

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLREV NO.635 of 2016

From the order dated 18.07.2016 passed by the S.D.J.M. (Sadar), Cuttack in D.V. CRLMC No.179 of 2016 and the order dated 02.08.2016 passed by the Sessions Judge, Cuttack in Criminal Appeal No.70 of 2016.

Vinay Gupta Petitioner
-Versus-
Saveri Nayak Opp. Party

For Petitioner: - Mr. Raghu Tandan
Gyanloka Mohanty
Divya Bansal
For Opp. Party: - Mr. Sourya Sundar Das
(Senior Advocate)
Suman Modi
Byomokesh Sahu
Shalaka Das

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing-01.11.2016 : Date of Judgment-28.11.2016

S. K. Sahoo, J. The little angel 'Sadhika' came to see the beauty of this wonderful world with an honest face, simple looks and heart touching smiles. She was full of expectations that her parents would be her role models and would shoulder all the

responsibilities to give her the wings of independence and allow her to grow of in an atmosphere of unselfishness. She wanted to prove herself to be the greatest gift of God with the divine love of her parents. Time rolled on. With the passage of time, her dream started shattering. She kept on wondering, fearing and doubting her peaceful existence. She saw her parents fighting for their ego forgetting all ethics of domestic discipline. She started crying, "Please Papa Mama! Don't spoil your tiny creation. Be magnanimous in forgiving each other. Don't fight for my custody. I can't be happy with one without the other. Come together. I am waiting for both of you with open arms. Hold my hands from both the sides. Lead me ahead. With all your brilliancy, we can recreate a heavenly home and prove ourselves to be the best family in the world."

The petitioner Vinay Gupta has filed this criminal revision petition challenging the impugned order dated 02.08.2016 passed by the learned Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 in dismissing his criminal appeal and thereby upholding the order dated 18.07.2016 passed by the learned S.D.J.M.(Sadar), Cuttack in D.V. CRLMC No. 179 of 2016 in allowing the petition filed by the opposite party Saveri Nayak under section 23(2) of the Protection of Women from Domestic

Violence Act, 2005 (hereafter 'P.W.D.V. Act') for ex-parte order of interim custody of the minor girl child of the parties namely, Sadhika Gupta in favour of the opposite party and directing District Protection Officer (D.P.O.), Cuttack for the production of the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.

2. On 01.07.2016 the opposite party filed an application under sections 12, 18 and 21 of P.W.D.V. Act against the petitioner in the Court of learned S.D.J.M. (Sadar), Cuttack which was registered as D.V. CRLMC No. 179 of 2016.

It is the case of the opposite party that she is the legally married wife of the petitioner and their marriage was solemnized on 23rd February 2003 at Ludhiana in accordance with Hindu rites and customs and both of them are software professionals working in Multi National Company. After marriage, both the petitioner and the opposite party stayed at Noida, U.P. till December 2003 and then they shifted to Gurgaon, Haryana in January 2004 and stayed till 2010. During this period, it is the case of the opposite party that the petitioner tortured her both physically and mentally and one year after marriage, the petitioner and his family members started demanding dowry and the petitioner did not even hesitate to assault the opposite party

demanding a son. In May 2007 when the opposite party had to undergo surgery for the removal of her right ovary, neither the petitioner nor his parents took care of her. In December 2007 when the opposite party met with an accident and sustained injury on her spinal cord and after surgery, the doctor advised her to take complete bed rest for three months, the petitioner and his family members created an unhealthy atmosphere for which the opposite party had to undergo a state of depression, leading to migraine and was often in a state of anxiety. In January 2011, the opposite party became pregnant but the petitioner and his parents did not cooperate with the opposite party. They were expecting a male child. The opposite party came to her native place at Cuttack where she gave birth to a girl child namely Mehr @ Sadhika Gupta in the month of August 2011. The petitioner did not spend any amount towards the delivery and upbringing of the girl child and everything was managed by the opposite party with a lot of hardship and agony. As a girl child was born, the petitioner and his parents cursed the child and the opposite party was not provided with any kind of care and affection. During the 21st day celebration of the girl child at Cuttack, the petitioner created a lot of nuisance for which the opposite party had to undergo further depression and agony. By

