore, in the ordinary course that the child should be in the custody of the respondent/wife. Obviously, the petitioner/husband is entitled to demonstrate as to how

the fact situation in the matter in hand is exceptional and demands a deviation from the well settled principles. The foremost circumstance relied upon is the fact of the disability from which the respondent/wife has been suffering. It is being demonstrated that she is suffering from Spastic Diplegia C.P., having disability to the extent of 40%, measured by adopting McBride scale. However, as has been rightly borne in mind and pointed out by the learned Judge of the Appellate Court, though the respondent/wife has been suffering from such a disability, she is quite capable of and has been handling the child properly till the couple was together. It is pertinent to note that the learned Judge also had an opportunity to personally see the respondent/wife in the Court and has formed a subjective opinion about how inspite of her such disability, she is capable to look after the child. Apart from his such subjective satisfaction, he has also demonstrated as to how there could not have been any dispute as regards her ability to maintain the child so long as the couple was together. He has also pointed out that inspite of her such a condition, the petitioner/husband could cohabit with her for couple of years during which the child was born. If such is the state-of-affair, no exception can be taken to the observations made and conclusions drawn by the learned Judge that the plea being raised by the husband/petitioner is a convenient one and the respondent/wife is capable of looking after the child inspite of her such disability.

11. As far as the financial condition of the respondent/wife is

concerned, in my considered view, even if the respondent/wife is incapable of earning anything on her own, that cannot be a legal and logical parameter for refusing custody of minor child. If at all the petitioner/husband is really interested in the welfare of the child, he can conveniently provide her with sufficient amount monthly so as to enable her to maintain even the child and not only herself. Therefore, financial condition of the respondent/wife, in my considered view, cannot be a right reason to refuse her the custody of the minor child.

12. Having considered all the above mentioned facts and circumstances and bearing in mind the consistent view of the Supreme Court in the cases of ***Roxann Sharma*** (supra) and ***Yashita Sahu*** (supra), the child being less than five years of age, no fault can be found with the judgment and order passed by the learned Judge of the Appellate Court allowing the respondent/wife's application (Exh-4) under Section 21 of the DV Act and directing to handover the custody of the child to her.

13. The Revision Application is dismissed.

14. The petitioner/husband shall handover the custody of the child, as directed by the Appellate Court in the impugned judgment and order, on 19.07.2021.

15. It is clarified that the observations made hereinabove are confined to the decision of the present Revision Application and the learned

Judge of the lower Court shall not get swayed away by those.

[MANGESH S. PATIL]
JUDGE

npj/CRIREVN60-2021