

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 353 OF 2008

Mrs.Mary Cedric Pinto .. Petitioner

versus

Mr.Cedric Francis Pinto & Anr. .. Respondents

Mr.N.P.Deshpande for the petitioner.

None for the 1st respondent.

Ms.A.T.Jhaveri, A.P.P for the respondent No.2-State.

CORAM : A.S.OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : 2nd July 2009.

DATE ON WHICH JUDGMENT IS PRONOUNCED: 10th September 2009.

JUDGMENT:

On 2nd July 2009 the submissions of the learned counsel appearing for the petitioner were heard. The judgment was not delivered on that day as the learned counsel appearing for the 1st respondent was not present. The judgment was reserved. The judgment could not be pronounced earlier as the file of the petition was misplaced.

2. The petitioner is the wife and the 1st respondent is the husband. An application was made by the petitioner under section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the said Act) before the learned Magistrate praying for various reliefs. The dispute relates to custody of three minor children. Interim relief was granted by the learned Magistrate by order dated 21st November 2007 in exercise of powers under section 23 of the said Act by

directing that the 1st respondent shall hand over temporary custody of the three minor children to the petitioner. The directions were given to the 1st respondent to desist from causing domestic violence as mentioned in the report of the Protection Officer. Under the said order an arrangement was made enabling the three minor children to stay with the 1st respondent father from 8.00 a.m of every Saturday till 9.00 a.m on the immediately following Sunday. An appeal was preferred by the 1st respondent. By the impugned order dated 19th December 2007, the learned Additional Sessions Judge modified the order of the learned Magistrate and directed that the husband and wife will be entitled to retain the custody of the minor children every alternate month. The petitioner and 1st respondent were directed to take proper physical and mental care of the children whenever the children would remain in their custody.

3. When the writ petition came up before this Court for admission on 15th September 2008, the petition was ordered to be placed in chamber. On 19th September 2008 in chamber this Court interviewed the three minor children. Thereafter, the matter appeared before the Court on 24th September 2008. The paragraphs 2 to 4 of the order passed on that day read thus: "2. It must be stated here that on Friday, 19th September 2008 at 5.30 p.m the children were called to my chamber alongwith the petitioner and the 1st respondent. I had no occasion to talk to the three children. To enable me to talk to the children, I requested the parties and the advocates to wait outside the chamber. While leaving the chamber, the learned advocate holding for the advocate for the petitioner requested the Court to ensure that a cellphone is not kept with the eldest child for recording the conversation in the chamber. The first respondent categorically stated that there is no basis for such apprehension.

3. The children were at pains to tell me that they desire that the parents should come together and they will be very happy if they are in position to stay with both the parties. Therefore, in chamber, a suggestion was given to the parents to explore the possibility of reconciliation, keeping in mind the desire expressed by the three children.

4. I gather from Shri Deshpande, learned advocate for the petitioner that as of today, there is no possibility of reconciliation between the petitioner and the 1st respondent. "

4. On 27th April 2009 when the petition was called out, none appeared

for the 1st respondent. The advocate for the petitioner was present. He stated that no progress has been made in the matter of settlement. Therefore, the petition was ordered to be fixed for final disposal.

5. The petitioner and 1st respondent married on 18th October 1989 under the provisions of the Special Marriage Act. On 27th December 1991 they again got married in church. The couple was blessed with three children. The first two are the daughters and third one is the son. The present ages of the children appear to be 16 yrs, 14 yrs and 12 yrs respectively.

6. As stated earlier, temporary custody of the minor children was granted by the learned Magistrate in favour of the petitioner. The order of temporary custody was disturbed by the Sessions Court by passing a peculiar order. The petitioner-wife and the 1st respondent husband were permitted to retain custody every alternate month. It, however, appears that after the order of the Sessions Court, the custody of the children has remained with the 1st respondent father.

7. The learned counsel appearing for the petitioner submitted that there was no reason for the learned Additional Sessions Judge to disturb the order of temporary custody passed by the learned Magistrate. He submitted that the order of the learned Sessions Judge that custody of the children will be retained by the petitioner and 1st respondent every alternate month is perverse and is not in the interests of the minors. He submitted that out of the three minors two are daughters and the son is of tender age. He submitted that welfare of the minors require that their custody should be retained with the mother.

8. I have given careful consideration to the submissions. It is well settled law that while deciding an application for custody of minor children, the only paramount consideration is welfare of minor children and the legal rights of the parties or the parents are not relevant. The order of the learned Magistrate records that the minor children on their own sought audience of the learned Magistrate and in chamber when the learned Magistrate talked to the children, they expressed a desire to stay with the mother. Thereafter, the learned Magistrate passed an interim order directing that the custody of the minor children be handed over to the petitioner. However, he passed an order directing that at weekends the minor children will stay with the 1st respondent.

