

Ghuge

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 277 OF 2022

Abhay Manohar Pant	...Applicant
V/s.	
The State of Maharashtra & Ors.	...Respondents

**WITH
INTERVENTION APPLICATION NO.2210 OF 2022**

Jyotika Dilip Tase	...Intervener
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IN THE MATTER BETWEEN

Abhay Manohar Pant	...Applicant
V/s.	
The State of Maharashtra & Ors.	...Respondents

Ms. Seema Sarnaik i/b Sushant Valimbe for the applicant.

Mr. Sanjeev Kadam, i/b Ramanik Pawar for Intervener.

Ms. G.P. Mulekar, APP for the State.

Mr. Abhijit Sarwate, a/w Ajinkya Udane, i/b Ms. Hardev Kaur for (wife-Shubhangi Pant)-respondent No.2.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 19, 2022

P.C.:

1. This revision is by the husband in proceedings arising from the custody of his female child (Aarya)(10 years). The facts relevant to the adjudication of the issues are as under:-

On 18th January 2011, the marriage between the petitioner and respondent No.2 was performed. On 08th June 2012, daughter Aarya was born. Due to the quarrels between the petitioner and respondent No.2, the divorce petition came to be filed before the Family Court. The First Information Report under the provisions of POCSO Act was also filed against the petitioner, which according to the petitioner, was at the instance of respondent No.2. The petitioner was arrested in the said offence. At the time of arrest, the daughter Aarya was with the petitioner. On 19th February 2021, the Child Welfare Committee, Pune, took custody of daughter Aarya. On 3rd March 2021 petitioner was granted bail and was released from judicial custody on 31st March 2021.

2. Child Welfare Committee on 22nd February 2021 passed an order directing handing over custody of the petitioner's daughter (Aarya) to the care and protection of Balgram Yerawada, Pune. Respondent No.2 challenged the said order by Criminal Appeal No.76 of 2021. The petitioner was not made the party in the said appeal. By impugned order dated 16th June 2021, the learned Sessions Judge allowed the appeal by setting aside the order passed by the Child Welfare Committee handing custody to Balgram Yerawada, Pune. The Additional Sessions Judge further directed respondent No.1 to hand over custody of daughter Aarya to respondent No.2. Aggrieved thereby, the petitioner has filed the present revision application, which was initially filed as a Criminal Writ Petition but was converted into a Criminal Revision Application.

3. Ms. Seema Sarnaik learned Advocate for the applicant made following submissions :-

I) In the absence of the father being made a party to the appeal, the appeal itself was not maintainable.

II) There is no discussion in the Judgment as to why custody was directed to be handed over to the mother in preference to the father. In the absence of the father being made a party to the appeal, legal prejudice has been caused to the father as he could not point out to the learned Sessions Judge why the custody of the child was required to be handed over to the father.

4. Per contra, Mr. Sarwate, learned Advocate for respondent No.2, submitted that pendency of the criminal proceeding under the POCSO Act disentitles the petitioner from claiming custody of his daughter. He submitted that the Sessions Court has considered the grounds raised in the appeal, and based on such grounds, the order of handing over custody to the mother has been passed. According to him, the factors for handing over custody to the mother are implicit in the order. He, therefore, submitted that the learned Additional Sessions Judge has rightly exercised its jurisdiction vested in it by law.

5. Having considered the submissions made on behalf of both the parties, in my opinion, the impugned order deserves to be quashed and set aside on the limited ground that the learned Appellate Judge has failed to supply reasons for handing over custody in favour of the mother as opposed to the father. The

sessions court has recorded a finding that there is no inquiry conducted by a committee under Section 40(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015. There is no report from District Child Welfare Officer before concluding that the child needs care and protection. It is also held that there is nothing to show that the Committee considered the child's opinion.

6. While setting aside the order passed by Child Welfare Committee, except for reasons in paragraphs No.17 and 18, no other reasons have been assigned by the Sessions Judge. If inquiry under section 40(3) was not carried out or mandatory procedure was not complied with by the Child Welfare Committee, it was obligatory for the learned Sessions Judge, being Appellate Court, to remand the proceeding back to the Child Committee for reconsideration.

7. Furthermore, the learned Sessions Judge directed respondent No.1 to hand over custody of the minor child to the mother without taking into consideration the aspect of the welfare of a child or essential parameters. It is pertinent to note that clause 3 of the operative part of the order of Sessions Court is not in the nature of interim arrangement till the appropriate orders regarding custody of a child are passed by Family Court. Such a course would have enabled the father to seek custody of his daughter. In my considered opinion, in the absence of the father being made a party to such an appeal, clause 3 of the order passed by the learned Sessions Judge cannot be sustained.

8. Since the learned Sessions Judge had allowed the appeal for noncompliance of mandatory procedure under the provisions of the Act, the proceedings need to be remanded to the Child Welfare Committee for passing appropriate order regarding handing over custody to the parent.

9. Since the issue involved in the present revision is regarding the custody of a minor child of petitioner to respondent No.2, it is necessary in the interest of justice to pass an appropriate order regarding the custody of minor child Aarya till the appropriate orders are passed either by the Child Welfare Committee or by the Family Court before the proceedings for custody of the child are pending.

10. The petitioner being the natural father, at this stage, is entitled to have at least visitation right of child Aarya since this order is passed to take care of the situation in the interregnum period till the rights are adjudicated by either Child Welfare Committee or Family Court, as the case may be.

