

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)
CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 291 of 2022

Sri Krishna Kundu

Vs

Puja Kundu Mukherjee.

For the Petitioner : Mr. Anirban Banerjee.
Mr. Debasish Mukhopadhyay.

For the Opposite Party : None.

Heard on : 04.04.2023

Judgment on : 05.04.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for setting aside of order no. 15 dated 30.11.2022 passed by learned Additional Sessions Judge, Fast Track Court, Siliguri in connection with Criminal Revision No. 30 (12) of 2020 (CIS No. 30 of 2020).
2. The petitioner's case in short is that the petitioner got married with the opposite party on 20.05.2010 and after their marriage the petitioner and the opposite party started to lead their conjugal life at their matrimonial house at Bairagi Para, Mohit Nagar, Assam More, Police Station-Kotwali, District – Jalpaiguri and since the solemnization of marriage the opposite party was reluctant to stay at her matrimonial house and as a result in the month of April 2011 the petitioner was forced by the opposite party to leave his parental house and shift to a rented house in Siliguri. Out of their wedlock the opposite party gave birth to a male child on 30.10.2013.
3. The petitioner/husband states that since the inception of the marriage the petitioner was subjected to tremendous mental and physical torture by the opposite party and on 23.03.2020 the petitioner was forced to leave the rented house in Siliguri along with his minor son and come back to his house at Bairagi Para, Mohit Nagar, Assam More, Police Station- Kotwali, District- Jalpaiguri.

4. That on the basis of false and baseless allegations against the petitioner, the opposite party lodged a written complaint before the Siliguri Women Police Station on 06.06.2020 and on the basis of the said written complaint the concerned authority registered an First Information Report vide Siliguri Women Police Station Case No. 74 of 2020 dated 06.06.2020 under Section 498A/323/509 of the Indian Penal Code, 1860.
5. That only with an intention to further harass the petitioner, the opposite party on 17.08.2020 filed a complaint before the learned Additional Chief Judicial Magistrate, Siliguri vide CR Case No. 314 of 2020 under Section 342/344 of the Indian Penal Code, 1860 along with an application under Section 97 of the Code of Criminal Procedure, 1973 for issuance of search warrant.
6. The case was subsequently transferred to the court of learned Judicial Magistrate, 1st Court, Siliguri and the learned Magistrate gave extensive hearing to both the parties and **also recorded the statement of the minor child wherein the minor child specifically stated that he wants to stay with his father as his mother is violent in nature.** Accordingly vide order dated 12.10.2020 the learned Judicial Magistrate, 1st Court, Siliguri was pleased to hand over the custody of the minor child in favour of the petitioner/father.

7. Challenging the aforesaid order dated 12.10.2020 passed by the learned Judicial Magistrate, 1st Court, Siliguri, the opposite party moved a revisional application before the learned Sessions Judge, Darjeeling vide Criminal Revision No. 30(12) of 2020. Vide order dated 30.11.2022 the learned Additional Sessions Judge, Fast Track Court, Siliguri was pleased to set aside the order passed by learned Judicial Magistrate, 1st Court, Siliguri. Hence the revision.
8. **Mr. Anirban Banerjee, learned counsel for the petitioner** has submitted that while setting aside the order passed by the learned Magistrate the learned Additional Sessions Judge, Fast Track Court, Siliguri failed to appreciate that the paramount consideration for the Court is the welfare of the minor child and if the child is handed over to his mother in spite of her violent and abusive nature instead of the petitioner who is extremely loving and caring to the child, then it will cause tremendous hazard to the future of the minor child.
9. **Mr. Banerjee** has further submitted that the learned Sessions Court has failed to appreciate that the custody of a child cannot be claimed by filing an application under Section 97 of the Code of Criminal Procedure, 1973.
10. It is also submitted that the learned Trial Court failed to appreciate that the minor child voluntarily deposed before the learned Magistrate without any coercion from anybody and in a sound condition of mind the child stated that he wants to stay with his

father i.e. the petitioner as his mother i.e. the opposite party is violent and abusive to him.

11. It is submitted that in these unprecedented circumstances unless the order dated 30.11.2022 is set aside the petitioner will suffer irreparable loss.
12. That the entire action/and order of the learned Sessions Judge is an abuse of the process of law.
13. **In spite of due service there is no representation on behalf of the opposite party.**
14. **The relevant orders of the Magistrate's Court and Session's Court are as follows:-**

Case No. CR. 314/2020

Order dated 12.10.2020

..... Now, the respective applications filed by the complainant and the accused for handing over the minor child are taken up for consideration.

The report submitted by S.I. Chettri is also taken up for consideration simultaneously.

Heard the respective contentions of the Ld. Counsels representing both parties.

Also perused the relevant rulings relied upon by the Ld. Counsels.

Considered.

Minor Shreyon Kundu is also present before the Court. The Complainant and the accused are also present.

The child shreyon Kundu is asked whether he wishes to go with his mother or father. Upon being so asked by the Court, minor Shreyon Kundu empathetically expressed his intention to go with his father i.e. Krishna Kundu. The child stated before the Court that his mother beats him up often. He again expressed his intention to go with his father.

Upon having heard both parties and giving paramount consideration to the wishes expressed by the child, the Court deems it fit to allow the application of Krishna Kundu. Minor Shreyon Kundu be released upon execution of bond of Rs. 1,000/- by the petitioner Krishna Kundu. The petitioner Krishna Kundu is directed to produce the minor Shreyon Kundu as and when directed by this Court to do so.

Let the child Shreyon Kundu be immediately handed over to Shri Krishna Kundu upon execution of the P. R. Bond.....

Sd/-
J.M. 1st Court, Siliguri.

