

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

CRIMINAL WRIT PETITION NO. 2732 OF 2022

Rajesh Bhanudas Helkar	...Petitioner
Versus	
Urmila Helkar And Ors.	...Respondents

....

Mr. Priyal G. Sarda, Advocate for the Petitioner.

Mr. Nitin Sejpal a/w Mrs. Pooja Sejpal a/w Ms. Akshata B. Desai a/w
Mr. Yogesh Devyani, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent – State.

....

CORAM	:	PRAKASH D. NAIK, J.
DATE	:	29th AUGUST, 2022.

PER COURT:

1. The petitioner has challenged order dated 29.07.2022 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Appeal No.421 of 2022 and order dated 13.07.2022 passed by learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai below Exhibit – 1 in C.C. No.218/DV/2021.

2. The respondent No.1 is wife of the petitioner. Their marriage was performed on 29.11.2012. They have two children out of wedlock.

3. The respondent No.1 initiated proceedings under Section 12 of the Protection of Women from Domestic Violence Act (herein

after referred to as 'DV Act') before the Court of learned Additional Chief Metropolitan Magistrate, Bandra, Mumbai which were registered as C.C. No.218/DV/2021. The respondent No.1 had sought reliefs under Sections 18, 19, 20, 21, 22 & 23 of the DV Act. The petitioner was respondent No.1 in the said proceedings, whereas the relatives of the petitioner were Respondent Nos.2 to 5. According to respondent No.1, she was subjected to domestic violence. The petitioner filed reply in the said proceedings on 10.02.2022. The petitioner preferred Misc. Application before the Court of learned Metropolitan Magistrate on 10.02.2022 and prayed that, before considering issue of custody of children, the respondent No.1 and children be directed to be examined by Psychiatrist and report be called. The application was opposed by respondent No.1 by filing reply on 09.03.2022. Subsequently joint pursis (Exh.15) was filed before the Court of learned Magistrate on 22.04.2022 stating that the applicant therein (respondent No.1) undertakes to undergo medical test for syndrome of schizophrenia for unsoundness of mind to be conducted by any duly qualified (Psychologist/Psychiatrist) to be directed by this Court in presence of respondent. The respondent therein (petitioner) undertake to handover the custody of minor children without protest or demur to the applicant (respondent No.1) being declared of sound mind in

the aforesaid medical test.

4. The learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai passed order dated 13.05.2022 on the joint pursis. In the said order it was observed that, as per joint pursis it is informed by the the parties to the Court, the respondent shall have no objection to give the custody of their minor Children Shourya and Shriya to the applicant (Respondent No.1 herein) if applicant undergoes psychological medical test for unsoundness of mind and syndrome of schizophrenia and she is ultimately declared of sound mind upon such test. By the first Paragraph of pursis Exhibit – 15 it is informed by the parties that respondent is ready without any objection to handover the custody of the children to the applicant (respondent No. 1) if, the psychological test declares the applicant of sound mind. The applicant and respondent only by way of pursis that the applicant (respondent No.1 herein) undertakes to undergo psychological medical test in presence of respondent by a duly qualified doctor (Psychologist/Psychiatric). Both the parties before the Court submitted that Dean of J.J. Hospital be requested to assign the Psychologist/Psychiatric to conduct psychological test of the applicant. The report of the Psychologist submitted to the Court will be binding on both the parties. It is also informed that respondent (petitioner herein)

undertake to handover/give away the custody of minor children without protest or demur to the applicant, upon applicant being declared of sound mind in the aforesaid medical test. In view of the joint pursis filed by the parties, applicant is ready to undergo psychological test and both the parties are ready to abide by the report of Psychologist submitted after examination of the applicant.

The operative part of the said order is as follows :-

ORDER

- “1. The Dean of Sir, J.J. Hospital, Mumbai is requested to appoint a Psychiatrist/Psychologist to conduct psychological test of applicant Smt. Urmila Rajesh Helkar.
2. The report of Psychological test of the applicant Smt. Urmila Rajesh Helkar be submitted to the Court with a finding that whether the applicant is suffering from unsoundness of mind or syndrome of schizophrenia.
3. The concerned psychologist is requested to allow the respondent No.1 Only for giving history if, any and during the medical test if psychologist requires presence of respondent No.1 psychologist may allow him to remain present.
4. The concerned Psychologist is requested to conduct psychological test of applicant Smt. Urmila Rajesh Helkar and submit report to the Court within tow weeks from the receipt of the request from the Dean of Sir J.J. Hospital, Mumbai.
5. The respondent and the applicant are directed to cooperate the Psychologist for conducting psychological test of the applicant as directed by the concerned psychologist.
6. The applicant and the respondent are directed to remain present before Dean of Sir J.J.Hospital, Mumbai on 18.05.2022.”

