

**Gujarat High Court**  
**CR.MA/1200/2011 4/ 4 ORDER**

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD  
CRIMINAL MISC.APPLICATION No. 1200 of 2011

LABHUBHAI BABUBHAI DESAI - Applicant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

Appearance : MSHETVI H SANCHETI for Applicant(s) : 1,  
Mr.L.R.Pujari, APP for Respondent(s) : 1, MR RJ GOSWAMI for Respondent(s) : 2,

CORAM :HONOURABLE MR.JUSTICE MD SHAH

Date: 06/04/2011

ORAL ORDER

This petition under Section 482 of the Code of Criminal Procedure has been filed by the petitioner for quashing and setting aside order dated 18-12-2010 passed by the learned Metropolitan Magistrate, Court No.1, Ahmedabad, in Domestic Violence Case No.1109 of 2010 and order dated 13-1-2011 passed by the learned City Sessions Judge, Ahmedabad, in Criminal Appeal No.513 of 2010 whereby petitioner was directed to hand over custody of two minor children to the respondent No.2 till final disposal of Domestic Violence Case No.1109 of 2010 filed by the respondent No.2.

The case in short is that respondent No.2, who is the wife of the petitioner, filed Cri.Misc.Appln.No.50 of 2010 in the Court of learned Metropolitan Magistrate, Ahmedabad, under Sec.97 of Cr.P.C. for issuance of search warrant for getting custody of three children presently staying with the petitioner. Said application was allowed on 25-6-2010 against which, petitioner preferred Cri.Misc.Appln.No.334 of 2010 before the Sessions Court and it was allowed by quashing and setting aside the order passed by the learned Magistrate. However, the petitioner was ordered to keep the children present in the trial Court on 14-10-2010. Being aggrieved by the same, petitioner approached this Court by filing Cri.Misc.Appln.No.12567 of 2010 under Sec.482 of Cr.P.C. This Court (Coram: Akil Kureshi,J.) vide order dated 25-10-2010 ordered to keep custody of eldest daughter with the petitioner. The respondent No.2 was given liberty to make appropriation application under the Protection of Women from Domestic Violence Act before the Magistrate seeking appropriate relief. In pursuance of which, the respondent NO.2 filed Domestic Violence Case No.1109 of 2010 before the Court of learned Metropolitan Magistrate for interim custody of twin children aged five years. The learned Metropolitan Magistrate ordered the petitioner to hand over interim custody of two minor children to respondent No.2. Criminal Appeal No.513 of 2010 preferred by the petitioner was rejected by the learned City Sessions Judge, Ahmedabad. Hence, the present petition.

Heard learned advocate for the petitioner, Ms.Hetvi H.Sancheti, learned APP, Mr.L.R.Pujari for the respondent No.2 and learned advocate, Mr.R.J.Goswami for the respondent No.2.

This Court has gone through both the orders passed by the trial court as well as the appellate Court. This Court has also called the minor children in the chamber for ascertaining the wish of the children in presence of learned advocates appearing for the respective parties. It is ascertained from the children that they have love and affection towards their father and grandfather but not towards their mother. They are studying at present by staying with their father. This Court could find that the children are not ready to leave their father even for a single day. Normally, custody of the minor children should be kept with the mother as it is the mother who can take best care of the children. However, in the present case, this Court could see that the children do not have slightest love and affection towards their mother and hence, it will take much time for the children to get adjusted with mother and get proper care and attention. However, as the children are already with the father and have been taking much care and caution by the father to the utmost satisfaction of children and in the best interest of the children almost in all respects, this Court is of the view that if the custody of the children is left with the father, the children would be more happier. It is true that children have been staying with their father and, therefore, children would not be inclined to stay with their mother as they did not get love and affection of mother. However, keeping the welfare, wish and interest of the children in mind, this Court is of the opinion that it will not be in the best interest of the children to keep their custody with the mother especially when they have shown their love and affection towards their father and did not have slightest inclination towards their mother. These aspects have not been considered by the trial court as well as the appellate court. They have not even made an attempt to call the children in chamber for ascertaining their wish. It is seen that a totally illegal order has been passed by the trial court in directing the complainant to file application under the Guardian and Wards Act and to obtain order qua custody of two minor children and it is a matter of surprise that said order has been confirmed by the learned Sessions Judge.

In view of the above, both the orders dated 18-12-2010 passed by the learned Metropolitan Magistrate Court No.1 in Domestic Violence Case No.1109 of 2010 and 13-1-2011 passed by the learned Sessions Judge in Criminal Appeal No.513 of 2010 require to be quashed and set aside and are accordingly quashed and set aside. This petition is accordingly allowed. Looking to the peculiar facts and circumstances, court below is directed to decide Domestic Violence Case No.1109 of 2010 as early as possible preferably within three months from the date of receipt of copy of this order. The parties are at liberty to approach the Civil Court under the Guardian and Wards Act for custody of the children and if such proceedings are initiated by either of the parties, the observations made by this Court in this order will not come in the way of parties while deciding such application.

(M.D.SHAH,J.)