11. Mr. Sarwate, learned Advocate for respondent No.2, submitted that since the offence under the provisions of POCSO has been registered against Petitioner, it dis-entitles him from claiming even visitation rights. Having considered the submission, in my opinion, the filing of the First Information Report, which according to the petitioner, is at the instance of respondent No.2, would not disentitle the petitioner from claiming visitation rights. It is undisputed that the petitioner is the natural father of the daughter (Aarya).

12. At this stage, it would be profitable to make the reference of the judgment of Apex Court in the case of ***Yashita Sahu v. State of Rajasthan***, (2020) 3 SCC 67, where in paragraph 22 it held as under:

22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody, clearly define the nature, manner and specifics of the visitation rights.

23. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

13. In the light of the aforesaid judgment, in my opinion, mere filing pendency of the case under POCSO Act against the petitioner is not sufficient to deny even visitation rights to the natural father.

14. Mr. Sarwate next submitted that the child had expressed unwillingness to reside with the father. However, I have considered the statement of daughter Aarya recorded on 19th February 2021, where she consented to reside with the father. Thereafter, the custody of the child is not with the father. Hence, as alleged by respondent No.2, unwillingness cannot detain this Court from granting visitation rights to the petitioner.

15. Mr. Sarwate next submitted that this court exercising power under Section 401 of Code of Criminal Procedure, 1973 and has only those powers which are specifically conferred by Section 401 of Code of Criminal Procedure, 1973, which empowers the Court to set aside the impugned order and nothing else.

16. The object of revisional jurisdiction is to confer upon superior Criminal Courts a kind of paternal or supervisory jurisdiction to correct a miscarriage of justice. Where there has been failure of justice, it is not only the province of this court to interfere but also the duty. Since the proceedings arise out of custody of the child, the power of this Court to grant relief in favour of either parent or to pass an order considering the welfare of the child is not taken away. In the matter of custody of child, this Court can exercise incidental or consequential power under Section 401 of Code of Criminal Procedure, 1973 to pass appropriate orders in furtherance of welfare of child and to protect

the dignity of child. In the matter of custody of child, it would be *Parens Patriae* Jurisdiction of this court which enables it to pass necessary orders for protection of welfare of child. The High Court being the Court of record, can always exercise incidental power being court of record. Therefore, in my opinion, Section 401 would not detain the High Court from granting visitation rights to the natural father during the interregnum period until the rights of parents are adjudicated by the appropriate forum, i.e., by the Child Welfare Committee or the Family Court. I, therefore, pass the following order :-

- I) The impugned Judgment and Order passed by the Additional Sessions Judge, Pune dated 16th June, 2021 in Criminal Appeal No.76 of 2021 is quashed and set aside ;
- II) The proceeding is remanded back to the Child Welfare Committee, which shall pass an appropriate order in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, after giving opportunity of hearing to the petitioner and respondent No.2. Child Welfare Committee shall pass appropriate order within two (2) months from today.
- III) Till the Child Welfare Committee passes final order on the custody of the daughter of the petitioner and respondent No.2 (Aarya), the petitioner shall have visitation rights to meet the daughter Aarya on *25th and 28th of October, 2022* between 03:00 p.m. to 06:00 pm at *Swadhar IDWC, Flat No.301, Dhan-Shree Apartment opposite Chittaranjan Vatika,*

Model Colony, Pune-411005 under the supervision of the counselor of the Family Court subject to payment of his charges by the petitioner.

IV) From 1st November 2022, the petitioner shall have visitation at Family Court premises in Pune between 03:00 p.m. to 06:00 p.m. every Saturday. On such Saturday when the Family court is closed, the visitation place shall be *Swadhar IDWC, Flat No.301, Dhan-Shree Apartment opposite Chittaranjan Vatika, Model Colony, Pune-411005*, under the supervision of the counselor of the Family Court, subject to payment of his charges by the petitioner.

V) This interim arrangement shall be subject to further orders passed by the Family Court in the Divorce Petition filed by the petitioner. Apart from the application filed by the petitioner for retaining the interim custody, the petitioner is at liberty to file a fresh application for custody of the child, which shall be decided by the Family Court in accordance with law.

VI) Respondent No.2 shall not interfere with the meeting between the father and child Aarya, which would be under the supervision of the counselor of the Family Court.

VII) The grant of visitation rights to the father should not be construed as an opinion on the rights of the father to seek permanent custody of the daughter (Aarya).

VIII). On payment of regular charges, the in-charge of the Chandan Nagar Police Station shall provide a lady constable

in plane clothes at Swadhar IDWC, Flat No.301, Dhan-Shree Apartment opposite Chittaranjan Vatika, Model Colony, Pune 411005 on 25th and 28th October, 2022 at 03:00 p.m. to 06:00 p.m. so that any untoward incident during the meeting shall be avoided.

17. The Revision Application No.277 of 2022 stands disposed of in the above terms. No costs.
18. In view of the disposal of the Revision Application, the Intervention Application would not survive and stands disposed of accordingly.
19. Copies of the reports received by this Court from the Marriage Counselor, Pune or any other reports shall be sent to the Child Welfare Committee, Pune and the Family Court, Pune, to be placed in the respective proceedings.

(AMIT BORKAR, J.)

(The order is modified as per order dated 21st October, 2022. The corrections in the clauses 16(III), 16(IV) and clause 16(VIII) are inserted and corrected which shows in italics)