9. The learned Additional Sessions Judge has noted in the impugned order that he had taken interview of the minor children in his chamber and he had talked to the parties with a view to bring about settlement. He has recorded that the petitioner was not in a mood to even think of settlement.

10. In paragraph 4 of the impugned order, he has noted that both the mother and father were claiming custody. He noted that the children want both the parents to stay together and they need love and affection of both, the mother and the father. He noted that the children expressed their desire to celebrate Christmas and New Year in the company of their parents. The relevant part of the order passed by the learned Additional Sessions Judge reads thus:

“

REASONS

6. The elder daughter Eleine is the student of IXth standard. Cedrina and Edric are the students of Vth standard. Their welfare is of paramount consideration. The children do not have any allegation against the parents. Both the parties want to exercise their parental authority to have custody of the children. The children want both the parents and stay with them together. They want to celebrate Christmas and the New Year in their company, which appears impossible, because the respondent No.1 is not ready. It is in these circumstances the appeal needs to be partly allowed as the order passed by the learned Magistrate needs some modification in the interest of the children. Hence, the following order:

ORDER

The appeal is partly allowed as under:-

1. The appellant shall give the custody of the three children to the respondent No.1 today in the Court.

2. The respondent No.1 shall keep the children in their custody till 19th January 2008. She shall give the custody back to the appellant on 20th January 2008 at about 9 a.m in the office of Mahila Vikas Kendra Pulgate, Pune and the appellant shall collect the children therefrom.

3. Thereafter the appellant shall keep the children in his custody till 19th February 2008 and he shall deliver the custody of the children to the respondent No.1 on 20th February 2008 at the same place and time to enable the respondent No.1 to collect the children.

4. In this manner this cycle of one month shall go on until further order.

5. The appellant and the respondent No.1 shall not remove the children out of the municipal limits of the Pune Cantonment and Pune Corporation without prior permission of the learned Magistrate.”

11. It must be noted that even before this Court the three children were at pains to point out that they desire that their parents should stay together and they would be very happy if they get an opportunity to stay with both the parents. Therefore, on 19th September 2009 a suggestion was given by this Court to the parents to explore the possibility of reconciliation keeping in mind the desire expressed by the three children. The petition was adjourned

thereafter from time to time. But the parties could not reconcile and come to a settlement. It is not possible at this stage to find out which of the two parties is not willing to settle the dispute. But it has to be observed that it would have been in the best interests of the minor children if the petitioner and the 1st respondent had patched up the differences and had agreed to reside under one roof only with a view to ensure that the minor children get company of both the parents. Both the parties should have given paramount importance to the wishes expressed by their children. Sadly, the petitioner and 1st respondent are not able to patch up the disputes. They could have even considered of residing under one roof atleast for few years till the children become major.

12. The three children are school going children. It must be stated here that the Sessions Court has passed a very peculiar order. The Sessions Court thought that it is in the interests of the minors that they remain in custody of their parents every alternate month. Such approach, to say the least, is shocking. The learned Sessions Judge has not at all considered the effect of this arrangement on the minors. The Act of disturbing custody of the minors after every one month will cause mental trauma to the minor children. The minor children have already suffered because of the attitude adopted by the parents of not settling the disputes atleast for the sake of children. In a case where there is a dispute between the parents over the custody of minor children, the custody has to be retained with one of the parents with visitation rights and/or right to have temporary custody for few days reserved in favour of the other parent. The arrangement which is made by the impugned order is certainly not in the interests of the minors and by such arrangement, the minors are bound to suffer. Therefore, the order impugned which is certainly not consistent with the welfare of the minors, will have to be quashed and set aside. Now the question which remains is what should be the interim arrangement during the pendency of the main application under section 12 of the said Act. For whatever reasons, for a substantially long time, the custody of the minors has remained with the 1st respondent father. Now it will not be in the interests of the minors to disturb the custody of the father till the main application is heard. The main application under section 12 of the said Act will have to be heard and disposed of expeditiously. However, the petitioner will have to be given right to meet her minor children and to remain in their company for sufficiently long time at periodical intervals. Even the minor children will need the company of their mother. However, interim arrangement will have to be worked out by the parties before the learned Magistrate as the 1st respondent has not chosen to appear before this Court at the time of final hearing.

13. Hence, I pass the following order:

: O R D E R :

(a) The impugned order dated 19th December 2007 is quashed and set aside.

(b) Considering the events which have transpired, till the disposal of the application under section 12 of the said Act, the custody of the minor children of the 1st respondent husband shall not be disturbed unless there are subsequent events warranting change in custody.

(c) The petitioner will be entitled to meet the minor children at regular intervals and to remain in their company for sufficiently long time. The learned Magistrate will pass a proper order in that behalf after hearing both the parties.

(d) The main application under section 12 of the said Act shall be decided as expeditiously as possible and preferably within a period of three months from today.

(e) All contentions of the parties in the main application are expressly kept open.

(f) The writ petition is disposed of in above terms.

(A.S.OKA,J)