

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 359 OF 2023

Sarfraj Khalil Pathan .. Petitioner
Versus
The State of Maharashtra & Ors .. Respondents
...

Ms. Swatantri Waghmare, for the petitioner.
Mr. Nikhil Hire i/b Mr. Ranjeet Patil for Respondent No.2
Mr. Y.M Nakhwa, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 30th MARCH 2023

P.C:-

1 Heard the learned counsel for the petitioner and the learned counsel for the respondent no.2 ,3 and 4.

The present petition is filed by the husband/ the father of the minor child Master Kashaf aged 5 years, seeking his custody and calling in question the impugned judgment dated 23/09/2022 delivered by the Additional Sessions Judge, Sangli in P.W.D.V.A Appeal and also the order passed by the LD. J.M.F.C, Miraj, by which the custody of the child Kashaf, has been handed over to the mother Fatima.

2 Heard the learned counsel for the applicant and the learned counsel for the respondents.

The marriage between the petitioner and the respondent no.2 was solemnized on 24/6/2012 and out of the wedlock three children are born. The younger child Kashaf is alleged to be forcibly

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removed from the custody of the mother and this resulted in an application being filed by the wife under Section 23 of the Protection of Women from Domestic Violence Act, seeking temporary custody of a child. The applicant wife though filed an application for maintenance and other relief, she pressed into service the application for custody of the child Kashaf.

On consideration of the application the Magistrate arrived at a conclusion that considering the tender age of the child, he should be in the custody of the mother and he cannot be deprived of her love and affection. The mere allegation that the mother and her family is engaged in black magic, did not deter the magistrate from issuing a positive direction to the petitioner to hand over the custody of his child to his mother, by keeping in mind the principle, that welfare of the child is of paramount consideration and the child being of tender age he must remain in custody of the mother.

3 This order was subjected to challenge before the Additional Sessions Judge, Sangli in an appeal and on scrutinizing the reasoning contained in the order passed by the J.M.F.C, the appellate Court concurred the said finding and specifically noted that the other two children i.e. Mehrin and Inaya are residing with Fatima i.e. the mother and since, she is capable of taking care of the two children, why she can be said incompetent to care for Kashaf.

By recording the positive finding to the effect that she can take care of Kashaf the child of such a tender age cannot be deprived of the love and affection of his mother. The order passed by the Magistrate was confirmed.

4 On hearing the learned counsel for the petitioner and counsel for the respondents, I find no legal infirmity in two orders, which has given paramount importance to the welfare of the child,

since there is no denial of the fact that the respondent no.2 is not capable of taking care of the child nor she has denied the responsibility.

The learned counsel for the petitioner state that he has already instituted proceedings under the Guardianship Act, for seeking custody of all the three children, which he is at liberty to prosecute. However, since no illegality is noticed in the impugned order, by upholding the same, the petition is dismissed.

5 Since Advocate Ms. Swatantri Waghmare has been appointed by legal aid for the purpose of espousing the cause of the petitioner, I would like to record my appreciation for the strenuous efforts taken by her.

The legal services authority is directed to pay the legal remuneration to her within a period of six weeks from today.

(SMT. BHARATI DANGRE, J.)