

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL REVISION NO.93 OF 2021

Applicant : **Sneha Milind Kale,**
Aged 36 years, Occ. Housewife,
R/o C/o Shri Mukund Deshpande,
Flat No.F-4, Pushpanjali Complex, 73,
Pandey Layout, Khamla, Nagpur.

-- **Versus** --

Non-Applicants : 1] **Milind s/o Shrikrishna Kale,**
Aged 39 years, Occ. Service.

2] **Shobha w/o Shrikrishna Kale,**
Aged 65 years, Occ. Household.

3] **Shailesh s/o Shrikrishna Kale,**
Aged 43 years, Occ. Advocate.

All residents of house of Shri Mangesh Naik,
Near Maharaja Apartment, Madhav Nagar,
Gorakshan Road, Akola, Tq. & District Akola.

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Shri R.S. Parsodkar, Advocate for the Applicant.
Shri S.P. Bhandarkar, Advocate for the Non-Applicants.

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<u>CORAM</u>	: <u>VINAY JOSHI, J.</u>
<u>RESERVED ON</u>	: <u>17th NOVEMBER, 2021.</u>
<u>PRONOUNCED ON</u>	: <u>26th NOVEMBER, 2021.</u>

J U D G M E N T :-

The challenge in this revision is to the judgment and order dated 13/07/2021 passed by the learned Additional Sessions Judge-9, Nagpur in Criminal Appeal No.16/2021, whereby confirming the order dated

18/02/2021 passed by the Judicial Magistrate First Class, Court No.10, Nagpur on Exh.6 in M.C.C. No.316/2021.

02] Briefly stated, the applicant/wife has applied to the learned Magistrate in terms of Section 12 of Chapter-IV of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “D.V. Act” for short) seeking multiple reliefs as provided under Sections 17, 19 & 21 of the D.V. Act. During pendency of said application, wife has filed application [Exh.6] under Section 21 of the D.V. Act for temporary custody of her female child, aged 4 years and 2 months. After hearing both sides and interviewing the minor, the learned Magistrate was pleased to reject the application vide order dated 18/02/2020. Being aggrieved by rejection, the applicant/wife has preferred Criminal Appeal No.16/2021 in terms of Section 29 of the D.V. Act, to the Court of Sessions for setting aside the order of rejection and for grant of temporary custody. The learned Sessions Judge after hearing both sides by dismissing the appeal has confirmed the order of Magistrate rejecting the wife’s claim for temporary custody of the child. Dissatisfied by consecutive failure, the wife has called in question the legality, propriety and correctness of both impugned orders by way of this revision application.

03] At the inception, it necessitates me to state the background facts. The applicant/wife got married with non-applicant No.1/husband (hereinafter

referred to as non-applicant only) on 08/05/2015 at Nagpur as per Hindu customary rites. The applicant/wife as well as non-applicant/husband, both were holding the Degree of Bachelor in Engineering. Both were employed in the District Thane and started to live together in a Flat at Thane owned by the non-applicant/husband. Out of said wedlock, the couple had a female child born on 23/05/2016. It is the wife's case that during her cohabitation at Thane, after initial few days, she suffered physical and mental harassment.. The ill-treatment continued even after the birth of female child.

04] Non-applicant No.2/Shobha is mother of husband, whilst non-applicant No.3-Shailesh is elder brother of husband, who is a practicing Advocate at Akola. Non-applicant No.2-Shobha and non-applicant No.3-Shailesh were permanently residing in rented premises at Akola. On 23/11/2020 i.e. during lockdown period, the husband took minor girl to his brother's house at Akola. The child remained in the company of her grandmother-Shobha and uncle-Shailesh at Akola. The husband was working online from Akola due to complete lockdown.

05] It is the wife's case that after matrimonial discord, she started to reside with her parents at Nagpur. She repeatedly visited to Akola to meet her child, but was hardly allowed to meet her own daughter. Since the conduct of the husband amounts to "domestic violence" within the meaning of Section 3

of the D.V. Act, wife filed application to the learned Magistrate for multiple reliefs. As stated above, the wife applied for temporary custody of her daughter, however, she failed in the Court of Magistrate as well as in the appeal before the Sessions Court.

