



IN THE HIGH COURT OF KARNATAKA
AT BENGALURU

DATED THIS THE 20TH DAY OF MAY, 2021

BEFORE

THE HON'BLE MRS. JUSTICE K.S.MUDAGAL

CRIMINAL PETITION No.356/2019

BETWEEN

MR. OLIVER MENEZES
AGED ABOUT: 39 YEARS,
S/O: LATE JOSS MENEZES PRABHU,
RESIDING AT JOSS VILLA,
BALMATTA NEW ROAD,
MANGALURU-575001.

...PETITIONER

(BY SRI.P.P.HEGDE, ADV.)

AND

MRS. SERITA THERESE MATHIAS
W/O: OLIVER MENEZES
AGED ABOUT 33 YEARS,
R/AT FLAT NO.204,
POOJA ENVELATE,
PADAVINANGADI, MANGALURU-575008.

... RESPONDENT

(BY SRI. BRIJESH KALAPPA, ADV.)

THIS PETITION IS FILED U/S 482 OF CR.P.C., PRAYING TO QUASH THE IMPUGNED ORDER DATED 10.01.2019 PASSED BY THE JMFC, II COURT, MANGALURU, D.K. IN CRL.M.C.NO.02/2019 DIRECTING THE PETITIONER HEREIN TO HANDOVER THE CUSTODY OF THE CHILDREN TO THE RESPONDENT AND DIRECTING INSPECTOR OF POLICE, MANGALURU EAST POLICE STATION TO PROCURE THE CHILDREN WHEREVER THEY ARE FROM AND RESTORE THEM TO THE CUSTODY OF THE RESPONDENT.

RESERVED FOR ORDERS ON : 21.04.2021
ORDER PRONOUNCED ON : 20.05.2021

THIS PETITION PERTAINING TO THE PRINCIPAL BENCH HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT SITTING AT DHARWAD BENCH MADE THE FOLLOWING:

: ORDER :

"Whether the order dated 10.01.2019 passed by the JMFC., II Court, Mangaluru, D.K. (for short 'the trial Court') in Criminal M.C.No.02/2019 and the entire proceedings in the said case amount to abuse of the process of the Court" is the question involved in this case.

2. Respondent was the petitioner and petitioner was the respondent in Crl.Misc.No.2/2019 before the Trial Court. The marriage of the petitioner and respondent was solemnized on 03.12.2011 at Mangaluru according to the Christian rights as the parties belong to Christian religion. Out of the wedlock the couple begot daughter by name Sarah on 01.10.2012 and son by name Jayden on 17.02.2015. The couple had the troubled marriage.

3. For the purpose of convenience petitioner and respondent are referred to henceforth as husband and wife respectively. The wife filed Crl.M.C.No.2/2019 before the JMFC, II Court, Mangaluru, D.K., under Section 12 of Protection of Women from Domestic Violence Act, 2005 (for short 'D.V. Act') against the husband on 08.01.2019. Under the petition she claims that the respondent has kidnapped the minor children and she sought restoration of the custody of the children, protection order for herself and her children, maintenance of Rs.50,000/- each to the children, separate residence, cost, compensation etc. Before that the husband and wife had filed complaints against each other before the police.

4. Even before the notice of the petition in Crl.M.C.No.2/19 was issued, the husband voluntarily appeared before the trial Court. Along with the petition, the wife had filed interlocutory application under Sections 21 and 23 of the D.V.Act, for a direction to the Station House Officer, Mangaluru, East Police Station to procure

Baby Sarah and Master Jayden and restore them to her custody and interim protection for herself and the children.

5. The application was actually to grant ex-parte order. Since the husband appeared before the trial Court even before issuance of notice he was also heard in the matter. The trial Court order indicates that husband filed a memo denying the allegations made in the interim application and making allegations that the wife is leading adulterous life and therefore he has filed complaint against her, the alleged adulterer and his mother-in-law. He also produced the alleged WhatsApp messages exchanged between the wife and the alleged adulterer etc.

6. The trial Court after hearing the parties, by the impugned order directed the husband to hand over the children to the custody of the wife pending disposal of the application on merits. Further the trial Court directed the jurisdictional police to procure the children from wherever they are and to restore them to the custody of wife. The trial Court held that though the husband has to be given

an opportunity, looking in to the interest of the minor children aged 4 and 6 years, it is necessary to restore them to the custody of the petitioner/wife for care and protection till further orders.