the time the girl child was born, both the petitioner and the opposite party had been transferred to Bengaluru for which the opposite party left the girl child in the care of her parents at Cuttack and she was frequently visiting her. The petitioner never accompanied the opposite party to Cuttack or enquiring about the well being of the child. The opposite party was trying her best to convince the petitioner to show fatherly love, affection and inclination towards the child but she had to face the anger and merciless beating in the hands of the petitioner. When both the petitioner and the opposite party were transferred to Noida, the opposite party was subjected to continuous torture for which in November 2015, she left Noida with her four years girl child and came to her father's place at Cuttack. Both the petitioner and his parents were hurling abusive words at the opposite party, her parents and her daughter over telephone. The girl child was admitted in a school in C.D.A., Cuttack. Due to physical and mental torture, the opposite party went on depression for which in the 1st week of June 2016, the opposite party and her mother came to Bengaluru for medical checkup. The girl child had also accompanied them. The opposite party informed the petitioner about her visit to Bengaluru for medical checkup. After five days, the petitioner came to the hotel where the opposite party was

staying and on 14th June 2016 when the opposite party was in deep sleep, the petitioner took away the sleeping child without intimating the opposite party and left the hotel and nobody in the hotel could guess the foul play of the petitioner. The CCTV footage of the hotel confirmed that it was around 7.40 a.m. when the petitioner left with the girl child. The petitioner switched off his mobile phone for which the whereabouts of the girl child could not be known. The opposite party lodged an F.I.R. against the petitioner on 15th June 2016 for which a case under section 363 of the Indian Penal Code was registered. The petitioner travelled via road from Bengaluru to Chennai and then he took a flight from Chennai to Delhi and after reaching at Delhi, the petitioner answered to the call of the opposite party. The girl child also talked with the opposite party and she was desperate to come back to the opposite party.

It is further case of the opposite party that the conduct of the petitioner towards her and her child amounts to domestic violence and the girl child who was below the age of five years is under illegal/unlawful confinement of the parents of the petitioner. It is stated that the girl child needed the company, love and affection of the opposite party and that the opposite party is entitled to the custody of the child.

It was prayed for by the opposite party in her application that the petitioner be directed not to cause any domestic violence to the opposite party and her daughter and to further handover the daughter to the opposite party forthwith.

3. On 04.07.2016 the opposite party filed an application under section 23 of the P.W.D.V. Act before the learned S.D.J.M.(Sadar), Cuttack in the aforesaid D.V. CRLMC No.179 of 2016 praying for ex parte interim custody of the daughter and for a direction to the petitioner to hand over the girl child to the opposite party forthwith. It is stated in the application that the petitioner is working at New Delhi and he was spending fourteen to sixteen hours in his office and leaving no time to spend with the girl child and therefore, it is difficult to conceive that the child would be living in any kind of congenial atmosphere and accordingly, ex-parte order of interim custody of the girl child was prayed for.

4. The learned Magistrate vide order dated 11.07.2016 after hearing the learned counsel for the opposite party was of the view that the domestic incident report indicates the age of the girl child to be four years. It was held that the petitioner had not provided the address where the girl child was kept. The opposite party had given four addresses of the petitioner and

accordingly, the Court gave opportunity to the opposite party to clarify regarding the complete address of the petitioner so that it can be disposed of. In pursuance of such order, the learned counsel for the opposite party filed a memo before the Magistrate with complete address of the petitioner.

5. The learned Magistrate passed the impugned order on 18.07.2016 wherein he has been pleased to observe that as per the domestic incident report, the petitioner subjected the opposite party to domestic violence and the age of the daughter of the parties is about four years. The learned Magistrate allowed the prayer made in the petition under section 23(2) of the P.W.D.V. Act regarding ex parte order for interim custody of the girl child in favour of the opposite party and directed the District Protection Officer (DPO), Cuttack to take necessary assistance from DCP, Cuttack regarding proper implementation of the order and to produce the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.

6. The petitioner challenged the impugned order dated 18.07.2016 of the learned S.D.J.M.(Sadar), Cuttack before the learned Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 and the learned Appellate Court vide impugned order dated 02.08.2016 has been pleased to observe that the petitioner is yet

to make his appearance before the learned Magistrate who is competent to pass custody order in regard to the girl child under section 21 of the P.W.D.V. Act and section 25(2) of the P.W.D.V. Act gives a scope to the Court for alteration, modification or revocation of any order passed under the P.W.D.V. Act. While dismissing the Criminal Appeal, liberty was granted to the petitioner to approach the learned Magistrate, in the event of which it was directed that the learned Magistrate shall give opportunity of hearing to the petitioner on the question of custody of the child and to pass necessary order.