Case No. Crl. Revision No. 30(12)2020

Order No. 15
Dated:- 30.11.2022

That the instant Criminal Revision is hereby allowed on contest but without any cost.

The impugned order dated 12.10.2020 is hereby set aside as it is in contradiction to the earlier order of the Ld. Court dated 10.09.2020 and the custody of the child be given to her mother.

The Ld. Court below is also requested to dispose of the case as soon as it is possible considering the future of the child.

Considering the same, the Ld. Court below is requested to dispose of the case sooner it is possible without granting unnecessary adjournment.

Let a copy of this order along with the LCR be sent to the Ld. Court below for information.

Dictated & corrected by me

Sd/-
Additional District & Sessions Judge
Fast Track Court, Siliguri

15. **Section 97 of the Code of Criminal Procedure, lays down:-**

“97. Search for persons wrongfully confined.-If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search- warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.”

16. The Supreme Court **in Rohith Thammanna Gowda vs State of Karnataka & Ors., Civil Appeal Nos. 4987 of 2022, on 29 July, 2022**, held:-

“9. To answer the stated question and also on the question of jurisdiction we do not think it necessary to conduct a deep survey on the authorities. This Court in **Nithya Anand Raghawan Vs. State (NCT of Delhi) & Anr. [(2017) 8 SCC 454]**, reiterated the principle laid in **V. Ravi Chandran Vs. Union of India [(2010) 1 SCC 174]** and further held thus :-

“In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceedings instituted before it was in **close proximity and filed promptly after the child was removed from his/her native state** and brought within its territorial jurisdiction, **the child has not gained roots here and further that it will be in the child’s welfare to return to his native state** because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible

reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. **Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm**".

(Emphasis added)

10. In **Ravi Chandran's** case (*supra*), this Court took note of the actual role of the High Courts in the matter of examination of cases involving claim of custody of a minor based on the principle of *parens patriae* jurisdiction considering the fact that it is the minor who is within the jurisdiction of the court. Based on such consideration it was held that even while considering Habeas Corpus writ petition qua a minor, in a given case, the High Courts may direct for return of the child or decline to change the custody of the child taking into account the attending facts and circumstances as also the settled legal position. In **Nitya Anand's** case this Court had also referred to the decision in **Dhanwanti Joshi Vs. Madhav Unde [(1998) 1 SCC 112]** which in turn was rendered after referring to the decision of the Privy Council in **Mckee Vs. Mckee [(1951) AC 352]**. In Mckee's case the Privy Council held that the order of the foreign court would yield to the welfare and that the comity of courts demanded not its enforcement, but its grave consideration. Though, India is not a signatory to Hague Convention of 1980, on the "Civil Aspects of International Child Abduction", this Court, virtually, imbibing the true spirit of the principle of *parens patriae* jurisdiction, went on to hold in Nithya Anand Raghavan's case thus:

"40. ... As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount

importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the preexisting order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation – be it a summary inquiry or an elaborate inquiry – the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We

are in respectful agreement with the aforementioned exposition.”

17. On perusal of the materials on record and the relevant orders in this case as reproduced earlier, it is seen that the learned Magistrate by his order dated 12.10.2020 has handed over the child (minor) to the father by giving proper reasons. The learned Magistrate has given clear findings and also heard the child (most important). It is on hearing the child, whose welfare is paramount handed over the child to the petitioner/father as desired by the child.
18. The Session Judge’s findings are contradictory to each other and has thus erroneously set aside the Magistrate’s order and directed the Magistrate to hear the matter afresh, though the Magistrate has heard the matter extensively and passed the order. The Sessions Judge came to the following findings:-

“The Ld. Court below on one hand issued Search Warrant and brought the said minor son from the custody of his father which suggests that the Ld. Court below justified her order of issuing Search Warrant.

On the other hand, Ld. Court below again in contrary to the order of Search Warrant again handed over the child to the father from whom the said child was brought to court through Search Warrant. Both the order of Ld. Court below are contradictory to each other. It is an admitted fact that when the said minor son was questioned by the Ld. Court below his age was mere 6 years 11 months 13 days (as on 12.10.2020) and the understanding capacity

of the child whether tested or not has not been mentioned in the order sheet. There is no reflection in the order sheet that the understanding capacity has been tested. It is also not reflected in the order sheet that the discrimination power of the child aged 6 years 11 months 13 days.

It is pertinent to mention here that due to pseudo ego fighting of the petitioner and the respondent, the future of the child is really hampered and I apprehend that the present circumstances and the state of affair of the parents might hampered the psychology of the child in the near future. It is the duty of both the petitioner and the respondent to think over the bright future of their minor child by burrying their ego and at this minor stage the child needs the love and affection of both of his father and mother which should not be forget by the petitioner and the respondent.

As such, the impugned order passed by the Ld. Court below is in contradiction to its own earlier order dated 10.09.2020 and is not sustainable and hence liable to be set aside.”

The Sessions Judge over looked the fact that the child was with the father and was produced on the basis of a prayer under Section 97 Cr.P.C. The child has categorically stated that he wishes to stay with his father, which the learned Magistrate rightly allowed.

19. Thus the grounds for setting aside the order is not in accordance with law and as such the order of the Sessions Judge is clearly an abuse of the process of Court and being not in accordance with law is liable to be set aside in the interest of justice.

20. **CRR 291 of 2022 is allowed.**
21. The order no. 15 dated 30.11.2022 passed by learned Additional Sessions Judge, Fast Track Court, Siliguri in connection with Criminal Revision No. 30 (12) of 2020 (CIS No. 30 of 2020) is set aside.
22. There will be no order as to costs.
23. All connected Application stand disposed of.
24. Interim order if any stands vacated.
25. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
26. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)