5. The respondent No.1 was examined at J.J. Hospital, Mumbai.

The Medical Officer, Sir, J.J. Hospital, Mumbai submitted Medical examination report of respondent No.1 vide letter dated

25.05.2022 to the Court of learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai.

6. The report was signed by one Psychologist and three Psychiatrist from Grant Govt. Medical College and Sir J.J. Group of Hospitals. The report refers to psychiatric evaluation of respondent No.1 under the caption of 'History' it is stated that, the respondent No.1 came for psychiatric evaluation and reporting. The respondent No.1 and the petitioner were interviewed separately. Case first reported to psychiatry OPD on 15.05.2022. She was assessed by Professor, Assistant Prof. and Senior Resident on 18.05.2022 and 20.05.2022. Psychological testing of respondent No.1 was done by Senior Psychologist Mrs. Beena Sawant. Psychological testing report was attached. The Findings mentioned therein were that mental status examination within normal limits. Psychological testing done (20.05.2022). Psychologist did not require presence of petitioner. She shows good ego, strength. Hope for future is constructive. Her problem solving ability is present. Good self Concept. No pathological sign seen. Touch with reality is very good. The impression indicated is that she is of sound mind. She is not suffering from Schizophrenia.

7. In spite of the aforesaid report, the petitioner preferred application on 9th June, 2022 seeking directions to conduct test

impartially and submitting report to the Court. The respondent No.1 opposed the said application by filing say on 09.06.2022. The petitioner preferred application on 20.06.2022 for rejecting the report and that the petitioner do not accept the report. The learned Magistrate rejected the said application on 21.06.2022. While passing the said order it was observed that, no case is made for re-examination of the patient. The petitioner had filed on record affidavits of neighbours about behaviour of respondent No.1. The learned Metropolitan Magistrate vide order dated 13.07.2022 partly allowed the prayers for interim relief. The petitioner was directed to pay Rs.10,000/- per month to respondent No.1 towards interim maintenance from the date of application till final decision of the main application. The petitioner was directed to pay amount of 10,000/- per month to respondent No.1 towards interim rent for alternate accommodation from the date of order till final disposal of the main application. The petitioner was directed to handover the interim temporary custody of the children to the Respondent No.1 within 15 days till final decision of the main application. The respondent No.1 and the petitioner shall mutually file arrangement of the visits by the petitioner with children once in 15 days from handing over interim custody to the respondent No.1 herein. The order of interim custody of children with respondent

No.1 in this petition and visiting rights of the petitioner herein are subject to order of any competent Court having jurisdiction to decide custody of the children. The respondent No.1 shall not take away children out of India without permission of the Court. The prayer for restraining the petitioner from alienating Stridhan and return of Stridhan was rejected. The prayer for restraining the respondents therein from committing future domestic violence was rejected. The prayer for interim compensation was rejected. The petitioner preferred application for stay of the order on the ground that petitioner proposes to challenge the said order by preferring appeal. The learned Magistrate by separate order dated 13.07.2022 granted fifteen days time to petitioner to prefer appeal. The application for examination of children by Psychiatrist preferred by petitioner was also rejected on 13.07.2022.

8. The order dated 13.07.2022 was challenged by the petitioner herein before the Sessions Court by preferring Criminal Appeal No.421 of 2022. The appeal was dismissed on 29.07.2022. The petitioner preferred application Exhibit – 3 before Sessions Court, in appeal for stay to the order passed by learned Magistrate. The learned Sessions Judge rejected the said application by order dated 29.07.2022.

9. Learned Advocate for the petitioner submitted that the

impugned orders are required to be set aside. The children are in custody of the petitioner. The Courts below ought to have considered that the children are aged about 8 years and 4 years. Both are studying in school at Pune. The respondent No.1 is residing in Mumbai and the transfer in the mid of academic year will cause serious prejudice to their academic career. The petitioner is taking care of the children. The respondent No.1 is suffering from psychological problem. She is not able to maintain the children. The trial Court has overlooked the affidavits filed by the neighbours. The objection filed by the petitioner on medical report was not considered by the Courts. More weightage was given to psychological report. The medical test was not conducted as per the joint pursis. The Medical report dated 10.04.2021 of P. D. Hinduja Hospital ought to have been considered in proper perspective. The Courts committed error in granting temporary custody of children to respondent No.1. The Medical Officer did not take any information inspite of directions to that effect given by the Dean of Sir J.J.Hospital. The respondent No.1 had left the children in custody of the petitioner. The children are not interested in joining her mother.

