

HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

Writ Appeal No.1066 of 2021

HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

D.B. : Hon'ble Shri Subodh Abhyankar
and Hon'ble Shri Satyendra Kumar Singh, J.J.

Writ Appeal No.1066 of 2021

Jaya Chakravarti

Versus

The State of Madhya Pradesh and others

Shri Prateek Maheshwari, Counsel for the appellant.

Smt. Archana Kher, Deputy Advocate General for the
respondent Nos.1 to 3/State.

Shri A. K. Saxena, Counsel for the respondent Nos.4 to 6.

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J U D G E M E N T

(Passed on 02/03/2022)

Per:- Subodh Abhyankar, J.

1] This writ appeal has been filed under Section 2(1) of Madhya Pradesh Uchha Nyayalaya (Khand Nayaypeeth Ko Appeal) Adhiniyam, 2005 and the rules made thereunder being aggrieved of the order passed by the learned Single Judge on 12.03.2021, in W.P. No.17603 of 2020 wherein while quashing the impugned order dated 24.09.2020, passed by the Sub-Divisional Magistrate whereby custody of the children of the appellant was given to her husband the respondent No.4 herein, the writ court has granted only partial relief by not giving any express direction restoring the custody of the children in favour of the appellant.

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2] In brief, the facts giving rise to the present appeal are that the appellant is the wife of the respondent No.4 Vikas Chakravarti and their marriage solemnized in the year 2003. Out of this wedlock, they have twin sons aged around 16 years the respondent Nos.5 and 6 herein. Admittedly, a dispute has taken place between the parties, which led to the respondent No.4 filing an application under Section 97 of the Cr.P.C. for custody of the children before the Sub-Divisional Magistrate, Narsingharh, District Rajgarh and the SDM, while exercising its power under Section 97 of Cr.P.C., has issued a search warrant on 11.09.2020 and in compliance thereto, the Police Narsingharh has produced the respondent Nos.5 and 6 in his Court and after taking their statements, their custody has been handed over to the respondent No.4, the husband vide order dated 24.09.2020. The aforesaid order has been challenged by the appellant/wife in W.P. No.17603 of 2020 and the learned Single Judge while allowing the aforesaid writ petition agreeing with the contention raised by the counsel for the appellant/petitioner has passed the following order, which is under challenge before this Court. The relevant Para 13 of the same reads as under:-

"13. Respondents No.5 & 6 are aged 16 years, therefore, they are in a position to give their choice as to with whom they want to live. They recorded their statement before the Magistrate as well as before the Registrar of this Court that they are willing to

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live with their father. So far the allegation against the mother i.e. petitioner is concerned same is very vague in nature. No specific instances have been quoted in their statements about ill-treatment by the petitioner. Some times mother become very strict towards their children than the father, therefore, the Children's liking develops towards the father but that does not mean that the mother ill-treats her children or becomes their enemy. The children spend most of the time with their mother, therefore, some times does not like the control and strictness of the mother and by no stretch of the imagination, it cannot be termed as an offence that can be led to illegal confinement. It appears that respondents No.5 & 6 were not liking the strictness of the mother, therefore, they have shown their willingness to reside with the father. Since they are aged about 16 years, therefore, it would not be proper to pressurize them to live either with mother or father but so far the order of the Magistrate is concerned it is *per se* illegal and without jurisdiction. Sub Divisional Magistrate has wrongly exercised his power under section 97 Cr.P.C that too without following the principle of natural justice. Sub Divisional Magistrate did not issue a notice to the petitioner and called the children through police and recorded their statement behind the back of the petitioner without there being any cross-examination etc. and passed the order. Respondents No.5 & 6 are minors as per the definition of child under section 2(12) of the Juvenile Justice (Care & Protection of Children) Act, 2015. The Sub Divisional Magistrate has directed the police to produce them before the Court by way of a search warrant without considering that such process may affect their mind, it is nothing but insensitive conduct on the part of the Sub Divisional Magistrate, therefore, the order dated 24.09.2020 passed by the Sub Divisional Magistrate is hereby quashed. Respondent No.4 is directed not to force respondents No.5 & 6

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to live with him. They are free to live with their mother.”

3] Shri Prateek Maheshwari, counsel appearing for the appellant has submitted that despite the petition being allowed and the impugned order being quashed, the appellant/petitioner has got no relief as custody of her both the sons have not been given to her, despite the fact that their custody was illegally obtained by the respondent No.4 in the first place. In support of his contention, Shri Maheshwari, has also relied upon the various decisions of Hon'ble Supreme Court in the case of **Yashita Sahu Vs. State of Rajasthan and others** reported in **(2020) 3 SCC 67 para 9**; **Nil Ratan Kundu and others Vs. Abhijit Kundu** reported in **(2008) 9 SCC 413 para 56** and **S. Anand Vs. Vanitha Vijaya Kumar and others** reported in **(2011) 4 MLJ 494 paras 55, 57, 58 & 59**. Thus, it is submitted that the impugned order be modified, accordingly to the extent that the custody of the children be handed over to the appellant wife from the respondent No.4 husband.

4] Counsel appearing for the respondent No.4, on the other hand has opposed the prayer and it is submitted that no interference is called for as the aforesaid order has been passed by the learned Single Judge after having an interaction with the respondent Nos.5 and 6, who have expressed their willingness to reside with their father the respondent No.4 only. Thus, it is submitted that the appeal is liable to

be dismissed.

5] Heard counsel for the parties and perused the record.

6] From the record it is apparent that the learned Single Judge has effectively quashed the order dated 24.09.2020 passed by the SDM but has not given the custody of the children to the appellant. There is no doubt about it that where the impugned order is set aside by a higher authority, as a natural corollary, the status quo, prior to the date of impugned order has to be restored to the parties but this case is not in respect of the any immovable or movable property or any live stock, but is in regard to two human beings, the minor sons aged 16 years of the appellant and the respondent No.4. It is true that both of them are minor, however, the age of 16 years is not such an age where a child, given a choice, is not able to make up his or her mind as to his or her inclination to reside with either of the parents. In the present case, this choice has been exercised in favour of the father and thus, despite agreeing with the contentions of the appellant/petitioner regarding the legality of the impugned order, the learned Writ Court has not found it to be appropriate to hand over the custody of the children to the appellant/petitioner/wife.

7] So far as the decisions cited by Shri Maheshwari in the case of **Yashita Sahu Vs. State of Rajasthan and others;** **Nil Ratan Kundu and others Vs. Abhijit Kundu** and **S. Anand Vs. Vanitha**

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Vijaya Kumar and others (supra) are concerned, none have dealt with such a peculiar situation as in the present case and thus are distinguishable. In all, the decisions cited by Shri Maheshwari, the Hon'ble Supreme Court has emphasized that while deciding the custody of the child, primary and paramount consideration is the welfare of the child and if the welfare of the child so demands, technical objections cannot come in the way. In the present case, it is nobody's case that the respondent No.4 is in any manner incompetent or is having such vices which may prejudice the interest of the children in his company. In the considered opinion of this court, had it been a case where the father was not found fit to provide healthy environment to the children's upbringing, this court would certainly have interfered in the impugned order and the choice made by the children, but there are no such facts brought on record by the appellant.

8] In view of the same, the appeal being devoid of merits and is hereby **dismissed**.

(Subodh Abhyankar)
Judge

(Satyendra Kumar Singh)
Judge

Pankaj