7. Mr. Raghu Tandan, learned counsel for the petitioner emphatically contended that passing of an ex-parte interim order regarding custody of the child in favour of the opposite party is not permissible under section 23(2) of P.W.D.V. Act and therefore, the learned Magistrate has exceeded his jurisdiction while passing the impugned order dated 18.07.2016. He further contended that the impugned order is in the nature of final relief at the interim stage which should not have been passed. He submitted that the opposite party is suffering from obsessive compulsive disorder (OCD) since 1997 and she had suffered three episodes of depression and also suffered suicidal ideations and she is still undergoing periodic treatment at NIMHANS,

Bengaluru and she has suppressed all these aspects of her psychiatric disorder in her application filed before the Magistrate which amounts to playing fraud upon the Court and therefore, the interim order should be set aside. It was further contended that the welfare of the child is of paramount consideration and the Court should not have hastily passed the impugned order without considering such vital aspect and without hearing the petitioner in absence of any irreparable or irretrievable situation. It was further contended that a father cannot be said to have kidnapped his own child and a false case has been foisted by the opposite party with an oblique motive. While concluding his arguments, Mr. Tandan submitted that even though as per the Hindu Minority and Guardianship Act, ordinarily the custody of a minor child below the age of five years should be with the mother but if in the interest of the child, custody of the mother is not beneficial then the Court is not bound to give such custody to the mother. It was urged that since in the main application, the petitioner has already filed his reply so also an application under section 25(2) of the P.W.D.V. Act before the Magistrate for keeping the impugned order dated 18.07.2016 in abeyance and for revocation of the impugned order, necessary direction be given to the Magistrate to dispose of the proceeding in

accordance with law expeditiously without disturbing the custody of the girl child with the petitioner.

Mr. Sourya Sundar Das, learned Senior Advocate on the other hand in his inimitable style, forcefully but elegantly urged that the combined reading of the provisions under sections 21 and 23 of the P.W.D.V. Act clearly envisage that an ex parte order relating to interim custody of the child can be passed on the basis of the affidavit filed by the aggrieved party if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent might commit an act of domestic violence. Though the word 'may' has been used for granting ex parte order on the basis of the affidavit in sub-section (2) of section 23 of the P.W.D.V. Act but looking at the purpose the Act seeks to achieve, the expression 'may' is to be construed as 'shall'. The learned counsel placed sub-section (2) of section 28 of the P.W.D.V. Act which permits the Court in laying down its own procedure for disposal of the application under sub-section (2) of section 23 of the P.W.D.V. Act. It was contended that on a conjoint reading of sections 21, 23(2) and 28(2) of the P.W.D.V. Act, it can be safely inferred that the Magistrate has got ample jurisdiction to pass ex

parte interim orders with regard to the custody of child in favour of the aggrieved party. The learned counsel further urged that the conduct of the petitioner in taking away the minor child from Bengaluru hotel while the opposite party was sleeping coupled with the fact that the petitioner had never taken any responsibility of the child at any point of time earlier, it can be said to be a rare and exceptional case where the Court passed the ex parte interim order and no fault can be found with the same. It was contended that the opposite party has made categorical assertions in the application filed before the Magistrate that the petitioner subjected her to physical assault and mental harassment and she has further stated that because of the conduct of the petitioner, the opposite party was going into mental depression and therefore, there was no suppression of facts as contended by the learned counsel for the petitioner. It is further contended that section 6 of the Hindu Minority and Guardianship Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. It was urged that a mother would be in the best position to communicate with the daughter with regard to biological changes happening to her which due to shyness, she might not disclose the same to her father. The learned counsel emphasized

that obsessive compulsive disorder (OCD) cannot be construed as a psychological disorder like schizophrenia. He submitted that the petitioner who is remaining busy in his official works for about fourteen hours a day cannot take care of the child's mental, physical and emotional needs rather the opposite party who is a successful software professional for nearly sixteen years and is financially independent and was taking all the care of the child single handedly is the best person in the circumstances to get the custody of the child for the welfare of the child which is of paramount consideration. It was urged that the child has been deprived of motherly love and affection due to highhandedness of the petitioner for which a criminal case of kidnapping has already been initiated against him. The learned counsel further submitted that P.W.D.V. Act does not provide a revision petition against the order of the Appellate Court and since in view of section 12(5) of the P.W.D.V. Act, the Magistrate has to make every endeavour to dispose of the application under section 12 within a period of sixty days, it would not be proper to interfere with the concurrent findings of the Courts below and therefore, the revision petition should be dismissed.