7. The husband has filed this petition for quashing of the order granting interim custody and the entire proceedings before the trial Court on the following grounds;

- (i) Since the parties belong to Christian religion, they are governed by Indian Divorce Act. The husband has filed M.C.No.412/2019 against the wife and wife has filed M.C.No.206/2019 against the husband for dissolution of marriage. The custody of the children can be granted only in those proceedings.
- (ii) Only the Court adjudicating the matrimonial cases or the Court of under Guardians and Wards Act, are competent to decide the issue of custody of the children.

- (iii) The adjudication for custody of the children does not lie under the D.V.Act. At the most under D.V.Act, temporary custody can be granted. The trial Court bypassing family/personal laws resorted to pass such order which is abuse of the process of the Court.
- (iv) The enquiry as required under Section 23 of the D.V.Act was not conducted. Therefore, the order is bad in law.
- (v) The complaint in criminal M.C.No.2/2019 is frivolous. Since Section 29 of D.V.Act does not provide for interim stay in the appeal under that provision, such appeal is not effective remedy. Therefore, the petition under Section 482 of Cr.P.C. is maintainable.
- (vi) The trial Court has not followed Sections 21, 23, 28 of the D.V.Act and Rule 6 of the

Protection of Women from Domestic Violence
Rules 2006.

8. Reiterating the ground of petition Sri. P.P.Hegde, learned counsel for the husband relies on the following judgments;

- 1) Smt. Yashaswini Vs. Mr. Anegudde Ganesh, reported in ILR 2016 KAR 2155.**
- 2) Krishna Murthy Nookula Vs. Savitha, reported in 2009 SCC Online Kar 769.**
- 3) Capt. Vipin Menon Vs. State of Karnataka, reported in ILR 1992 KAR 2622.**
- 4) Smt. Radha @ Parimala Vs. N.Rangappa, reported in ILR 2004 KAR 3212.**
- 5) Vaidehi Vs. I. Gopinath, reported in 1992 SCC Online Mad. 44.**
- 6) Mausami Moitra Ganguli Vs. Jayant Ganguli, reported in (2008) 7 SCC 673.**
- 7) Sham @ Navnath and Others Vs. Sau Yogita, reported in 2018 SCC Online Bom 1868.**

- 8) Dhaval Rajendrabhai Soni Vs. Bhavini Davalbhai Soni, reported in 2011 SCC Online Guj 899.**
- 9) Rosy Jacob Vs. Jacob A.Chakramakkal, reported in (1973) 1 SCC 840.**
- 10) Shaleen Kabra Vs. Shiwani Kabra, reported in (2012) 5 SCC 355.**

9. Per contra, Sri Brijesh Kalappa, representing the wife opposes the petition on the following grounds;

- (i) Since the impugned order is appealable one, the petition under Section 482 of Cr.P.C., is not maintainable.
- (ii) Since the proceedings under the D.V.Act are civil in nature, the petition under Section 482 of Cr.P.C., does not lie.
- (iii) Husband is guilty of violation of the order of this Court regarding interim custody of the children. Therefore, he is not entitled to any relief.

- (iv) Husband's mother is ill-treating the minor daughter, therefore the welfare of the children is not protected in the hands of husband and his family members.
- (v) The allegations of adultery are all baseless. The print out of the whatsapp messages produced by the husband's counsel has no evidentiary value at all.
- (vi) The trial Court has granted only an interim custody. It is open to the husband to seek alteration of the same by adducing evidence.
- (vii) The judgments relied on by the husband's counsel are not applicable to the facts of the case. This is not a fit case to exercise the powers under Section 482 of Cr.P.C, to question the proceedings.

10. In support of his contention, he relies on the following judgments;

- (i) Asian Resurfacing of Road Agency Pvt. Ltd., and Others Vs. Central Bureau of Investigation, reported in AIR 2018 SC 2039.**
- (ii) State of Karnataka Vs. M. Devendrappa and Others, reported in AIR 2002 SC 671.**
- (iii) State of Haryana and Others Vs. Ch. Bhajan Lal and Others, reported in AIR 1992 SC 604.**
- (iv) Amar Nath and Others Vs. State of Haryana and Others, reported in AIR 1977 SC 2185.**
- (v) Mohit alias Sonu and Another Vs. State of U.P. and Another, reported in AIR 2013 SC 2248.**
- (vi) Amit Kapoor Vs. Ramesh Chander and Others, reported in (2012) 9 SCC 460.**
- (vii) Sirisha Dinavahi Bansal Vs. Rajiv Bansal, reported in 2020 (3) Bom Cr. (Cri) 18.**
- (viii) Sujoy Kumar Sanyal Vs. Shakuntala Sanyal and Others, reported in 2011 (1) CHN 265.**

