



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr.M.M.O No.1164 of 2022

Date of Decision: June 2, 2023

Lajwanti & others

...Petitioners.

Versus

Priti Devi & others

..Respondents.

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner: Mr.Shanti Swaroop Bhatti, Advocate.

For the Respondents: Mr.G.D. Verma, Senior Advocate, alongwith Mr.Hitesh Thakur & Ms.Shruti Sharma, Advocates, for respondent No.1

Mr.Harinder Singh Rawat, Additional Advocate General, for respondent Nos.2 and 3.

Vivek Singh Thakur, J.

The instant petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.PC') has been preferred by petitioners, against order dated 23.11.2022, passed by Sub-Divisional Magistrate, Nalagarh, District Solan, H.P., in Case No.72-IV of 2022, titled as *Priti Devi vs. Lajwanti & others*, and order/warrant dated 24.11.2022, issued in the same matter, whereby Magistrate has held that respondent No.1-Priti Devi, being natural guardian of her minor sons, is entitled for their custody and SHO Police Station Ramshahar, has been directed to produce minor children (petitioners No.4 and 5

1 Whether reporters of the local papers may be allowed to see the judgment?

herein) before Magistrate on 12.12.2022 for handing over their custody to their mother Priti Devi.

2. I have heard learned counsel for the parties and have also gone through the record.

3. Facts, emerging from the record, are that respondent No.1-Priti Devi was married with Amar Singh, who was son of petitioner No.1-Lajwanti and petitioner No.2-Darshan Singh. Whereas, petitioner No.3-Sunita Devi was his sister. Petitioners No.4 and 5 minors are children of Amar Singh and respondent No.1-Priti Devi.

4. Due to quarrels taking place between husband and wife as well as with other members of family, Priti Devi and her husband Amar Singh had been residing separately at Nalagarh. Whereas, petitioner Nos.1 and 2 and other members of family were residing in Village Bahlam in Tehsil Ramshehar, District Solan, H.P. Petitioner No.3-Sunita Devi has been married to Jai Pal, resident of Khokhra, Post Office Khera, Tehsil Nalagarh, District Solan, H.P.

5. Record reveals that there were quarrels not only between husband Amar Singh and wife Priti Devi, but also between Priti and Sunita Devi and other family members, i.e. Sunita as well as Darshan Singh and Lajwanti, and to avoid quarrels, as per compromise, Amar Singh and Priti Devi were residing at Nalagarh alongwith their two minor children. Elder son Divyance is 7 years old, whereas, date of birth of younger son Harshit is 14.06.2021.

6. On 17.07.2022, Amar Singh was taken to Hospital at Nalagarh by Priti Devi, by informing local police, in police Van, where during treatment he died at 10.30 p.m. At that time, her minor children were alone in rented room. According to respondent No.1-Priti, when she was in Hospital attending to her husband, she called her parents to look after minor children, who rushed to Nalagarh and mother of respondent No.1 stayed with children in the room. Whereas, father of respondent No.1-Priti came to the Hospital. In the meanwhile, Sunita Devi came to the room of Amar Singh and took both children with her to Village Bahlam, and, Darshan Singh lodged FIR against respondent No.1-Priti Devi alleging that Amar Singh committed suicide due to cruelties by his wife respondent No.1-Priti Devi. Resultantly, on 18.07.2022, respondent No.1-Priti Devi was arrested and, thereafter, she was enlarged on bail on 27.07.2022. During intervening period children remained with petitioner No.2-Darshan Singh, who were handed over to Darshan Singh by petitioner No.3-Sunita Devi, who was well acquainted with children because she was frequent visitor and she took children to the house of her father (petitioner No.2-Darshan Singh) in Village Bahlam.

