

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CRR-297-2022 (O&M)

Date of Decision: *December 08, 2022*

Rinku Kumar

.... *Petitioner*

Versus

Swati Rustagi and others

... *Respondents*

CORAM: HON'BLE MR. JUSTICE VIVEK PURI

Present: Mr. Vineet Jakhar, Advocate,
for the petitioner.

Vivek Puri, J.

The petitioner has assailed the order dated 07.02.2022 passed by the Court of learned Additional Sessions Judge, Gurugram, vide which the order dated 22.09.2021 passed by the learned trial Court with regard to the interim custody of the child has been modified.

The respondent No.1 had initiated the proceedings under the Protection of Women from Domestic Violence Act (hereinafter referred to as the `Act') against the petitioner and others. During the course of the proceedings, an application under Section 21 of the Act has also been moved for the interim custody of the minor son. The learned trial Court in terms of the order dated 22.09.2021 allowed the application and the petitioner was directed to hand over the custody of the minor child to the respondent on or before 13.10.2021. It was also observed that the order under

Section 21 of the Act is an interim measure and only temporary custody has been given.

The petitioner has assailed the order by preferring an appeal under Section 29 of the Act before the Court of Sessions. The appeal preferred by the petitioner has been dismissed, but the impugned order has been modified with the following observations:-

“Needless to say that welfare of the child is of paramount consideration and temporary custody of the child must remain with the respondent-mother who is able to provide all the basic amenities to the child as since from his birth. This order is for temporary custody of the minor child and appellant-respondent can move proper application before competent court of jurisdiction under the Guardians and Wards Act for seeking permanent custody of the child, if so desires. However, it is pertinent to note that though the appellant-father may not be entitled to the temporary custody rights of the child, however, he being the father of the child, cannot be completely deprived of meeting his child and visiting his for his welfare and well-being. It is also not desirable that the children should grow without having the love and affection of her father who too has a right to help in the upbringing of the child. Therefore, it is held that the temporary custody of the minor children shall remain with the mother i.e. respondent but

the child should also get sufficient exposure to his natural father.

In view of the above findings and observations, the minimal visitation rights can be allowed to the father. The order dated 22.09.2021 passed by the learned trial Court is modified to the extent that the appellant shall be entitled to meet the child on 1st and 3rd Saturday of every month from 11.00 AM to 4.00 PM at any place with the consent and convenience of both the parties. The mother shall bring the child at the place at 11.00 AM sharp and shall allow the children to interact with the appellant from a comfortable distance and shall collect the child at 4.00 PM sharp from there. The respondent shall not also prevent the child from receiving any gifts that may be given by the father to child.

However, as regards to the rest contentions made by the appellant-respondent, the appeal stands dismissed being devoid of merit.”

I have heard learned counsel for the petitioner and perused the record.

The learned counsel for the petitioner has argued that as per the provisions of Section 21 of the Act, only temporary custody can be granted, but the Courts below have granted permanent custody of the minor child to the respondent no.1. Furthermore, the order passed by the learned trial Court depicts the designation of the Presiding

Officer as Civil Judge (Junior Division) and consequently, the said order has been passed by the Court which was not competent to deal with the matter. The respondent no.1 is a patient of schizophrenia and it shall not be appropriate to hand over the custody of the minor child to the respondent no.1.

It may be mentioned here that the age of the child is stated to be less than 5 years. By no stretch of imagination, it can be said that the permanent custody of the child has been passed on to the mother i.e. the respondent no.1. There is specific and categoric observation by the trial Court to the effect that the order under Section 21 of the Act is of an interim measure and only temporary custody of the child has been given. Even the lower appellate Court has observed that only the temporary custody of the child shall remain with the respondent no.1 and furthermore, the petitioner can move proper application before the competent Court of jurisdiction under the Guardians and Wards Act for seeking permanent custody of the child, if so desires. The lower appellate court has been considerate enough and has even extended visitation rights to the petitioner. Section 21 of the Act provides for custody of the minor child as a temporary measure and there is nothing to indicate that the jurisdiction has been wrongly exercised by the Courts below in passing on the temporary

custody of the child to the mother who is less than 5 years of age.

It shall not be appropriate to interfere in the order passed by the learned trial Court merely because the designation has been specified as Civil Judge (Junior Division) instead of Judicial Magistrate First Class. The same is result of typographical / clerical error and it does not in any manner the effect the merits of the case. The rival contentions of the parties have been dealt with and appropriate order has been passed by the trial Court.

Besides, on a query, the learned counsel of the petitioner has not disputed the fact that no such challenge to the order passed by the learned trial Court was raised in the grounds of appeal submitted in the Court below.

The learned counsel for the petitioner has argued that the respondent is a patient of schizophrenia and in such circumstances, the custody of the child with her will not be for the welfare and benefit of the child.

In this regard, it may be mentioned here that in terms of the order dated 04.04.2022, it was pointed out that the respondent is a patient of schizophrenia. As there was no medical record to specifically indicate that the respondent has been diagnosed with such disease, the petitioner had sought time to verify with regard to availability of such record. Significantly, no such medical

record has been produced by the petitioner. Although, there are allegations to the effect that the respondent no.1 is suffering from depression, but there is lack of material on record that the health issues, if any, being suffered by the respondent no.1, are grave to the extent that it shall not be for the welfare and benefit of the minor child to remain in her custody. The child being less than 5 years of age is required to be in the custody of the mother, particularly, on account of lack of material to indicate that the respondent is suffering from any ailment which may prevent her from taking proper care of the child in his upbringing. Even the petitioner has been given visitation rights by the learned lower appellate Court.

In these circumstances, no illegality or irregularity is made out in the impugned orders, which may warrant interference by this Court.

Instant petition is dismissed, accordingly.

December 08, 2022

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(Vivek Puri)
Judge

Whether speaking/reasoned	:	Yes/No
Whether reporting	:	Yes/No