Maintainability of the revision petition

8. There is no dispute that there is no specific provision in P.W.D.V. Act for filing any revision against the judgment and order passed by the Appellate Court.

Section 29 of the P.W.D.V. Act indicates that an appeal to the Court of Session is maintainable against the order passed by the Magistrate. The Act empowers the Magistrate to pass different orders like protection orders (section 18), residence orders (section 19), monetary reliefs (section 20), custody orders (section 21) and compensation orders (section 22). The Act also empowers the Magistrate to pass interim orders and even ex parte orders in view of section 23. If either the aggrieved person or the respondent is aggrieved by any of the aforesaid orders, the remedy lies with her/him to challenge the same by filing an appeal under section 29 of the P.W.D.V. Act before the Court of Session.

Section 28(1) of the P.W.D.V. Act indicates that all the proceedings under sections 12, 18, 19, 20, 21, 22 and 23 so also the offences under section 31 of the P.W.D.V. Act shall be governed by the provisions of the Code of Criminal Procedure, if it is not otherwise provided in the Act. The Code of Criminal Procedure under section 397 of Cr.P.C. which deals with exercise

of power of revision empowers the High Court to call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying himself about the correctness, legality or propriety of any finding or order or sentence passed and also to verify the regularity of any proceeding of such inferior Court. Section 401 of Cr.P.C. deals with powers of revision of the High Court. Sub-section (4) of section 401 of Cr.P.C. states that under the Code, if an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. Therefore, a party aggrieved by an order passed by the Magistrate under a P.W.D.V. Act proceeding cannot challenge the order directly before the High Court in a revision petition nor even the Court of Session is empowered to entertain a revision petition. So far as the other Acts are concerned, in absence of any specific provision in those Acts, against the order of the Magistrate, a revision petition is maintainable either to the Court of Session or to the High Court but if a revision application has been made either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them in view of the bar under sub-section (3) of section 397 of Cr.P.C. Second

revision application by the same party to the High Court after the dismissal of the first revision application by the Sessions Judge is not ordinarily maintainable even under the garb of section 482 of Cr.P.C. The whole idea is to prevent unnecessary delay and multiplicity of the proceedings. However in case of **Krishnan - Vrs.- Krishnaveni reported in (1997) 13 Orissa Criminal Reports (SC) 41**, the Hon'ble Supreme Court held that when the High Court on examination of record finds that there is grave miscarriage of justice or abuse of process of the Courts or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is, therefore, to meet ends of justice or to prevent abuse of process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under section 397(1) read with section 401 of the Code. It was further held that though revision before the High Court under sub-section (1) of section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under section 482 of the Code. In case of **Popular Muthiah -Vrs.- State of Tamil Nadu reported in (2006) 34**

Orissa Criminal Reports (SC) 749, it is held that the High Court while exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive so also procedural matters.

In case of **Harshakumar -Vrs.- State of Kerala reported in 2011 (3) KHC 15**, it was held that judgment of the Court of Session in an appeal though preferred under Section 29 of the Act being of an inferior Criminal Court, is revisable by the High Court in exercise of its power under Sections 397(1) and 401 of the Code.

In case of **K. Rajendran -Vrs.- Ambikavathy reported in (2013) 2 Madras Law Journal 406**, it is held as follows:-

"45. As far as the present case is concerned, as against the impugned order dated 21.9.2012 passed in D.V.O.P. No. 29 of 2012, the Revision Petitioners are to prefer only Statutory Appeal as per Section 29 of the Act. It is a viable efficacious, effective and alternative remedy, as opined by this Court. In the instant case, obviously, the Petitioners have not filed any petition seeking alteration, modification or revocation of the order passed by the Learned Judicial Magistrate in D.V.O.P. No. 29 of 2012

dated 21.9.2012. Without seeking alteration, modification or revocation of the order so passed in D.V.O.P. No. 29 of 2012 dated 21.9.2012 by the Learned Judicial Magistrate and also not filing the Statutory Appeal under Section 29 of the Act, the Petitioners have directly approached this Court by filing the instant Criminal Revision petition under Section 397 and Section 401 of Cr.P.C. *Only when a Revision is filed as against the judgment or order passed by the Court of Session in Appeal as per Section 29 of the Act, then only, the right of availing the procedural facility of filing the Revision is available to the Petitioners, in the considered opinion of this Court.* When a statutory right of filing an Appeal is provided to the Petitioners (as per Section 29 of the Act), then this Court is of the considered view that the Petitioners cannot invoke the Revisional Jurisdiction of this Court under Section 397 read with 401 of Cr.P.C. In the result, it is held by this Court that the present Criminal Revision Petition filed by the Petitioners before this Court will not lie in the eye of Law."