06] Heard both sides exhaustively, gone through the reported judgments cited by the parties and interviewed the child in isolation.

07] The husband's learned Counsel initially raised preliminary objection about the very maintainability of revision application. He would submit that the impugned order dated 18/02/2021 was purely an interlocutory order and, therefore, due to bar created under Section 397(2) of the Code of Criminal Procedure, the revision is not maintainable. Besides that, it is submitted that the scope of interference under the revisional jurisdiction is quite narrow and limited. To substantiate said contention, reliance has been placed on the decision of the Supreme Court in the case of Amit Kapoor vs. Ramsh Chander and Another – (2012) 9 SCC 460. In said case, while considering the claim of discharge, the Supreme Court has expressed about the comparative scope of interference under the revisional jurisdiction along with inbuilt limitation on exercising power under the revisional jurisdiction. To counter the said submission, the learned Counsel appearing for the wife by

placing reliance on the decision of the Kerala High Court in the case of Baiju s/o Chandran Nair & another vs. Latha d/o Balan Nair & another decided on 09/06/2011 in Cri.M.C. Nos.969 & 1705 of 2011, urged that the remedy to challenge the order passed in appeal under Section 29 of the D.V. Act is by way of revision. A special emphasis is laid on paragraph 16 of the judgment. The Kerala High Court while dealing with the application under Section 482 of the Code of Criminal Procedure has specifically framed the question for consideration as below:

“Is the judgment of Court of Sessions in an appeal filed under Section 29 of the Act amenable to the revisional power of the High Court under Sections 397(1) and 401 of the Code of Criminal Procedure (for short, “the Code”)?”

08] After considering the nature of litigation under the D.V. Act and the revisional powers under Sections 397(1) & 401 of the Code, it was answered that the orders passed under Section 29 of the D.V. Act by the Sessions Court, being an inferior criminal Court, are revisable by the High Court in exercise of its powers under Section 397(1) & 401 of the Code.

09] Notably, though the impugned order is in the nature of interim order, has substantially affected the rights of the parties here is revisable. Besides that, the challenge posed before this Court is to the order passed in appeal under Section 29 of the D.V. Act. Initial order passed by the learned

Magistrate has merged into the order of Sessions Court in terms of order under Section 29 of the D.V. Act. The initial order has changed its character into an order passed in appeal by the Sessions Court and thus it is amenable to the revisional jurisdiction of this Court. Thus, the issue of maintainability no longer confines me in deciding revision on its own merits.

10] The issue involved is restricted to the entitlement of the party for temporary custody of a minor female child, who was below five years of age at the relevant time. The very nature of order is of temporary nature as is explicitly made clear by Section 21 of the D.V. Act itself. The matter has come up to this Court at interim stage, hence, it requires limited scrutiny. The husband's learned Counsel submitted that unless there is a domestic violence, the Court of Magistrate cannot pass interim order. The applicant/wife has categorically pleaded about the mental and physical harassment meted out by the husband. The said statement is supported by the wife's affidavit. At this juncture, I do not find any reason to discard her version for entertaining the interim prayer. Consequently, I do not feel it appropriate to delve much upon said aspect since the lis is pending in the first Court of Magistrate, where the evidence is yet to be recorded. In short, at this stage, there is no reason to doubt the wife's contention to that regard.

11] The learned Counsel appearing for the husband took me to the factual aspect and by placing reliance on the decisions in the cases of (1) Sheila B. Das vs. P.R. Sugasree – (2006) 3 SCC 62, (2) D. Rajaiah vs. Dhanapal & Another – 1984 SCC OnLine Mad 292, (3) Nil Ratan Kundu & Another vs. Abhijit Kundu – (2008) 9 SCC 413, (4) Gaurav Nagpal vs. Sumedha Nagpal – (2009) 1 SCC 42, (5) DSG vs. AKW – (2020) 12 SCC 248 and (6) Lahari Sakhamuri vs. Sobhan Kodali – (2019) 7 SCC 311, submitted that in peculiar facts of this case, the father is entitled for custody for the well-being and welfare of the child.

12] In most of the above cases, Courts have preferred to handover custody of a child to father in preference to the mother. Those decisions were rendered by the Courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor in staying with father. Needless to say that on given facts of this case, conflicting demand of child has to be resolved.

