

(2011) 02 GUJ CK 0192

In the Gujarat High Court

Case No : Special Criminal Application No. 1560 of 2010

Dhaval Rajendrabhai Soni

APPELLANT

Vs

Bhavini Dhavalbhai Soni and Others

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 21

Penal Code, 1860 (IPC) — Section 498A

Protection of Women From Domestic Violence Act, 2005 — Section 12, 21, 23

Citation : (2012) 1 Crimes 648 : (2011) 1 GLH 719 : (2011) 3 GLR 1965 :
(2011) 4 RCR(Civil) 741 : (2011) 4 RCR(Civil) 590 : (2011) 4 RCR(Civil) 741 :
(2011) 4 RCR(Criminal) 590

Hon'ble Judges : Akil Abdul Hamid Kureshi, J

Bench : Single Bench

Advocate : N.V. Solanki, for the Appellant; J.A. Adeshra and D.C. Sejpai,
Assistant Public Prosecutor, for the Respondent

Judgement

Akil Kureshi, J.—The Petitioner is husband of Respondent No. 1. They got married in the year 2002. Out of the wedlock, wife gave birth to a son on 6-11-2004 named Mihir. Subsequently, however, disputes arose between husband and wife. It is stated that wife and husband reside separately since 17-5-2007. With respect to who is responsible for such separation, there are contradicting versions. It is not necessary for me to go into the same in the present proceedings. It is, however, not in dispute that since separation, son is with the father. Here again wife's case is that despite best efforts the custody of the child is not given to her. Again with respect to this also, I propose to make no observations because proceedings for custody of child are pending before the Sessions Court.

2. In the present proceedings, husband has challenged an order dated 13-3-2009 passed by learned J.M.F.C., Bhuj in Criminal Application No. 481 of 2008 filed by wife under the Protection of Women from Domestic Violence Act ("the Act" for short). Said order was confirmed by the Sessions Court in Appeal

by order dated 14-7-2010 passed in Criminal Appeal No. 7 of 2009.

3. In the impugned order, learned Magistrate has on the application of wife passed several different orders which are to the following effect:

Resistance Order Learned Magistrate directed the husband to provide one bedroom premise in Ahmedabad to the wife for her residence or in lieu thereof to pay Rs. 2,000/- by way of rent to her.

Financial Assistance Learned Magistrate directed the husband to pay Rs. 4,000/- per month to the wife by way of maintenance.

Custody Order Learned Magistrate further directed the husband to hand over the custody of the child Mihir to the wife till disposal of the proceedings under the Guardians and Wards Act and directed him to pay for his education and also permitted husband to visit son periodically.

Protection Order Learned Magistrate directed the husband and family members not to commit any act of domestic violence against the wife.

4. This order was confirmed by the Sessions Court in appeal. Husband, therefore, has filed the present petition challenging the said order.

5. On 16-8-2010, while issuing notice, this Court had stayed the directions for handing over custody of the child. Interim order was confirmed while admitting the petition.

6. I have heard learned Advocates for the parties for final hearing of the proceedings.

7. Counsel Shri N.V. Solanki for the Petitioner contended that learned Magistrate could not have passed any order for custody of the child under the said Act since the Act empowers the Magistrate to pass only interim order. Since, application of wife u/s 12 of the Act was being disposed of, no such order of interim custody of the child could have been passed.

7.1. He further contended that child is residing with the father. Father is looking after the child since May, 2007 in absence of the mother. Particularly, when proceedings under the Guardians and Wards Act are pending, even otherwise on facts, learned Magistrate ought not to have directed handing over custody of the child to the mother.

7.2. Counsel further submitted that Petitioner is employed in a shop run by his father. He, therefore, has some financial difficulties but is duty-bound to pay maintenance and other charges fixed by the learned Magistrate for which some time may be granted.

8. On the other hand, learned Counsel Shri Adeshra opposed the petition contending inter alia that the order of custody is to enure only till the proceedings under the Guardians and Wards Act are concluded. No interference is, therefore, called for.

8.1. He further contended that husband has not paid maintenance and other charges as directed by learned Court though he has sufficient means to do so.

9. At the outset, I may notice that Section 12 of the said Act pertains to application to the Magistrate that the aggrieved person or the protection officer may file seeking various reliefs under the Act. The Act provides for various reliefs that an aggrieved person can seek from the Magistrate including right to reside in a shared household, protection orders, residence orders, monetary reliefs, compensation etc.

Section 21 in particular, pertains to custody order and reads as follows:

Custody Orders:- Notwithstanding anything contained in any other law for the time-being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the Respondent:

Provided that if the Magistrate is of the opinion that any visit of the Respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

Section 23 of the Act clarifies that the Magistrate has power to grant interim as well as ex-parte order as deemed just and proper.

10. Question is, in the proceedings under the said Act can a Magistrate pass custody order beyond the life of the proceedings before him?

11. On one hand, as already noted, Counsel for the Petitioner suggested that since Section 21 of the Act empowers learned Magistrate to pass only temporary custody orders, such order can have the effect only during the pendency of the proceedings before the Magistrate and not beyond. On the other hand, Counsel for wife submitted that term used in Section 21 is temporary custody and not interim custody and that therefore, Magistrate can pass an order which can operate also beyond life of proceedings u/s 12 before him.