Even though there is no specific provision relating to preferring a revision petition in the High Court against the order of the Appellate Court in a P.W.D.V. Act proceeding, I am of the view where there is grave miscarriage of justice or abuse of

process of the Courts or there is failure of justice by passing the order, in order to meet ends of justice, the High Court can entertain a revision petition. Accordingly, I do not find any force in the contention raised by the learned counsel for the opposite party that the revision petition is not maintainable in the eye of law.

Whether the Magistrate is competent to pass ex parte order of interim custody of girl child?

9. Section 21 of the P.W.D.V. Act empowers the Magistrate to grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf, at any stage of the hearing of the application for protection order or for any other relief under the Act.

Section 21 of the P.W.D.V. Act further empowers the Magistrate to make arrangements for visit of the child or children by the respondent, if necessary. However, the Magistrate can refuse to allow the respondent to visit the child or children if he is of the opinion that any such visit would be harmful to the interests of the child or children.

The section starts with non-obstante clause. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an

overriding effect over any other law in force as is mentioned in the non-obstante clause. It is a legislative device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. The provision in which the non-obstante clause occurs would wholly prevail over any other law for the time being in force and it removes all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the non-obstante clause is attached.

Section 23(1) of the P.W.D.V. Act empowers the Magistrate to pass an interim order as he deems just and proper while adjudicating any proceeding before him. Section 23(2) of the P.W.D.V. Act empowers the Magistrate to grant an ex parte order on the basis of affidavit filed by the aggrieved person under sections 18, 19, 20, 21 and 22 against the respondent if he is satisfied that the application filed by the aggrieved party prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood that the respondent might commit an act of domestic violence.

In view of the conjoint reading of section 21 and section 23(2) of the P.W.D.V. Act, it is very clear that the Magistrate is empowered to pass an ex parte order in granting interim/temporary custody of any child or children to the aggrieved party even basing on the affidavit filed by such aggrieved party without notice to the respondent. The only criteria for passing such ex parte order must be a case of exigency under the facts and circumstances of each case which can only be considered if the application prima facie discloses regarding commission of domestic violence or likelihood of commission of such domestic violence on the aggrieved person. There must be sufficient and compelling reasons to persuade the Court to pass such ex parte interim/temporary custody order of the child. For example, if the Magistrate is prima facie satisfied that the minor child of tender age has been separated from the mother forcibly or custody of the child with the respondent is harmful and against the interest of the child and further custody with the respondent is likely to aggravate the situation, the Magistrate can certainly pass ex parte interim order relating to grant of interim/temporary custody of the child or children in favour of the aggrieved person basing on the affidavit inasmuch as if prompt action at that stage is not taken then the legislative

intent of making such a provision would be frustrated. At a later stage, the Magistrate being satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order passed then he can entertain the application filed on that behalf by either of the parties and can pass appropriate order recording his reasons. The Magistrate has got the power to revoke the ex parte order if he is satisfied that the order has been obtained by the aggrieved person by suppression of material facts or misrepresentation or by playing fraud upon the Court.

The learned counsel for the petitioner placed reliance in case of **Dr. Preceline George -Vrs.- State of Kerala reported in ILR 2010 (1) Kerala 663: 2010 (1) Kerala Law Times 454**, wherein it was held that the Magistrate can pass ex parte ad interim order without notice to the respondent as provided under section 23 (2) and on the appearance of the respondent, after granting an opportunity to the respondent to object the claim and on hearing the applicant and the respondent, a final interim order under section 23 (1) is to be passed with or without modification of the ad interim order. It was further held that such relief under section 23 (2) can be granted only if urgent orders are warranted on the facts and

circumstances of the case and delay would defeat the purpose or where an interim order is absolutely necessary either to protect the aggrieved person or to prevent any domestic violence or to preserve the then existing position.