- (ix) P. Pathmanathan and Others Vs. Monica and Others, reported in 2021 (2) CTC 57.**
- (x) Vijayalekshmi Amma Vs. Bindu, reported in ILR 2010 (1) Kerala 60.**
- (xi) Manish Tandon Vs. Richa Tandon and Others, reported in 2009 (1) UC 242.**
- (xii) Nityananda Mishra Vs. Pranati Mishra and Others, reported in 2019 (1) ILR-CUT 413.**
- (xiii) Padal Venkata Rama Reddy Vs. Kovvuri Satyanarayana Reddy and Others, reported in (2011) 12 SCC 437.**
- (xiv) Aravindakshan and Others Vs. State of Kerala and Others, reported in 1985 Crl.LJ 1389.**
- (xv) S.Amutha Vs. C. Manivanna Bhupathy, reported in AIR 2007 MAD 164.**
- (xvi) Jasvir Kumar Vs. Harjinder Singh, reported in AIR 2014 P & H 187.**

11. Having regard to the rival contentions, the first question that arises for consideration is about maintainability of the petition. The impugned order is

purportedly passed under Sections 21 and 23 of the D.V.Act. The said provisions read as under;

21. Custody order. – 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.

23. Power to grant interim and ex parte order.- (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence, he may grant an **ex parte order** on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.

12. The reading of Section 21 makes it clear that the same has overriding effect on any other law. Therefore there is no merit in the contention that the temporary custody of the children could be dealt with only in the proceeding under the Indian Divorce Act or Guardians and Wards Act.

13. Section 29 of the D.V.Act states that **there shall lie an appeal** to the Court of the Session within 30 days from the date on which, the order made by the Magistrate is served on the aggrieved person or the respondent as the case may be, whichever is later.

Since the word '**shall**' is used in Section 29 any order passed by the Magistrate under the D.V.Act is appealable one. Section 29 does not provide for granting of an interim order is not an acceptable justification to the aggrieved party to rush to the High Court invoking Section 482 of Cr.P.C. bypassing Section 29. Such interpretation defeats the object of the Act and Section 29.

14. Further the Magistrate in the impugned order has clearly stated that an opportunity has to be given to the respondent to file objection. The restoration of custody under the impugned order is made pending disposal of the application on merits. The said application is still pending for hearing. Without pursuing the hearing of that application, the husband has filed this petition and litigating in this Court since last about three years. Had he sought adjudication of the application on merits before the trial Court itself, the matter could have been disposed of by this time.

15. The Delhi High Court in **Rajiv Bansal's** case referred to supra in the similar circumstances held that to bypass the remedy of appeal under Section 29 of the Act, there should be egregious, compelling circumstances, demanding immediate judicial intervention by the High Court and invasion into the domains exercisable by subordinate Courts under Special Statutes. As already pointed out, since the impugned order was passed pending adjudication of the interim application, husband could have filed objection to the application and sought discharging of the order. He could have also resorted to the relief under Section 25 of the D.V.Act for alteration of the orders.

16. In para 5 of the judgment in **Sujoy Kumar Sanyal's** case the Calcutta High Court held that the power of the appellate Court under Section 29 of the Act should not be usurped under the sweep of Section 482 of Cr.P.C. Referring to the judgment of the Hon'ble Supreme Court in Hossein Kasam Dada (India) Ltd. Vs. State of M.P. reported in AIR 1953 SC 221, it was held that a right of

appeal is not merely a matter of procedure but a matter of substantive right. It was also held that when in the D.V.Act there is a specific provision of appeal, no extraordinary aid is permissible to interpret such express provision in terms of general inherent powers under Section 482 of Cr.P.C.

