

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 357 of 2022

An application under Sections 397 and 401 of the Code of Criminal Procedure, 1973 challenging the judgment dated 11.07.2022 passed in Criminal Appeal No. 17 of 2018 by Additional Sessions Judge, Jharsuguda

AFR

Rakesh Singh

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Petitioner

-Versus-

Poonam Singh

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Opp. Party

Advocate(s) appeared in this case:-

For Petitioner : M/s. Prasanta Kumar Satapathy,
P. Panda, A.K. Rout, Advocates

For Opp. Party : Mr. Somadarsan Mohanty,
Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

6th December, 2022

SASHIKANTA MISHRA, J.

The petitioner questions the correctness of the order dated 11.07.2022 passed by learned Additional Sessions Judge, Jharsuguda in Criminal Revision Case No.17 of 2018 (treated as Appeal), whereby the order passed by learned S.D.J.M., Jharsuguda on 04.06.2018 in

CMC No.79 of 2018 under Section 21 of Prevention of Women from Domestic Violence Act, 2005 (in short, the 'PWDV Act') was set aside. The present opposite party- had filed an application under Section 21 of the PWDV Act claiming temporary custody of her child residing with his father. While learned S.D.J.M. rejected the prayer, learned Additional Sessions Judge set aside the order of learned S.D.J.M. by directing the petitioner- husband to deliver custody of the child to his wife within 30 days.

2. The petitioner and the opposite party are husband and wife having married on 28.11.2010. A male child named, Akhil Singh was born to them. The opposite party-wife being allegedly tortured by her husband and in-laws went to stay in her parental house along with her minor son on 01.01.2018. Her husband came and met her in her parental home and assured not to ill-treat her in future but forcibly took the child with him to his house. As such, the wife filed an application under Section 21 of the PWDV Act before learned S.D.J.M., Jharsuguda (CMC No.79 of 2018). After hearing both parties, learned S.D.J.M. took note of the age of the child at the relevant

time, i.e., 4 years and 8 months but held that he had been residing with his father and grant parents. Learned S.D.J.M., further held that even though the mother is the natural guardian of the child yet it would not be proper to disturb the healthy psychological environment of the child by sending him to a new place for a temporary period. It was further observed that Section 21 of the PWDV Act only speaks about temporary custody and in case the mother is interested for custody of her child, she can file application before the competent Civil Court under the Guardians and Wards Act, 1890 or any other law. Learned S.D.J.M. therefore, found no reason to grant temporary custody to the opposite party-wife and thus, rejected the petition.

3. The matter was carried in appeal to the court of Session. Learned Additional Sessions Judge after analyzing the facts of the case held that Section 21 provides for grant of custody to the aggrieved person or the person making an application on her behalf. In the instant case, the husband tortured his wife physically and mentally and drove her out along with her minor child.

Since the child is aged below five years, the custody of the child should be with the mother. Learned Additional Sessions Judge further held that there is no evidence on record to prove that the child would not be safe if he is kept in custody of the mother. As per Section 21, the appellant-wife is entitled to the custody of her child and the respondent-husband is entitled only to visiting rights. According to learned Additional Sessions Judge, learned S.D.J.M., should have taken into consideration the provisions prescribed under other law (Hindu Minority and Guardianship Act, 1956) and therefore, such order is palpably wrong. It was also held that the analysis of factual aspects made by the lower court is beyond the facts and evidence available in the case record and that the order was passed without recording any evidence. On such findings, learned Additional Sessions Judge allowed the appeal by directing the husband to deliver custody of the minor child to the wife within 30 days.

4. The said order is impugned in the present revision.

5. Heard Mr. P.K. Satpathy, learned counsel for the petitioner-husband and Mr. S. Mohanty, learned counsel appearing for opposite party-wife.

6. Mr. P.K. Satpathy questions the legality and propriety of the impugned order by contending that the same is beyond the scope and purview of Section 21 of the PWDV Act. As per the scheme of the provision, either the application filed by the aggrieved person (wife) in the present case is to be allowed or rejected. Learned S.D.J.M., found no merit in the application and therefore, rejected it citing valid reasons. Learned lower appellate court could not have reversed the said order by referring to the provisions contained in other laws relating to permanent custody of children and thereby ignoring the wishes of the child.