7. After release on bail, respondent No.1-Priti Devi filed an application under Section 98 of Cr.P.C. in the Court of Sub Divisional Magistrate, Nalagarh, for production and custody of minor children, but her application was rejected by the Magistrate on 09.8.2022 being not maintainable. The said order

was assailed by respondent No.1-Priti Devi before Additional Sessions Judge, Nalagarh, District Solan, H.P., who vide order dated 01.10.2022, passed in Criminal Revision No.8/NL/10 of 2022, titled as *Priti Devi vs. State of H.P. & others*, set aside order dated 09.08.2022 directing the parties to appear before the Magistrate on 10.10.2022, with direction to the Magistrate to decide the matter afresh. Whereafter, Magistrate passed impugned order dated 23.11.2022 against petitioner No.1-Lajwanti and petitioner No.2-Darshan Singh, directing them to handover custody of minor children to respondent No.1-Priti Devi and, thereafter, on 24.11.2022 issued a Production Warrant for handing over the children.

8. It has been contended on behalf of grandparents of the children that respondent No.1-Priti Devi was not having good relations with her husband, who was abetted by respondent No.1-Priti Devi to commit suicide and, therefore, lives of children will not be safe in the hands of respondent No.1-Priti Devi, and after death of their father there was none in the world to take care of them except grandparents and, therefore, under compelled circumstances, due to love and affection and to protect future generations grandparents (petitioner Nos.1 and 2) took their grandsons with them and by doing so, they have not committed any offence of confinement which is mandatory for attracting provisions of Section 97 Cr.P.C. It has further been canvassed that mother is an accused for abetting father of children to commit suicide and she is having no means to look

after and bring up children. Whereas, Darshan Singh-petitioner No.2 is an Ex-Serviceman and is having sufficient landed property which will be inherited by minor children and, in these circumstances, it will be in the interest of children to keep them with their grandparents, who are, in facts and circumstances of the case, otherwise entitled to keep them being their guardian as grandparents and, therefore, it has been contended that Magistrate has not applied judicial mind while deciding application preferred by respondent No.1-Priti Devi.

9. It has been contended that being grandparents, petitioner Nos.1 and 2 are natural persons to have custody of minor children and, therefore, there is no illegal confinement as also has been observed by the Magistrate in his order, however, in concluding part he has committed a mistake by holding that respondent No.1-Priti Devi is entitled to have custody of minor children. According to him, it would be in the interest of children to stay with grandparents who are having means to look after them. Whereas, respondent No.1-Priti Devi, mother of children, has no means to earn livelihood and she as well as her younger married sister are dependent upon their unemployed father, who has no regular source of income. Further that, in these circumstances, respondent No.1-Priti Devi will not be in a position to bring up the children in a better way than their grandparents, and keeping in view paramount consideration of welfare of children impugned order passed by the Magistrate deserves to be quashed and set aside.

10. Referring judgment of Two-Judges' Bench of Supreme Court in Special Leave Petition (Civil) No.1243 of 2008, titled as *Nil Ratan Kundu & another vs. Abhijit Kundu*, reported in **(2008) 9 SCC 413**, it has been argued that "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property and "Ward" is defined as a minor for whose person or property or both, there is a guardian. It has been submitted that mother is not capable and competent to claim guardianship of minor children and their father had already expired and, therefore, now grandparents are competent and entitled to have custody of minor children.

11. It has further been submitted that elder son has been admitted in the School at Nalagarh in Jai Sacchidanand Public School, Village Doli. Whereas, another son has been admitted in Anganwari and they are happy with their grandparents, who are meeting every requirement of children.

12. Referring judgments of Punjab and Haryana High Court in *FAO No.1556 of 2008, titled as Neelam vs. Man Singh and another, decided on 19.11.2014*; and Madhya Pradesh High Court in *Writ Petition No.7069 of 2022, titled as Pilu @ Priya vs. State of M.P., decided on 12.07.2022*, it has been contended that paramount consideration at the time of determining entitlement for custody of minor children, is welfare of children, and in present case, keeping in view accusation against mother (respondent No.1) and her financial condition, it would not be in the interest of minor children to handover their custody to her

and it would be in the interest of children to keep them with their grandparents. It has further been contended that as there is no illegal confinement or wrongful confinement, for entitlement of grandparents to have custody of minor grandchildren, petition/application under Section 97 Cr.P.C. was not maintainable and, therefore, Magistrate has committed a mistake by entertaining the petition and issuing direction to handover custody of children to their mother despite the fact that he himself recorded in the order that there is no wrongful confinement of minor children in the hands of their grandparents. It has been further contended that children were not missing, but with grandparents, which was in the knowledge of respondent No.1 and there was no reason to believe her that her children were missing and, thus, application/petition filed by her before the Magistrate was not maintainable.