17. Relying on its earlier Division Bench Judgment in **Rajamanickam Vs. State of Tami Nadu**, 2015 (3) MWN Cri 379, Madras High Court in paragraph No.41 of the judgment in **P.Pathmanathan's** case referred to supra held as follows ;

"41. As pointed out by a Division Bench of this Court in **Rajamanickam v State of Tamil Nadu**, 2015 (3) MWN Cri 379, Section 482 Cr.P.C preserves only the inherent criminal jurisdiction of the High Court. Thus, **a petition under Section 482, Cr.P.C would be maintainable only if the order complained of is passed by a criminal Court** or by a Court in exercise of powers under the Cr.P.C. An application under Section 12 of the D.V Act does not fall in either category, as what the Court is called upon to do at that stage is to interdict the exercise of civil jurisdiction by the Magistrate at the threshold. As indicated supra, **since the Magistrate is exercising only a civil jurisdiction in granting**

reliefs under Chapter IV of the Act, it follows that a Magistrate is not a criminal court for the purposes of proceedings under Chapter IV of the Act. It follows that an application under Section 482, Cr.P.C does not lie to quash an application under Section 12 of the D.V Act."

(Emphasis supplied)

18. The Kerala High Court in para No.17 of the judgment in ***Vijayalekshmi's*** case referred to supra held that an order passed under Section 18 to 21 and 22 of the D.V.Act, on an application filed under Section 12 does not impute an offence nor attach criminal liability. Therefore, Section 482 of Cr.P.C is not applicable.

19. Uttarakhand High Court in para 4 of the judgment in ***Manish Tandon's*** case referred to supra held that when an alternative and efficacious remedy of appeal under Section 29 of D.V.Act is available, the petition under Section 482 of Cr.P.C., is not maintainable.

20. Orissa High Court in ***Nityananda Mishra's*** case referred to supra dismissed the husband's petition

with cost of Rs.10,000/- for over stepping appellate forum and filing the petition under Section 482 of Cr.P.C.

21. The Domestic Violence Act is a special legislation enacted for the purpose of promoting the family relationship and institution of family. The act is an intermediary between the civil laws like Guardians and Wards Act, Hindu Minority and Guardianship Act, Hindu Marriage Act etc., and the criminal laws like 361, 498-A, or such offences under the Indian Penal Code. As rightly held by the Kerala High Court in **Vijayalekshmi's** case the orders under the 18 to 21 and 22 of the Act themselves do not attach any criminal liability, they are civil in nature. Therefore, in the considered opinion of this Court in such cases Section 482 of Cr.P.C., is not applicable.

22. Apart from that, the trial Court has passed the impugned order for interim restoration of the children to the custody of the wife pending hearing of the interim application. Under such circumstances, the husband bypassing remedies under Sections 25 and 29 of the

D.V.Act cannot resort to the proceedings under Section 482 of Cr.P.C.

23. The records of the case show that this Court made certain interim arrangements for the custody of the children for both parents by turns for certain period. Finally, on 20.12.2019, in continuation of the earlier orders, this Court directed the husband to hand over the children on 21, 22, 28 and 29 of 2019 to the custody of the grand-mother. Before that, by the order dated 07.11.2019 permitted the mother to meet the children. Admittedly, the husband has not complied those orders.

24. The Hon'ble Supreme Court in ***Padal Venkata Rama Reddy's*** case referred to supra in para 8 of the judgment held that the jurisdiction under Section 482 of Cr.P.C., is discretionary, therefore High Court may refuse to exercise the discretion, if a party has not approached it with clean hands. The material on record clearly shows that since 2019, the petitioner-husband is dragging this

matter without approaching the trial Court for disposal of the interim application.

25. It is settled proposition of law that the power under Section 482 of Cr.P.C., to quash the proceedings has to be sparingly exercised. While deciding such petition, the Court cannot sit in trial or embark on an enquiry upon the merits of the case pending before the trial Court.

26. Under the D.V.Act, the Magistrate has the powers to adjudicate upon the application filed by the aggrieved person for the relief's under Sections 17 to 23 of the Act. The mere pendency of the matrimonial cases between the parties does not divest the Magistrate of the jurisdiction under those provisions of the D.V.Act. The said matrimonial cases between the parties are filed subsequent to filing of the application under Section 12 of the Act, before the trial Court. Therefore, there is no merit in the contention that the pendency of the matrimonial cases divest the jurisdiction of the Magistrate to adjudicate

the application for custody of the children or the application filed under Section 12 of the D.V.Act.

27. Though the learned counsel for the petitioner strenuously relied on host of the judgments of the Hon'ble Supreme Court, this Court and various other High Courts, suffice it to say that they are not applicable to the facts of the case. This Court does find any merit in this case. Therefore, the petition is dismissed.

**Sd/-
JUDGE**

MSR