

(2013) 04 MP CK 0070
In the Madhya Pradesh High Court
Case No : Mis. Cr. Case No. 2249 of 2013

Deepa Gupta

APPELLANT

Vs

Rahul Gupta, Smt. Kusum Gupta and Ramendra Gupta

RESPONDENT

Date of Decision : 16-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Guardians and Wards Act, 1890 — Section 10, 8

Protection of Women From Domestic Violence Act, 2005 — Section 12, 18, 19, 20, 21

Citation : (2013) 2 JLI 398

Hon'ble Judges : Brij Kishore Dube, J

Bench : Single Bench

Advocate : V.K. Bhardwaj, with Mr. Anvesh Jain, for the Appellant; R.S. Dalal, Advocate and Shri Tapan Trivedi, for the Respondent

Judgement

Brij Kishore Dube, J.—This petition u/s 482 of the Code of Criminal Procedure, 1973 (For short, the Code) is preferred by the petitioner herein, Deepa Gupta for quashing the order dated 30/01/13 passed by IX Additional Sessions Judge, Gwalior in Criminal Appeal No. 7/13 whereby set aside the order dated 05/12/12 passed in MJC No. 17/12 by the Judicial Magistrate, First Class, Gwalior and remanded the matter back to it and also the order dated 07/03/13 passed by IX Additional Sessions Judge, Gwalior in MJC No. 1/13 whereby an application filed by the petitioner herein for recalling the order dated 30/01/13 has been dismissed. The relevant facts for adjudication of the matter are that Smt. Deepa Gupta instituted the proceedings u/s 12 of the Protection of Women from Domestic Violence Act, 2005 (For short, the Act) against the respondents herein/non-applicants. In the aforesaid proceedings, Smt. Deepa Gupta moved an application under Sections 23 read with 21 of the Act for interim custody of her son. The learned Magistrate vide order dated 05/12/12 after hearing both the parties by allowing the application ordered the respondents herein that the son, Adamyia be given in temporary custody to Smt. Deepa Gupta. The relevant portion of the order reads as under:

2. Feeling aggrieved thereof, the respondents herein have preferred an appeal u/s 29 of the Act before the Sessions Judge. The Additional Sessions Judge vide its order dated 30/01/13 by setting aside the order dated 05/12/12 passed by the Judicial Magistrate, First Class, Gwalior remanded back the matter to decide it afresh after hearing the parties.

3. The respondents herein have also filed a petition u/s 482 of the Code for quashing the order dated 05/12/12 passed by the Judicial Magistrate, First Class, Gwalior. This Court vide order dated 21/12/12 passed in Mis. Cr. Case No. 9559/12 dismissed the petition.

4. Smt. Deepa Gupta filed an application before the Additional Sessions Judge, Gwalior for recalling its order dated 30/01/13 in the light of the order passed by this Court in Mis. Cr. Case No. 9559/12 (supra). The same was registered as MJC No. 1/13 which was dismissed vide the impugned order dated 07/03/13. Being aggrieved by the impugned orders dated 30/01/13 and 07/03/13, the petitioner herein, Deepa Gupta preferred this petition.

5. Learned senior counsel for the petitioner submits that as per the judicial discipline when this Court vide its order dated 21/12/12 affirmed the order dated 05/12/12 passed by the Judicial Magistrate, First Class, Gwalior, therefore, the Additional Sessions Judge, Gwalior could not have passed any order contrary to the order passed by this Court. He has placed reliance on the following decisions:

(I) U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, , and

(ii) Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others,

6. In response, the learned counsel for the respondents argued in support of the impugned orders passed by the learned Additional Sessions Judge and submits that in Mis. Cr. Case No. 9559/12 (supra), Smt. Deepa Gupta moved an interlocutory application being I.A.No. 12195/12 seeking dismissal of the petition filed u/s 482 of the Code by the respondents herein on the ground that the same is not maintainable. This Court vide the order dated 21/12/12 (supra) after considering the aforesaid application, allowed it and dismissed the petition. It is further submitted that this Court has not tested the order dated 05/12/12 passed by the Judicial Magistrate, First Class, Gwalior on merits. This Court after hearing the parties on the aforesaid interlocutory application had passed the order and, therefore, the order dated 21/12/12 passed by this Court did not come in the way of exercise of the powers by the Appellate Court u/s 29 of the Act. Learned counsel further submits that Smt. Deepa Gupta has filed a petition under Sections 8 and 10 of the Guardian and Wards Act before the Family Court, Gwalior, however, the same has been withdrawn by her. Having withdrawn her case for permanent custody of the minor child, she cannot seek temporary custody of the child under the provisions of the Act. He has cited Babulal Nagar and Others Vs. Shree Synthetics Ltd. and Others, and submits that the remand order cannot be interfered in exercise of the inherent powers by this Court. Para 20 of the judgment is relevant and the same is reproduced hereunder:

ordinarily, the courts exercising extraordinary jurisdiction are loather to interfere with an order remanding the matter to the authority directed to investigate facts. The industrial Court had made an order of remand. The High Court was not justified in interfering with the same. By this uncalled for interference, it has merely prolonged the agony of the unemployed workmen and permitted the jurisdiction of the High Court under Art, 226 to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from court to court for adjudication of peripheral issues avoiding decision on issues more vital to them. (D.P. Maheshwari Vs. Delhi Administration and Others,

7. I have considered the rival contentions of the learned counsel for the parties and perused the record.

8. Admittedly, order dated 05/12/12 passed by the Judicial Magistrate, First Class, Gwalior was challenged by the respondents herein before this Court u/s 482 of the Code wherein an interlocutory application being I.A.No. 12195/12 was filed by Smt. Deepa Gupta seeking dismissal of the petition and after considering the matter, the following order was passed on 21/12/12 (supra):

Heard on I.A.No. 12195/12, which is an application filed on behalf of the respondent for dismissing the petition.