13] Notedly in above cases, principally it is ruled that the sole consideration should be the welfare of the minor and nothing else. The Court is not bound by mere legal rights of the parents, but see the ordinary comfort and interest of the child. The selection process should centre around the

paramount consideration about well-being and welfare of the child. In view of said legal position, by mere interpreting legal rights and provisions, the delicate issue cannot be answered. It is the consistent law that the rights of the parents may be taken into consideration. However, nothing can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases giving due weight to the circumstances and to the interest of a child.

14] Section 6 of the Hindu Minority and Guardianship Act, states that in the case of a boy or an unmarried girl, the father, and after him, the mother would be the natural guardian with a rider that the custody of minor, who has not completed the age of five years, shall ordinarily be with the mother. True, the father as a natural guardian is primarily entitled to the custody of a child, who has completed five years of age. However, in case of a child below five years of age, the position is reverse. In view of the proviso, onus lies on father to rebut the legal preposition as to why the custody of such child of tender age shall not be with mother. Herein, the date of birth of child was 23/05/2016, meaning thereby on the date of custody application, she was below five years of age. Though on date, the child has just completed five years of age, no mathematical calculations can be made. Merely because the child has just crossed few months above five years, the statutory provision regarding ordinary custody of mother cannot be overlooked.

15] On facts, admittedly the father is serving in a Multinational company at Thane. It is not disputed that still he is in the service of said company at Thane or Mumbai, but a special case is made out that presently due to lockdown, the father is doing his job online by staying at Akola at his brother's house. An attempt was made to say that since father is staying at Akola, his brother's family and mother are in the house to take care of the child. On the other hand, the wife stated that she is qualified engineer residing with her parents at Nagpur and potential to cater the needs of minor child. The wife has produced a copy of R.C.S. No.142/2021 filed by husband's mother and brother in the Court of Akola seeking injunction against her. It reveals that the father's brother and mother had filed a suit for permanent injunction restraining the applicant/wife from entering in their house at Akola and disturbing the peace. It was alleged that the wife frequently used to visit their house at Akola and forcibly trying to take away the child by crating a scene. Considering *prima facie* submissions, the Civil Court has also issued a temporary injunction restraining the applicant/wife from entering into the house of husband's brother and mother at Akola.

16] The applicant/wife has specifically denied that father is staying at Akola with his brother and mother. It is submitted that father is still serving in Thane/Mumbai. He is looking after marketing of the company for which he

used to visit various places. Precisely, it is submitted that due to job constrains, father is staying at Thane and occasionally visits to Akola, where he left the minor child with his brother and mother. It is contended that all the time, father is busy in working on laptop doing his duty, therefore, at Akola also, it is not possible for him to take care of the child.

17] Admittedly, father is in permanent job at Thane/Mumbai with Multinational company. It is not disputed that still he is in the said job, but according to him, presently due to pandemic situation, he is staying at Akola and doing job online. Needless to say that it is a temporary phenomena of doing online job from Akola. By the time, father might have joined his job at Thane or in short future, he would physically join at Thane. There is no substance in contending that in perpetuity father would do job online from Akola. Besides that, he being occupied higher position, has to physically attend the meetings or visit different places. Un-disputedly, at Thane flat, no one else than father is residing presently. Therefore, by all means it is not possible for him to look after the child and to cater needs of minor by paying requisite attention at Thane. Apart, though presently father is temporarily staying at Akola, however, due to his job constrains, naturally the child would be at the mercy of her old grandmother and uncle. The pleadings of R.C.S. No.142/2021 filed by father's brother-Shailesh state that after matrimonial

discord, father requested his brother to let him reside with them along with daughter at Akola. It means that even father is residing at his brother's house as a courtesy. The situation is somewhat worse that not only father alone is staying at his brother's house, but with his minor daughter. It can be easily understood that in absence of father, child would be living at Akola without parents.

18] On the other hand, the mother is staying at Nagpur with her parents and keen to look after the well-being of the child. No submissions are advanced to doubt the wife's financial potentials to cater the need of child. Pertinent to note that it is a female child, who has just crossed five years of age. Naturally, the child's ordinary comfort would be with her mother for which there could be no two opinions. Especially, she being female child requires mother's protection and care in her developing age. In the situation, I have no doubt in my mind in giving preference to the mother in absence of special circumstances.