7. Mr. S. Mohanty, leaned counsel appearing for the wife contends that as per Section 21, the wife is entitled to temporary custody. Since the child is a minor, the lower appellate court rightly directed the husband to deliver custody of the child to her as the same would be in the best interest of the child.

8. Before delving into the merits of the rival contentions noted above, it would be proper to refer to the relevant statutory provisions at the outset. Section 21 of the PWDV Act reads as under;

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.

Section 36 of the PWDV Act reads as follows:

36. Act not in derogation of any other law.—*The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.”*

9. It is to be noted at the outset that in view of the provisions contained under Section 36, the applicability of the provisions of other law for the time being in force is not taken away. Coming to Section 21, the said provision confers powers on the Magistrate to grant ‘temporary custody’ of any child to the ‘aggrieved person’. In the present context, the wife obviously is the

aggrieved person having preferred the application under Section 21.

10. From the materials on record it is evident that the child was born on 01.10.2013 and is thus, aged about 9 years at present. Of course, at the time of passing of the order by learned S.D.J.M. he was aged less than 5 years. But at the time of passing of the order by learned Additional Sessions Judge, he was aged more than 8 and $\frac{1}{2}$ years. It has been alleged that the child was forcibly taken away on 01.01.2018 by the husband. 4 years 11 months (nearly 5 years) have elapsed in the meantime. The child, it is undisputed, has been residing during this period with his father. Learned lower appellate court has proceeded on the premise that for a child aged below 5 years, the custody should be with its mother. This is unconscionable in view of the fact that the child was aged more than 8 and $\frac{1}{2}$ years at the time of passing of such order.

11. Be that as it may.

12. During pendency of the present revision, this court made an attempt to know the wishes of the child

and accordingly directed the physical presence of both the parties and the child. On 30.08.2022, this Court deliberated with the child and directed the mother to have a talk with him alone during lunch hour and accordingly both of them spent some time with each other. When the Court thereafter asked the child as to whether he is interested to stay in the company of his mother, he answered in negative. Law is well settled that when the question of custody of a child is to be determined, the wish/desire of the child shall no doubt be considered but ultimately the welfare of the child should be the paramount consideration. The above view was taken by the Apex Court in the case of **Rohith Thammana Gowda v. State of Karnataka**, reported in 2022 SCC OnLine SC 937

Nonetheless, it has also been held that if the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

13. As already stated, the child has clearly refused to stay with his mother. In the opinion of this Court, the child being aged more than 9 years at present must be held to be capable of forming a rational opinion on its own without being prompted or tutored by anyone. This is all the more true when it is considered that such opinion was expressed by the child after it had interacted with the mother alone for some time. The child has been residing with his father for nearly five years by now. His educational and other needs are being looked after by the father and there seems to be no complaint or objection raised in this regard from any quarter much less the child itself. Therefore, this Court is of the considered view that the interest of the child would be better served and protected if he continues to stay with his father rather than the mother. Even otherwise, this Court finds that learned Additional Sessions Judge has been unnecessarily guided by the provisions of Section 6 of the Hindu and Minority and Guardianship Act, 1956, even though the same, *stricto sensu*, has little application while dealing with an application for temporary custody

under Section 21 of the PWDV Act. Moreover, learned Additional Sessions Judge has apparently misread the order of learned S.D.J.M. by holding that a direction was given to the aggrieved person to approach the competent civil Court. A reading of the order of the learned S.D.J.M. does not reveal any such direction but only an observation that if the opposite party-wife so wants she may approach the competent Civil Court. Obviously, this is not akin to giving a direction to approach the Civil Court.

14. Thus, on a conspectus of the discussion made hereinbefore and particularly keeping in view the wish/desire of the child and his best interests in view, this court is of the view that the child should continue to reside with his father.

15. Resultantly, the impugned order passed by learned Additional Sessions Judge is set aside and the order passed by learned S.D.J.M., is restored.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 6th December, 2022/ A.K. Rana, P.A.