This petition u/s 482 of Cr.P.C. has been filed for quashing the order dated 5.12.2012 passed by learned J.M.F.C., Gwalior in MJC no. 17/12, whereby the application filed by the complainant in a case under Domestic Violence Act u/s 23 read with section 21 of the Domestic Violence Act for temporary custody of her son has been allowed.

Learned counsel for the respondent has raised preliminary objections in the form of application for dismissing the petition that the petition u/s 482 of Cr.P.C. filed by the petitioners for quashing the proceeding of all the cases pending under Protection of Women Act from Domestic Violence Act, 2005, is not maintainable.

Learned counsel for the respondent has cited judgment of Bombay High Court passed in the matter of Mangesh Sawant Vs. Minal Vijay Bhosale and Another, , in which it has been held that "protection of women from Domestic Violence Act, 2005 cannot be said to be a penal statue. Merely because the jurisdiction to entertain application u/s 12 has been conferred upon the learned Magistrate, the said Act cannot be termed as a penal statue and the proceedings under the said Act cannot be treated as Criminal proceedings. The power under the Act can be exercised even by a Civil Court or a Family court. However, it has also been held that in any case, it is well settled law that the power u/s 482 can be exercised sparingly and in only exceptional cases."

Learned counsel for the petitioners has submitted that the respondent has deserted her son who is merely 18 months of age and left the house of petitioners from New Delhi and now is residing at Gwalior. She had filed

application for taking custody of that child under the Guardianship and Wards Act but had withdrawn the same and she has filed similar application before the learned Judicial Magistrate. Since, the proceedings under Domestic Violence Act are conducted before the court of Judicial Magistrate, therefore, the provisions of Cr.P.C. are applicable to such proceedings and consequently the application filed u/s 482 of Cr.P.C. for quashing any proceeding of the court of Judicial Magistrate First Class is maintainable.

On perusal of the provisions of Domestic Violence Act, it is clear that some of the provisions of the Act are penal in nature while some of the provisions are civil in nature. The custody of the child is a matter of civil nature which is to be adjudged on the ground of age, sex and welfare of the minor child.

On merits also, the order of temporary custody has been passed u/s 23 read with section 21 of the Domestic Violence Act for a period of 3 months or till the disposal of the case whichever is earlier and liberty has been given to the petitioners for having meeting with the child. Respondent is mother of the child and it is not expected that mother of child because of dispute with her husband or in-laws will not take proper care of her child and an order u/s 23 of the Domestic Violence Act has to be passed after satisfaction of the Magistrate regarding Act of Domestic Violence and the aggrieved person under sections 18, 19, 20, 21 or the case as may be u/s 22 of the Act against the respondent, therefore, an order u/s 23 of the Act has to be passed keeping in view the provisions of Section 21. Therefore, by mentioning section 21 in the order or application it cannot be said that only order of fulfilling needs can be passed u/s 21 of the Domestic Violence Act.

Resultantly, the petition does not require any interference under the provisions of Section 482 of Cr.P.C. Therefore, IA is allowed and the petition is dismissed.

9. From a bare perusal of the aforesaid order passed by this Court, it is evident that this Court considered I.A.No. 12195/12 as well as merits of the impugned order dated 05/05/12 passed by the Judicial Magistrate, First Class, Gwalior. The order passed by this Court had attained finality as the same has not been further challenged by the parties.

10. In the case of Shankara Co-op. Housing Society Ltd., (supra) the Hon'ble Apex Court held that once the order of the High Court has attained finality then, it is not open for the lower Courts and even for the High Court to ignore the said order.

11. Considering the judicial discipline, the Apex Court in Uttar Pradesh Power Corporation Limited (supra), has observed as under:

19. In *Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others*, observed as under while dealing with judicial discipline, the two-Judge Bench has expressed thus: (SCC p. 406, para 18)

18..... One must remember that pursuit of the law, however glamorous it is,

has its own limitation on the Bench. In a multi-Judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned Single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.

12. It is apposite to mention here that the respondents herein have challenged the proceedings instituted against them by the petitioner herein u/s 12 of the Act before this Court by filing Mis. Cr. Case No. 9307/12 which was dismissed as withdrawn with liberty to file appropriate proceeding, if occasion arises vide order dated 22/02/13.

13. In view of the aforesaid, the impugned orders having apparent perversity and as such requires interference, therefore, by invoking the inherent powers u/s 482 of Cr.P.C., the impugned orders dated 30/01/13 and 07/03/13 passed by IX Additional Sessions Judge, Gwalior are hereby set aside.

14. Looking to the facts of the case as well as the dispute between the parties, the learned Trial Court is directed to expedite the disposal of the matter. With the aforesaid, petition stands disposed of accordingly.