13. Learned counsel for the petitioners has submitted that status report filed by the police is in favour of grandparents of the children, wherein it has been submitted, after verification, that in the house of Darshan Singh-petitioner No.2, his grandsons are being looked after by Darshan Singh and his family members in very nice manner and younger child Harshit attends Anganwari and elder son is studying in 2nd class in a Public School, Doli. Further that, Darshan Singh and his family members love the children too much and fulfill their every necessity and both children are very happy with their grandfather Darshan Singh and his family. Therefore, it has been contended that it would be in the welfare of the children to keep them with their

grandfather and other family members where they are residing at present.

14. It has been further contended on behalf of the petitioners that respondent No.1 was arrested on 18.07.2022 and enlarged on bail on 27.07.2022. But she has instituted the case for custody of children in the month of October 2022 which reflects that she was not interested in custody of minor children, but has filed present application only in order to have a claim on the property of petitioner No.2-Darshan Singh and his family through her minor children.

15. Learned counsel for the petitioners by referring judgments in *Harakh Singh vs. Lalmuni Kuer*, reported in *1977 CrL.J 723 Patna*; and *Anjula Divedi vs. State Represented by Sub Inspector of Police*, reported in *AIR 2016 (Karnataka) 358*, has submitted that against impugned order petition under Section 482 Cr.P.C., is maintainable.

16. Learned counsel for respondent No.1, referring judgment of Allahabad High Court in *Zahirul Hassan vs. State of Uttar Pradesh*, reported in *1988 CRI.L.J. 230*, has contended that despite having alternative remedy to file a case for custody of minor children, an application by mother under Section 97 of Cr.P.C., is maintainable.

17. Referring judgment of Bombay High Court in *Purushottam Wamanrao Thakur and others vs. Warsha and others*, reported in *1992 CRI.L.J. 1688*, it has been contended that even father, in given facts and circumstances, depriving mother from

custody of children by removing them from mother's residence, commits an offence amounting to wrongful confinement and in such a case, Search Warrant is justified. It has further been submitted that in present case, children have been removed from mother's residence by the grandparents without any authority or consent of the mother and, therefore, petition under Section 97 Cr.P.C., by her is maintainable.

18. Referring pronouncement of the Supreme Court in *Anjali Anil Rangari vs. Anil Kripasagar Rangari and others, (1997) 10 SCC 342*, it has been contended that mother is a natural guardian of minor children and custody of children from her only can be taken away on the basis of order/judgment passed by the Court after adjudicating her competence and entitlement in appropriate proceedings either under Guardianship and Wards Act, 1890 (in short 'Wards Act') or Guardianship Act, and unless and until such verdict is there against mother she is entitled to maintain application/petition under Section 97 Cr.P.C., for custody of her minor children from their grandparents.

19. Referring pronouncement of Gauhati High Court in *Piyush Chamaria vs. Hemanta Jitani & others, 2012 CRI. L.J. 2306*, it has been contended that taking away children from custody of mother and not allowing them to meet her or denial to return their custody to their mother, amounts to an offence of wrongful confinement of minors, for which it is not necessary to kidnap them and in such a situation Magistrate has jurisdiction under Section 97 Cr.P.C., to issue Warrant of Production and transfer

custody of children to natural guardian i.e. mother and issuance of such Warrant is not liable to be quashed on the ground that mother can take recourse of remedy under Wards Act or Guardianship Act.

