

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPLICATION NO.2242 OF 2021

- 1) Sonam W/o Sonu Kagda,
Age: 23 years, Occu: Household,
R/o: Gandhi Nagar, At Present,
Sambhaji Colony, N-5, CIDCO,
Aurangabad. ... Applicant

Versus

- 1] Sonu S/o Ramchandra Kagda,
Age 28 Years, Occu: Private Service,
R/o: Gandhi Nagar, Near Hanuman Temple,
Infront of Ravivar Bazar, Aurangabad.
- 2) The State of Maharashtra,
Police Commissioner Office,
Commissionerate Office, Aurangabad.
- 3) Police Inspector,
Pundaik Nagar Police Station,
Aurangabad. ... Respondents

...

Ms. Aummaheshwari S. Jadhav, Advocate for Applicant.

Ms. Surti Zainab, Advocate for Respondent No.1. (Appointed).

Mr. P. B. Borade, APP for Respondent Nos.2 & 3 / State.

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CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 07th September, 2022.

PRONOUNCED ON : 14th September, 2022.

ORDER:

. Heard finally with consent of both the sides.

2 The applicant/wife is challenging the following order passed by the learned Judicial Magistrate First Class, Court No.9, Aurangabad in a proceedings of Criminal M.A. No.1548 of 2021.

“ORDER

1. The non-applicant No.3 Sonam Kagda is hereby directed to comply the order of Hon’ble Sessions Court, Aurangabad passed in Criminal Revision No.148/2020 i.e. to handover the custody of said child Unsh/Guruprit Sonu Kagda to the applicant Sonu Kagda till next date.
2. Non-applicant No.3 to comply the order of Hon’ble Sessions Court, Aurangabad and if failed to comply, then necessary action will be taken as per rule.
3. The Ld. Advocate of the non-applicant No.3 do take the note of this order.”

3 Heard Ms. Aummaheshwari Jadhav, learned counsel for the applicant, Ms. Surti Zainab, learned counsel for respondent No.1 and Mr. P. B. Borade, learned APP for respondent Nos.2 and 3/State.

4 Ms. Jadhav, learned counsel for the applicant submitted that the applicant Sonam Kagda has filed an application vide Criminal Miscellaneous Application No.1183 of 2020 before the learned Judicial Magistrate First Class, Aurangabad for custody of her minor son by way of search warrant under Section 97 of the Code of Criminal Procedure. The learned Magistrate was pleased to allow that application on 7th November, 2020 and directed to respondent No.1/husband to handover the custody of the child to the applicant/mother forthwith. The said order was challenged before the Sessions Court by way of Criminal Revision No.148 of 2020. The learned Additional Sessions Judge, Court No.12, Aurangabad, was pleased to allow that revision and quashed and set aside the order passed by the learned Magistrate in Criminal M.A. No.1183 of 2020 dated 7th November, 2020.

5 Ms. Jadhav pointed out that in the meanwhile the applicant/wife filed proceedings before the Family Court at Aurangabad to restrain respondent No.1 from taking custody of her son. The learned Judge of the Family Court was pleased to allow the interim application vide Exhibit-5 and respondent No.1/husband is restrained from taking custody of minor son Anshu @ Gurpreet S/o.

Sonu Kagda from the applicant during pendency of the proceedings. She submitted that in view of interim order passed by the Family Court, Aurangabad, respondent No.1 cannot execute the order passed by the Revisional Court, Aurangabad and that too by moving an application purportedly under Section 186 of the Code of Criminal Procedure. The proceedings is not at all maintainable and liable to be quashed in order to prevent abuse of process of law.

6 Per contra, Ms. Surti Zainab, learned counsel for respondent No.1/husband supported the impugned order passed by the learned Magistrate whereby direction was issued to the present applicant to comply the order passed by the learned Additional Sessions Judge in Criminal Revision No.148 of 2020 by handing over the custody of the child to his father Sonu Kagda. She submitted that the learned Magistrate has rightly invoked his jurisdiction in order to execute the order passed by the Revisional Court. There is no legal defect as such. She submitted that the present application is without merit and liable to be dismissed.

7 I have considered the submissions of both the sides. Perused various orders passed by the concerned Courts.

8 The fight between the couple is about custody of their son, who is minor. There cannot be any debate that Civil Court / Family Court is the proper *Fora* to decide the custody of a minor child. The order passed by the Revisional Court granting custody of the son to respondent No.1 is by way of interim arrangement. After all, the order passed by the Civil Court would be certainly binding on both the parties. The dispute about the custody of a child, who is minor, is already reached in the Family Court, Aurangabad. The Family Court after hearing both the sides and after referring various citations, was pleased to grant interim relief in favour of present applicant. The order passed by the Family Court below Exhibit-5 in Interim Application No.88 of 2021 in Petition No. D 21 of 2021 makes it clear. The Family Court was pleased to restrain respondent No.1/father from taking custody of minor son Anshu @ Gurpreet Sonu Kagda from the present applicant during pendency of the proceedings under Sections 7 and 12 of the Guardian and Wards Act, 1890.

9 Let the Family Court decide main petition referred above. It may not be in the interest of both the parties to go on with number of proceedings seeking custody of a child. The Family Court would decide the issue of custody of a child and appointment of guardian according to the provisions of the Guardian and Wards Act, 1890.

The proceedings of Criminal M.A. No.1548 of 2021 initiated by respondent No.1/father to execute the order passed by the learned Additional Sessions Judge, Aurangabad in Criminal Revision No.148 of 2020 is nothing but abuse of process of law.

10 It is settled position of law that the decision of Civil Court would prevail upon Criminal Court order. The Family Court is the *Fora* which may decide substantive civil rights of a party. Both parties need some patience to have a decision from Family Court.

11 Having regard to the above reasons and discussion, it would be just and proper to quash the proceedings of Criminal M.A. No.1548 of 2021 with directions to both the parties to abide by the order passed by the Judge Family Court below Exhibit-5 dated 13th October, 2021 till final decision in the said matter. The visiting rights are already given to respondent No.1/father, which would take care of his interest. Hence, the following order is passed:

ORDER

- I. The criminal application is hereby allowed in terms of prayer clause (A).

- II. Both the parties shall abide by the order passed by the Family Court, Aurangabad below Exhibit-5 dated 13th October, 2021 (in Interim Application No.88 of 2021 in Petition No. D 21 of 2021) till final decision in the said proceedings.
- III. Inform to the concerned Courts accordingly.
- IV. Ms. Surti Zainab, learned counsel is appointed by this Court from the Legal Aid panel. Her professional fees is qualified at Rs.5,000/-. The Secretary, High Court Legal Services Sub Committee, Aurangabad, is requested to make payment of professional fees to Ms. Surti Zainab, learned appointed counsel.
- V. No order as to costs.
- VI. The application is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]