10. The petitioner has filed additional affidavit in support of this petition. In the affidavit it is stated that, he is in receipt of

documents under RTI from Public Information Officer and Assistant Police Commissioner, Kothrud Road, Division, Pune. It is submitted that respondent filed D.V. complaint on 02.12.2021 along with interim application. The respondent No.1 lodged the complaint of molestation of children by petitioner with Mahim Police Station on 03.01.2022. Mahim Police Station has not taken complaint. The respondent No.1 sent notice dated 16.02.2022 to Uttam Nagar Police Station, Pune and Assistant Commissioner of Police, Swargate Division, Pune with video recording in pen drive. In the complaint dated 16.02.2022, the respondent No.1 has alleged that the acts of alleged molestation committed by the accused are false. As per her complaint, the PSI of Uttam Nagar Police Station, Pune recorded the statements in presence of Counsellor of Foundation for Child Protection. In the said statement, petitioner's son Shourya stated that the petitioner and his relative has not committed any offence. The petitioner was not aware about the complaint filed by the respondent till 26.02.2022. He was asked to report Uttam Nagar Police Station along with son. After the inquiry was completed, the report was submitted to Uttam Nagar Police Station, Pune. It was observed that nothing incriminating was found in the videos given by respondent. Shourya was taking treatment of Therapy since 23.12.2021. The treatment continued

up to 14.03.2022. The respondent No.1 had created chaos by visiting the hospital. The treatment was required to be stopped. The petitioner had taken his son to Sasoon Hospital on 22.07.2022 for said therapy which was not available in the said hospital. Both the children are regularly going to school. Examination of Shourya will commence from 15.09.2022.

11. Learned Advocate for respondent No.1 submitted that both the Courts below has taken into consideration the factual aspects of the case and passed the impugned orders. The welfare of the child is paramount. The custody of the children should be given to mother. The petitioner had filed joint pursis with respondent No.1 and agreed that the custody of the children would be handed over to respondent No.1 in the event, the medical examination opined that the respondent is of sound mind. After the report was received, the petitioner took U-turn and challenged the said report. The respondent No.1 is of sound mind. The petitioner took the children in his custody. The respondent No.1 was examined by the Psychiatrist of Sir J.J. Hospital. There is no reason to doubt the medical report. After the children were in custody of petitioner, the school report regarding academic performance of the child are not good. The respondent No.1 has filed affidavit-in-reply. She has stated that, she is competent to take care of the children. She is

equipped with sufficient means as well as support from parental family members viz. her brother and sister, to assist her in upbringing of children. They have made arrangement for school admission of both children so as to ensure that there is no academic loss. The welfare of child, it is expected from husband to handover custody of children to wife. Children are minor and in need of care and caution by mother. The role of the mother in the development of the child's personality can never be doubted. The Hon'ble Supreme Court in several decisions have observed that child gets the best protection through the mother. It is a most natural thing to any child to grow up in the company to one's mother. The company of the mother is most natural thing for a child. Neither the father or any other person can give the same kind of love, affection, care and sympathy to the child as that of mother. The company of mother is more valuable to growing the female child. It is also stated that the petitioner is indulging in notorious activities. Some photographs of petitioner with women are annexed to affidavit in reply. She has lodged FIR against the petitioner under Section 498-A, 323, 504 & 506 r/w Section 34 of Indian Penal Code. The school report of Shourya indicate before both the kids were forcibly taken away by the petitioner his progress was excellent. Presently, the report shows poor performance of children.

The respondent No.1 is trying to get admission of the child in the school at Chembur.