In case of **Anvarbhai Rasulbhai Sanghvani -Vrs.- Mumtazben**, a single Bench of Gujarat High Court in Special Criminal Application No.2410 of 2009 vide judgment and order dated 08.12.2009 held that under section 23 (2) of P.W.D.V. Act, the Magistrate is empowered to pass any order under section 21 not only as an interim order, but also as an ex parte ad-interim order. A woman who is fighting against domestic violence, faces number of hurdles. The mother whose minor child is separated from her forcibly that too at a young age, would be left distressed and her resistance against domestic violence would break down. Magistrates, therefore, while dealing with the applications of an aggrieved person seeking custody of minor children who may have been forcibly separated from the mother should be prompt and considered to give effect to the legislative intent.

In view of the above discussions, I am of the view that the learned Magistrate has got the jurisdiction to entertain an application under section 23(2) of the P.W.D.V. Act relating to

passing an ex parte order for grant of interim custody of the child in favour of the aggrieved person.

Though it was urged by the learned counsel for the petitioner that the impugned order of the Magistrate is in the nature of final relief at the interim stage, I do not consider it to be so. In fact, the petitioner has already filed an application before the learned Magistrate under section 25 (2) of the P.W.D.V. Act which will be considered in accordance with law after hearing both the parties.

Playing fraud on the Court by suppression of facts

10. It is contended by the learned counsel for the petitioner that the opposite party has concealed the aspect of her psychiatric disorder which amounts to playing fraud upon the Court and therefore, the interim order needs to be set aside.

The learned counsel for the opposite party on the other hand contended that there are not only categorical assertions regarding physical assault and mental harassment in the application but also about the mental depression of the opposite party due to the conduct of the petitioner and his family members.

In case of **S.P. Chengalvaraya Naidu -Vrs.- Jagannath reported in (1994) 1 Supreme Court Cases 1**, it

is held that the Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. A person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

In Case of **A.V. Papayya Sastry -Vrs.- Govt. of A.P. reported in (2007) 4 Supreme Court Cases 221**, it is held that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or authority is a nullity and non est in the eye of law. Such a judgment, decree or order either by the 1st Court or by the final Court has to be treated as nullity by every Court superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. Fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

In case of **Dalip Singh -Vrs.- State of Uttar Pradesh reported in (2010) 2 Supreme Court Cases 114**, it is held that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

On perusal of the application filed under section 12 of the P.W.D.V. Act, I find that not only there are specific

averments relating to domestic violence committed on the opposite party by the petitioner and his family members but also it is mentioned that the opposite party went into a state of depression, leading to migraine and was often in a state of anxiety due to continuous ill treatment by the petitioner and his parents. It is further mentioned that because of the petitioner and his family members playing foul with the opposite party, both mentally and physically, the petitioner went into further depression for which in the 1st week of June 2016, the opposite party along with her mother had been to Bengaluru for a Medical checkup.

Though the learned counsel for the petitioner produced certain medical documents of the opposite party relating to her suffering from obsessive compulsive disorder (OCD) so also doctor's reports on the girl child but it is the contention of the learned counsel for the opposite party that the medical documents have been created with an oblique motive. Since the documents require proof in accordance with law and it can be considered by the Magistrate at the appropriate stage, I am not expressing any opinion on such medical documents in this revision petition.

In view of the above discussions, I am of the view that the contentions raised by the learned counsel for the petitioner that the opposite party has suppressed material aspect relating to her psychiatric disorder and thereby played fraud on the Court is not acceptable.

Whether any illegality committed by passing the impugned order?

The application under section 12 of the P.W.D.V. Act along with affidavit was filed by the opposite party on 01.07.2016 which was registered and the learned S.D.J.M. (Sadar), Cuttack called for the domestic incident report from the Protection Officer which was received on 04.07.2016. Such report supports the averments made in the application filed by the opposite party regarding domestic violence. The learned Magistrate specifically observed that after perusal of the domestic incident report (DIR), it prima facie reveals that the aggrieved person was subjected to domestic violence by her husband and the age of the daughter of the aggrieved person is about four years. The learned Magistrate further held that it is the bounden duty upon the Court to see the welfare of the child which is always paramount consideration.

