

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

CRIMINAL WRIT PETITION NO. 3940 OF 2015

Dr. Manish Mirani & Ors.	... Petitioners
V/s.	
Mrs. Raksha Mirani & Anr.	... Respondents

Mr. Ganshyam Upadhyay a/w. Mr. Hardik Vyas for the
Petitioners.

Mr. Aloukik R. Pai a/w. Ms. Neuty N. Thakkar i/b. Mrs. Bina R.
Pai for Respondent No.1.

Ms. Anamika Malhotra, A.P.P. for the State.

CORAM : A. V. NIRGUDE, J.

DATE : 11th DECEMBER, 2015.

P.C. :

1. This Petition filed under Article 227 of the
Constitution of India, deserves to be dismissed.

2. After hearing the submissions at bar for the
petitioner, I told the learned counsel appearing for the
petitioner to stop the arguments because I heard him quite at
length and took all the notes of his submission. I requested
him to keep sitting in the Court while I dictate my order.
Learned counsel still continued saying he wanted to place

reliance on certain case laws. He also requested me that I should interview the child before passing the order. I am of the view that this Petition can be disposed of without referring to any case law and without interviewing the child.

3. Briefly stated the facts of the case are as under :-

The respondent is the wife of petitioner No.1. They were married for 10 years and were staying together till 23.11.2013. Due to domestic dispute, the respondent-wife left her matrimonial house and came to stay with her parents. The minor child of the couple, on the day of separation of her parents, was about 7&1-2 years. She is now about 9 years old. She is staying with petitioner No.1 and others. It is the case of the respondent-mother that till 10.04.2014, she tried to bring her daughter back but in vain. Therefore, she made an application seeking various reliefs under the provisions of Protection of Women from Domestic Violence Act. She also sought interim custody of her daughter, etc.

4. The learned Magistrate vide his order dated 03.07.2014, interalia granted her temporary custody of the daughter. This order was stayed at the request of petitioner No.1, who challenged this order in Criminal Appeal before the Sessions Judge. The Sessions Judge continued the stay and dismissed her Appeal on merits on 22.09.2015. Thereafter,

the present Petition is filed and the petitioners obtained an order of stay from this Court. In view of this, the respondent-wife did not get custody of her daughter. The learned Magistrate while deciding the application for temporary custody mentioned that having regard to the tender age of the child, he felt that the mother is the natural caretaker and, therefore, the mother should have the child with her. The learned Sessions Judge opined that the order was of temporary nature and if there are good reasons for the father to claim custody of the child, he should make appropriate application before the appropriate forum. But he did agree that the child should be with the mother. The learned counsel for the petitioners made several points and I will deal with them one by one.

5. First and foremost is as under :-

i) The learned counsel submitted that both the Courts below erred in not interviewing the child before passing the order. He said that it is now settled law that wish of a child is also required to be taken into consideration before passing such orders. He however, did not place reliance on any specific provision of law in support of his contention. No doubt, in most of the cases such orders are passed after having interviewed the child concerned. But the learned Magistrate rightly held that a 7&1-2 years daughter should go to the mother because the mother is the natural caretaker of such a

tender aged child. This has fell from the learned Magistrate as common sense. If at all such decision was erroneous, the learned Magistrate would have discussed reasons why such orders could not have been passed. I am also of the view that the child should go to her mother because the mother at such stage is the most suitable parent.

ii) The learned Magistrate then mentioned that the respondent mother is not suitable parent because in the past she had suffered from mental illness. He placed on record various documents to indicate this fact. The Courts below brushed aside this submission mainly because of the circumstances of the case. Why this submission should be ignored is explained as under -

Both are educated couple. Both the parents are medical practitioners. They come from well to do strata of the Society. The child attends the school and is quite bright. Until November 2013, the child stayed with her mother as well as father. History of mental health in such situation would fall into two reasons - i) history of ill health of any kind would not disentitle the mother from having the custody of her child. Besides, the respondent mother is a practicing Homeopath. She is present before the Court with her father. I have seen her in my Court 3-4 times. Her conduct in the Court was not objectionable at all. I do not find that she is abnormal and suffers from any mental ailment. Although she is anxious

mother, she did not throw any tantrum in the Court. Such ugly scenes are not uncommon in the Court when custody of a child is the subject matter.

6. The learned counsel then pointed out that the respondent-mother did not take care of the child for the first 4-5 months. This submission is equivalent of taking advantage of one's own wrong. The parents of the child got separated and there was bound to be some heated exchanges between them and the mother apparently was deprived of her child's company. In April 2014, that is within four months from the separation, an appropriate application was moved. From these circumstances, it cannot be said that the mother was non-diligent and careless towards her child.

7. The learned counsel also submitted that even in the past the respondent mother had left her child unattended and had gone away. But this submission deserves to be ignored because the couple stayed together till November 2013 without any difficulty.

8. The learned counsel then made a rather lame excuse that this application should be dismissed because no specific prayer for interim custody is made in the Petition. The learned counsel then even stated that the child would be better off without her mother. This is rather a wishful

submission and is the reflection of those of the father. The petitioner and his family members probably think that the child would be spoiled in the company of the mother. I am really not concerned with their feelings. What is of paramount importance is love and care the child needs. Such love and care at this tender age is possible only from the mother. The learned counsel then tried to impress upon me that petitioner No.1 is a very loving and caring father and in his company the child could live lavishly and make progress. I am not inclined to accept this. Mostly, fathers are also caring parents. Petitioner No.1 is not exception to it. He is a highly qualified professional. He would certainly take care of his child but he must realize that his child is better off with the mother at this tender age. The learned counsel then pointed out to me that several complaints are made by the respondent-mother. He then made a submission that there is a record that respondent-mother made several irresponsible and reckless complaints against the petitioners. I am not inclined to think that this as a good reason for not giving the child's custody to mother because making complaints against persons who are not friendly with her is a natural conduct. The mother without a child is a helpless person and would tend to make complaints after complaints until the child is restored to her.

9. The application to stay the effect of this order is rejected mainly because the execution of the order, passed in

July 2014, remained stayed for last more than one year. This has caused pain and suffering to the respondent-mother. Therefore, stay is refused. In order to ensure the transfer of the child from the father's custody to that of the mother's, following precaution shall be taken –

The social workers of the Special Cell for Women and Children, Ghatkopar Police Station, along with the respondent mother shall visit the petitioner's house for taking the child. In case any resistance occurs from the petitioners' side, police constables should be employed to eliminate such resistance. The Social workers shall then take the child in custody and after taking due care the child shall be taken to the respondent-mother. The social worker, either of Ghatkopar Police Station or Thane Police Station, shall visit the child for seven days to ensure that the child gets adopted to the new environment. In case of any difficulty, a report shall be made to this Court. The proceedings of Domestic violence case are expedited.

10. The Petition is disposed of in above terms.

(A.V. NIRGUDE, J.)

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