20. Referring pronouncement of Supreme Court in *Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42*, it has been contended that petition for custody of minor children under Article 226 of Constitution of India or in alternative under Section 97 Cr.P.C., is maintainable where detention of the children by a parent or others is illegal or without any authority of law and such detention of minor by a person, who is not entitled to his legal custody, amounts to illegal detention for the purpose of grant of writ or issuance of Search/ Production Warrant under Section 97 Cr.P.C. It has been further contended that when mother, natural guardian of minor children, is available, who is entitled for custody of children, detention of children by grandparents is an illegal detention of minor children as petitioner No.2-Darshan Singh in his statement before the Magistrate, itself has stated that he shall not handover custody of minor children to their mother in any eventuality.

21. It has been contended on behalf of the respondents that had respondent No.1 been abettor for commission of suicide by her husband, then she would have never informed the police and would not have taken him to the Hospital with the help of police.

22. It has also been submitted on behalf of respondent No.1-mother that contention raised on behalf of the petitioners that after her release on bail on 27.07.2022, she instituted a case for custody of children in the month of October 2022, is misleading because immediately after release on bail on 27.07.2022, respondent No.1 had filed an application/petition before Sub-Divisional Magistrate for custody of her children on 29.07.2022, which was taken up by the Magistrate on 01.08.2022 and notices were issued to the respondents (petitioners herein) for 06.08.2022. On 06.08.2022, statements of parties were recorded. The said petition was dismissed on 09.08.2022. Thereafter, respondent No.1 assailed dismissal by filing a Revision Petition before Additional Sessions Judge, Nalagarh, which was allowed on 01.10.2022 and matter was remanded back to the Sub Divisional Magistrate (SDM), who, after adjudicating the matter, allowed the petition on 23.11.2022 directing the petitioners herein to handover custody of children to respondent No.1-mother. In furtherance to aforesaid direction, Magistrate issued direction to SHO Police Station Ram Shahar, to produce minor children before him on 12.12.2022 for handing over their custody to the mother.

23. The aforesaid order passed by the SDM has been stayed, in present petition, vide order dated 08.12.2022. It has been thus, contended that respondent No.1-mother from the day one after her release on bail is trying, by all legal means, to get custody of her minor children.

24. In present case, parents of children, alongwith children, were residing separate to the grandparents of children since long and were upbringing the children. Father of children expired by committing suicide. Grandfather lodged complaint against mother alleging abetment by her to father (her husband) to commit suicide. Till then, custody was with the parents including mother. After arrest of mother custody of children was taken by grandparents. Immediately after her release on bail, mother tried to have custody of her children and, for that purpose, she initiated proceedings, in reference, in present case. It is not a case where father of the children, who had committed suicide, was living alongwith children but separate to the mother of children so as to exclude the mother from having custody of children. Both of them husband and wife (father and mother) were looking after their children. Allegation that mother abetted the father of children to commit suicide is yet to be proved.

25. It is also a fact that mother has not been declared incompetent or disentitled to have custody of her minor children. According to Section 6 of Hindu Minority & Guardianship Act, 1956 (in short 'Guardianship Act') in case of a boy, mother is a natural guardian after father, with further proviso that custody of a minor, who has not completed age of 5 years shall ordinarily be with the mother. Therefore, after death of father mother is the next person to have guardianship/custody of minor children.

26. Section 13 of Guardianship Act, 1956 provides, as also reiterated in pronouncements referred supra, that apart

from right of mother or grandparents or anybody else to have custody/ guardianship of child, paramount consideration at the time of deciding the entitlement for custody of minor child is welfare of the minor.

27. Section 7 of the Wards Act, 1890 provides that Court, on satisfaction that it is for welfare of a minor, can pass order appointing a guardian of person or property of minor or both, or also for declaring a person to be a guardian of a minor and such order shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

28. Section 19 of the Wards Act, 1890 provides that a guardian is not to be appointed or declared by the Court with respect to a minor whose father or mother is living and is not, in opinion of Court, unfit to be guardian of the person of a minor.

29. Section 39 of the Wards Act, 1890 empowers to remove guardian appointed or declared by the Court or a guardian appointed by will or other instrument, for causes narrated in the said Section.