12. Said Act was enacted with following objects in mind:

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence u/s 498A of the Indian Penal Code. The Civil law does not, however, address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the Civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society....

13. From the Preamble of the Act, it can be seen that to achieve the above object the said Act was enacted to provide for more effective protection of right for woman guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected thereof and incidental thereto.

14. With above objects, Legislature has provided number of reliefs that wife can claim under the said Act by filing application u/s 12. Magistrate is vested with wide powers not only for granting different orders, as already noted such as protection order, residence order etc., is also clothed with power to pass interim as well as ex-parte interim orders.

15. Viewed from this angle, the power of the Magistrate u/s 21 of the Act, becomes crucial which empowers learned Magistrate notwithstanding anything contained in any other law for the time-being in force, to grant temporary custody of the child to the aggrieved person at any stage of hearing of the application for protection order or for any other reliefs under the Act. In essence, therefore, in any proceedings under the Act, Magistrate is empowered to grant temporary custody of the child to the aggrieved person. It can be easily appreciated that said power assumes significance when looked from angle of wife or any other woman approaching the Magistrate seeking protection against the domestic violence by husband, his family members or other relatives. A small child to a mother is extremely precious. If mother is separated from her child, her resistance is most likely to break down. It is in this regard that learned Magistrate is empowered to pass custody orders, notwithstanding anything contained in any other law for the time-being in force. Such powers of Magistrate read with Section 23 of the Act would include power to pass interim as well as ex-parte orders. It is, therefore, of great significance and importance that Magistrates while dealing with the application of an aggrieved person seeking custody of her child deal with the situation promptly and bearing in mind the objects and purpose of the Act and also bearing in mind that mother when separated from child is likely to agree to any terms and conditions, not to resist domestic violence from husband or other family members.

16. Significantly, the Legislature has, therefore, used words temporary custody and not interim custody. This is important since by virtue of Section 23 of the Act in any case, learned Magistrate has power to pass interim order which he otherwise can pass finally. Term temporary custody in Section 21 is used in juxtaposition to the term interim order used elsewhere in Section 23 of the Act. It thus becomes clear that learned Magistrate can pass an order of custody in favour of an aggrieved person by way of temporary measure not necessarily in the nature of interim order which can have life only upto life of the proceedings before him.

17. Having said so, I cannot lose sight of the fact that nowhere under the Act learned Magistrate is permitted to pass final order of custody and any order that learned Magistrate can pass must have limited validity either in terms of time or

happening of an event. Learned Magistrate cannot pass order granting permanent custody of the child to the aggrieved person.

18. With above clarity, if one reverts to the facts of the case, learned Magistrate has in context of the custody provided that child will remain with the mother till the proceedings under the Guardians and Wards Act are concluded. To that extent, therefore, in my opinion, directions issued by the learned Magistrate do not suffer from lack of jurisdiction or power.

19. Question however is, in facts of the case was he justified in doing so?

20. As pointed out by the Counsel for the Petitioner, the child has remained with the father since his birth. Child has remained with father exclusively since separation of husband and wife in May, 2007. Three and half years have passed since then. He is stated to be studying in school at Ahmedabad. Wife has already instituted proceedings before the Sessions Court under the Guardians and Wards Act. She is stated to have also prayed for interim custody in such proceedings. In such proceedings, detailed inquiry will be conducted. Both sides will have liberty to lead evidence. Therefore, bypassing these proceedings, particularly, when the child has been with the father since May, 2007 exclusively, I am of the opinion that learned Magistrate committed an error in granting temporary custody of the child to the mother. This part of the order, therefore, requires modification.

21. Counsel for the mother further stated that she is not being allowed to meet the child. I do not see any reason why mother should be deprived of even visitation rights of her own son. With respect to other directions, I see no reason to interfere. The Petitioner is only son of his father who has Jewellery shop in a highly commercial area of Manekchowk in city of Ahmedabad. Surely, he cannot avoid liability to maintain his wife. Amounts fixed by learned Magistrate are eminently just and reasonable.

22. Under the circumstances, petition is disposed of with following directions:

(1) Order for handing over custody of child temporarily to the mother is set aside.

(2) Petitioners and other family members shall, however, permit Respondent No. 1-Wife to meet her son Mihir once every week between 10 to 12 on Sundays. However, if she requires any change in time and date, she shall communicate beforehand to the Petitioner and his family members.

(3) It would be open for the mother after initially cultivating familiarity with the child, to take him out also.

(4) Learned Sessions Court shall decide application i.e. C.M.A. No. 160 of 2008 of wife for permanent custody expeditiously and unmindful of any observations made in this order. Same may be disposed of preferably by 31-5-2011.

(5) Petitioner shall continue to pay all other charges as fixed by learned Magistrate in the impugned order.

(6) 50% of arrears shall be cleared latest by 31-3-2011. Rest of the arrears shall be cleared by 31-5-2011.

Rule made absolute to above extent.