In case of **Mausami Moitra Ganguli -Vrs.- Jayant Ganguli reported in (2008) 7 Supreme Court Cases 673**, it is held that while determining the question as to which parent the care and control of a child should be committed, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The question of welfare of the minor child has to be considered in the background of relevant facts and circumstances. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. The stability and security of the child is an essential ingredient for a full development of child's talent and personality.

In case of **Rajesh K. Gupta -Vrs.- Ram Gopal Agarwala reported in (2005) 5 Supreme Court Cases 359**, it was held that in an application seeking writ of habeas corpus for custody of a minor child, the principal consideration for the Court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother

and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. Since according to the appellant Rajesh K. Gupta, Smt. Aruna Gupta is a case of paranoid schizophrenia and not any kind of serious mental ailment, Hon'ble Court did not find any ground to take a contrary view and disturb the custody of Rose Mala with the mother and give her in the custody of the appellant.

In the present case, it is specifically averred in the application filed under section 12 of the P.W.D.V. Act that while the opposite party was in deep sleep, the petitioner got control of the child forcibly as she was in a sleeping state and went out of the hotel very politely and in a casual manner so that nobody in the hotel would ever smell/suspect his foul play and criminal act. The CCTV Camera footage of the hotel according to the opposite party confirms her averments that the petitioner had parted with the sleeping child around 7.40 a.m. An FIR has also been lodged under section 363 of the Indian Penal Code against the petitioner. Whether the criminal proceeding against the petitioner who is the father and natural guardian of the girl child for an offence of kidnapping is maintainable or not is a complete different matter but it can be said that on the basis of the

averments made in the application supported by affidavit coupled with the domestic incident report which was called for by the Magistrate, it prima facie appears that the petitioner has committed an act of domestic violence on the opposite party and the manner in which the girl child of less than five years was allegedly separated from her mother, I am of the view that considering the welfare of the child, the learned Magistrate has rightly passed the ex parte interim order of granting interim custody of the girl child in favour of the opposite party. The petitioner is at liberty to establish before the Magistrate at appropriate stage that the psychological disorder of the opposite party, if any, is of such a nature that it would be harmful for the girl child to stay in the company of the opposite party. The Magistrate can duly consider the same and give his findings thereon at the time disposal of the application under sections 25 (2) and 12 of the P.W.D.V. Act filed by the petitioner and the opposite party respectively.

I shall be failing in my duty if I do not record here the impression that I have formed during the pendency of the proceeding before this Court. When this Court directed the petitioner to produce the girl child on different dates, in compliance to the orders, the petitioner produced the girl child

and she was allowed to remain in the company of the opposite party till the end of Court hours. During Durga Puja holidays, as per the order of this Court, the girl child remained in the custody of the opposite party from 8th October 2016 to 14th October 2016. It was marked that though the girl child was initially reluctant and hesitant to come to the opposite party on each date but after few hours, she was found happy in the company of her mother. Whether the girl child was tutored by the petitioner and his family members against the opposite party as alleged by the learned counsel for the opposite party has to be ascertained at appropriate stage by the Magistrate.

Having bestowed my anxious consideration to the materials available on record and the observations made by the Courts below, I am of the view that there is no illegality or infirmity in the impugned orders and therefore, the revision petition filed by the petitioner being devoid of merits, stands dismissed.

The girl child Mehr @ Sadhika Gupta who is produced today in Court by the petitioner Vinay Gupta be handed over to the opposite party Saveri Nayak immediately. The opposite party shall allow the petitioner to talk every day preferably in the evening hours with the girl child and shall allow the opposite

party to visit the girl child during holidays and she will be allowed to stay in the company of her father for about four hours on those days. The venue of their meeting shall be decided by the parties. This arrangement is purely interim in nature which will be decided finally by the Magistrate while considering the application filed under section 25 (2) of the P.W.D.V. Act filed by the petitioner or while disposing of the application under section 12 of the P.W.D.V. Act. In the meantime, the girl child has completed the age of five years. The Magistrate is at liberty to consider the custody of the girl child as provided under section 21 of the P.W.D.V. Act in accordance with law along with other reliefs sought for by the opposite party without being influenced by any observation made in this judgment. The learned Magistrate shall make endeavour to dispose of the application under section 25 (2) of the P.W.D.V. Act filed by the petitioner within a period of two weeks from the date of receipt of this judgment along with the L.C.R. and the application under section 12 of the P.W.D.V. Act within a period of sixty days from the date of its first hearing.

L.C.R. be sent back immediately.

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S.K. Sahoo, J.