19] The learned Magistrate has rejected temporary custody vide order dated 18/02/2021. Perusal of said order indicates that the learned Magistrate has interviewed the child and on that basis found it fit to handover custody to the father as expressed by child. The entire order of the learned Magistrate is

solely based on the personal interview of the child. The order does not reflect consideration of other relevant factors. The appellate Court, while confirming the order, has not assigned any reasons. Though the order passed in appeal runs into 13 paragraphs, however, one can find reasoning in last paragraph 13 in few lines, which runs as below:

“13. Admittedly, the impugned order is interim order and not final and applicant has sufficient chance to prove her case by leading evidence before the trial Court. The applicant can also avail other remedies for permanent custody of minor child before proper forum. Hence, in my opinion, the order passed by the trial Court requires no interference.”

20] Obviously, the appellate Court without assigning any reason opined that the order requires no interference being of interim nature. In fact the issue of custody of a minor girl, being delicate one, the appellate Court ought to have considered all the circumstances. The order of appellate Court is cryptic and passed in casual manner. The appellate Court has lost the sight of delicacy and virtually made the appellate provision otious.

21] Be that as it may, as per record, till March, 2020, the child lived with couple at Thane. Then in pandemic situation, the applicant/wife went to her parents' house on account of illness, whilst the husband went to reside at his brother's place at Akola with the child. Though, the wife remained

unsuccessful in both earlier rounds of litigation, however, presently she is having custody of the child. According to father, while the child was at Akola with him, the applicant/wife forcibly took child on 12/10/2021 and till date, the child is with mother. In response, it is submitted on behalf of the applicant/wife that on 12/10/2021 when she went to Akola to meet her daughter, she found the child in neglected condition, hence, she took her child with her.

22] The record indicates that on the first date of hearing, vide order dated 13/10/2021, this Court by recording this fact continued the custody of applicant/wife till next date. On the following date, this Court (another learned Judge) considering the sensitive nature of the issue, felt it necessary to interact with the child. Accordingly, the learned Judge interacted with child as well as with parents and suggested all of them to stay together at some place for a week with a hope to reunion, which they did but no use. However, the custody of child remained with mother, which was not disturbed.

23] Being sensitive nature of the lis, I have interacted with the child in isolation. This time, the child expressed her desire to live with mother. Notably, when child was brought from the custody of mother, she preferred the mother. Pertinent to note that earlier the child was brought from the custody of father before Magistrate, where she preferred father. Suffice to say that

though the child was intelligent, however, I sensed the element of tutoring during the course of interaction, Therefore, no much weightage could be given to the view expressed by the learned Magistrate while deciding interim custody, which was solely based on the interaction with the child.

24] In substance, though two courts have rejected to grant temporary custody of child to wife, however, in fact presently wife is having custody of child. The said fact was brought to the notice at the time of hearing of this application, however, I felt it appropriate to continue the custody with mother solely with a view that it is improper to shift the child from one to another, which would mentally affect the child.

25] Taking over all view of the position of parents, the place of living, the time which could be devoted to the child, gender and tender age of the child, undoubtedly mother should be preferred than father. In view of above discussion, both the Courts below erred in properly appreciating the factual aspect. The comparison suggests that child would be more comfortable with her mother rather than living at her uncle's house, that too in absence of continuous stay of father. In the result, both impugned orders would not sustain in the eyes of law. Hence, the revision application deserves to be allowed with following order:

ORDER

- I. Criminal Revision Application stands allowed.
- II. The impugned order dated 13/07/2021 passed in Criminal Appeal No.16/2021 along with the order passed by learned Magistrate below Exh.6, dated 18/02/2021 are hereby quashed and set aside.
- III. Application for grant of temporary custody [Exh.6] in Misc. Criminal Case No.316/2021 is hereby allowed.
- IV. The applicant/wife is entitled for temporary custody of a child in terms of Section 21 of the D.V. Act, which she shall retain.
- V. The non-applicant/father is entitled for sufficient access of child of which the suitable terms and conditions shall be decided by the Magistrate after hearing both sides.

(VLJAY JOSHI, J.)

**sandesh*