12. It is pertinent to note that the respondent No.1 had initiated the proceedings under the DV Act before the Court of learned Magistrate. The petitioner had claimed that the respondent No.1 is suffering from schizophrenia and that she is not of sound mind. The respondent No.1 agreed to get herself examined by the medical officer. Joint pursis were filed and it was agreed by the petitioner that, in the event the medical report shows that the respondent No.1 is of sound mind, he would handover the custody of the child to her. The respondent No.1 was examined at J.J.Hospital by the psychiatrist. The report is signed by one psychologist and three psychiatrist. There is no reason to doubt the said report. The petitioner had challenged the said report and submitted that the medical examination may be conducted impartially. The opinion of the petitioner cannot be substituted with the opinion expressed by the medical officer at J.J. Hospital. The report refers to the examination of respondent No.1. It clearly states that she is sound mind. She is not suffering from schizophrenia. Learned Magistrate has rightly rejected the application filed by the petitioner with the objections to the medical opinion and re-examination of respondent No.1. The learned Magistrate then passed order with

regards to maintenance and other reliefs and interim custody of the children. I do not find any reason to deviate from the order passed by the learned Magistrate. The order dated 13.07.2022 was passed in detail by appreciating all the requisite aspects. In Paragraph – 53 it was observed that both parties are mainly against each other on the point of custody of children. They are having two children. One son by name Shourya aged about 8 years and daughter Shreya aged about 3 years. It was contended by the respondent No.1 that children are influenced by the petitioner and tutored to believe that the respondent No.1 is villain. No care was taken of daughter when she was ill. The petitioner is having extra marital affairs with woman and engages in attending prostitutes. Telephonic conversation and transcriptions proves that the respondent No.1 was kept out of reach of children. The respondent No.1 has not seen the children since August, 2021. By referring to photographs, transcriptions and documents on record it was argued at the instance of respondent No.1 that for deciding custody of children paramount consideration is welfare of the children. The custody should be handed over to respondent No.1. The learned Magistrate has considered the submissions of both the sides and law relating to custody of children which is apparent from the observations made in Paragraphs – 53, 54, 56, 57, 58 & 60. It is well reasoned

order. There is no ground for setting aside the said order. Similarly the learned Sessions Judge has dismissed the appeal preferred by the petitioner. The Sessions Court assigned reasons for dismissal of appeal. In paragraph – 13 of the impugned order dated 29.07.2022, it is observed that after perusing the report given by Sir J.J. Group of Hospitals, after thorough examination, 3 Psychiatrist and 1 Psychologist gave findings and opined that wife Urmila is of sound mind. Sir J.J. Group of Hospital is premier Hospital run by the State Government. The order of trial Court itself shows that the husband to allow only for giving history, if any, and during the medical test if requires. It was not mandatory on doctors to conduct examination in the presence of the petitioner. What is directed by the trial Court is complied by the Doctors. Section 21 of the Mental Health Act contemplates, separate certification of each doctor, who examined alleged mentally ill person. The process enumerated under Section 21 of Mental Act is required for processing the reception order to be obtained from the Magistrate. The said provision is not attracted in the present case when voluntarily wife and husband agreed for examination to remove their doubts. So, prima facie the opinion given by the Doctor of Sir J. J. Group Hospital is genuine one and proved that wife is of sound mind. It was obligatory on the part of the husband

to handover the custody of the children to wife in accordance with pursis accepted by them.

13. Learned counsel for the respondent No.1 has relied upon several decisions such as **Rajeshwari Chandrasekar Ganesh V/s. The State of Tamil Nadu & Ors.** delivered in Writ Petition (Criminal) No.402 of 2021 dated 14.07.2022, The decision in the case of **Smt. Sreeparna Banik (Saha) Vs. Sri. Ankur Saha** decided by the High of Tripura, **Vivek Singh V/s. Romani Singh** delivered in Civil Appeal No.3962 of 2016, wherein it was observed that the proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. Reliance is also placed on the decision in the case of **Mr. Abhijit Bhikaseth Auti Vs. State of Maharashtra and Anr.** delivered in Criminal Writ Petition No.2218 of 2007 dated 16.09.2008, wherein this Court had considered the issue of grant of custody of children.

14. It is pertinent note that, interim custody of children has been given to respondent No.1 till main application is finally decided. The Court was required to analyze the fact in some details on

account of objections raised by petitioner and applications filed by him. In the light of the factual aspects as stated above, it is noted that the children are minor aged about 8 years and 4 years. The welfare of the child is of paramount importance. At this age the children require love and affection of mother. The children are away from mother for long period of time. They cannot be kept away from the mother for further period. I do not find any reason to disturb the orders passed by the Court of learned Magistrate and the Court of Sessions. Considering the aforesaid circumstances I pass the following order :-

ORDER

- i. Criminal Writ Petition No. 2732 of 2022 is dismissed.
- ii. The custody of the children be handed over to respondent No.1 on 12th September, 2022 at 3.00 p.m. before the learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai, through Protection Officer appointed under the Protection of Women from Domestic Violence Act.

(PRAKASH D. NAIK, J.)