30. In present case, it is also noticeable that younger child has not completed age of 2 years, whereas, elder one is about 7 years old. In all eventualities mother is entitled to have custody of younger child and it will be a cruelty to the children in case both of them are separated from each other and, therefore, custody of elder child is also deserves to be handed over to the mother with whom younger child will go.

31. Unless or until mother is incapacitated and declared incompetent or disentitled for custody of children, by the competent Court in appropriate proceedings in accordance with law, in view of Section 6 of the Guardianship Act, mother, after death of father, is entitled to have custody of her minor children.

32. Though learned counsel for the petitioners has contended that respondent No.1 is not having sufficient means to maintain and look after minor children, but no such plea has been taken in the statements of the petitioners recorded before the Magistrate.

33. In absence of any plea taken in the statements of the petitioners before the Magistrate, issue of incompetence or disentanglement of the mother has not been adjudicated by this Court. In case of initiation of any proceedings on that count, concerned Court shall decide the same, in accordance with law, on its own merit independent of order passed for handing over custody to the mother under Section 97 Cr.P.C., without being influenced by observation made hereinabove.

34. Be that as it may, if there is substance in the contention raised by petitioners No.1 to 3, then they are at liberty to initiate appropriate proceedings under the Wards Act and/or Guardianship Act.

35. Without going into the issue raised with respect to maintainability of present petition for availability of alternative remedy of filing Revision Petition, but taking into consideration entire facts and pronouncements of the Supreme Court in

absence of any material on record to disentitle the mother from custody of children or incompetency to look after and bringing up her children, but keeping open the said issued to be adjudicated and decided by the competent Court, if so desired by the grandparents or any other competent person, I do not find any illegality, irregularity or perversity in the order under challenge passed by the Sub-Divisional Magistrate, directing the grandparents to handover custody of children to their mother. Therefore, plea of petitioners is rejected and petition is dismissed.

36. However, it is clarified that right of mother to have custody of children is not absolute, but subject to welfare of children and in case in appropriate proceedings she is found incompetent and/or disentitled to have custody of children or to ensure welfare of the children, then she will lose right to continue their custody and in such eventuality custody/guardianship of children may be handed over to their grandparents or any other person competent and entitled to have custody of children, but, in accordance with law. Petitioners No.1 to 3 are at liberty to avail appropriate remedy, in accordance with law.

37. Before parting with the case, I am constrained to observe that despite the fact that proceedings under Section 97 Cr.P.C., are judicial proceedings, record/file of proceedings in the Court of Sub-Divisional Magistrate has not been maintained in proper manner. There is no separate order sheet indicating on

which date what order was passed by the Magistrate. Record has been maintained like a layman. Such practice or affair in keeping and managing record of judicial proceedings requires to be deprecated and improved and for improvement the Magistrates are required to be instructed to keep record of judicial proceedings in proper manner with proper order sheets of day-to-day proceedings on the dates fixed for conducting such judicial proceedings with respect to order passed by the Magistrates on that dates. Concerned ministerial staff is also required to be trained.

38. The Chief Secretary to the Government of Himachal Pradesh is directed to look into the matter personally and to ensure proper keeping and maintaining of record of judicial proceedings by the officers conducting judicial proceedings in the State of Himachal Pradesh. He is also directed, if required, to take necessary steps to conduct training of officers and/or officials of the State dealing with judicial work/files in H.P. State Judicial Academy.

39. Copy of this order be sent to the Chief Secretary to the Government of Himachal Pradesh for necessary action in terms of paragraphs 37 and 38.

40. Record be returned to Sub-Divisional Magistrate, Nalagarh, District Solan, H.P.

41. Petition stands disposed of in aforesaid terms, so also pending application(s), if any.

42. Parties are permitted to produce/use copy of this order, downloaded from the web-page of the High Court of Himachal Pradesh, before the concerned Court/authorities concerned, and the said Court/authorities shall not insist for production of a certified copy but if required, may verify passing of the order from Website of the High Court.

(Vivek Singh Thakur),
Judge.

June 2, 2023
(Purohit)

High Court of H.P.