

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.11476 of 2015
in
FIRST APPEAL NO.2333 OF 2015

NITIN VITHAL OTARI
VS
LATABAI NITIN OTARI AND OTHERS
...

Mr.Ajeet B.Kale, Adv. For applicant.
Mr.DD Choudhari, Adv. For Resp.Nos. 1 to 3. .

CORAM : P.R.BORA, J.

DATE OF RESERVING ORDER : 8th August,2016
DATE OF PRONOUNCING ORDER: 29th AUGUST,2016.

PER COURT :

1) Heard. The present Civil Application is filed by the appellant/applicant seeking interim custody of his children till decision of the present appeal.

2) The appellant had filed Misc. Civil Application No.96/2013 before the District Court at Jalgaon under Section 25 of the Guardian and Wards Act, 1890 for the custody of his children viz. Ku.Nitisha @ Vaibhavi and Master Ujjwal.

3) The learned District Judge, after having considered the evidence brought on record by the parties, has rejected the application so filed by the present appellant. The said order is challenged by the appellant in the present appeal.

4) In the present application though the appellant has sought interim custody of both of the children during the course of the arguments, the submissions were restricted to the custody of minor daughter Nitisha @ Vaishnavi. The interim custody of daughter Nitisha is sought by the appellant on the ground that she requires continuous treatment for the ailment of epilepsy, which is not possible at Achallpur, where Respondent No.1 is presently residing along with her children. It is also the contention of the applicant that the treatment requires to be given to Nitisha is costly and Respondent No.1 is unable to provide such treatment to her.

5) Respondent No.1 has filed an affidavit in reply to the application so submitted by the appellant. Respondent No.1 has denied all the averments raised in the application. It is the contention of Respondent No.1 that Nitisha is being properly looked after by her and the treatment required to be given to her is available at Achalpur. The respondent has also placed on record the medical papers, more particularly the prescriptions from Dr. Amol Chitrakar, who runs a psychiatric care unit in the name of Yeshwant Hospital at Paratwada. It is further contended that the applicant has filed the application with oblique motive to avoid the payment of maintenance to the respondents as well as to give a counter blast to the maintenance proceedings initiated by Respondent No.1. It is further contended that both the children are admitted in the schools at Achalpur and are receiving very good education. It is further contended that father of Respondent No.1 is extending the monetary assistance to Respondent

No.1 to bear the expenses of medical treatment of Nitisha. Respondent No.1, has, therefore, prayed for rejecting the application.

6) Initially an endeavour was made in the present matter for amicable settlement between the parties by referring the parties to Advocate K.B.Choudhari, who is a trained Mediator. However, the mediation did not succeed and the matter was required to be heard by this Court.

. When the matter was heard for some time on 1st August, 2016, a submission was made by Shri A.B.Kale, learned Counsel appearing for the present applicant, that the applicant is ready to provide a separate residence to Respondent No.1 at Jalgaon, so that she can comfortably reside at the said place along with the children and which would also facilitate the treatment of Nitisha. It was also submitted by Shri Kale, on instructions of the appellant, that the appellant will bear all the expenses for the residence, education and medical treatment of both the

children and will also bear the total expenses of day-to-day maintenance of Respondents 1 to 3. It was earnestly urged by Shri Kale that the appellant is genuinely concerned with the ill-health of daughter Nitisha and desires that she should get the proper treatment, which, according to him, is not possible at Achalpur.

7) On the proposal so given on behalf of the appellant/applicant, learned Counsel appearing for respondents was asked to seek response of respondent No.1. When on 8th August, 2016, the matter was taken up for hearing the learned Counsel for the respondents informed that the respondent No.1 is not ready to accept the proposal given by the applicant having regard to the bitter past experiences. On 8th August, 2016 the learned Counsel for the appellant was asked by this Court to put the proposal of the applicant on record, in writing. Accordingly, the appellant has filed a short affidavit and the same is taken on record.

8) In view of the fact that the proposal so made by the appellant/applicant has not been accepted by Respondent No.1, it may not be permissible in the present application, which is filed seeking interim custody of the minor children, to issue any directions to Respondent No.1 to come to Jalgaon along with the children and reside at Jalgaon in the separate house as proposed by the applicant.

9) Now, the further question arises, whether independently custody of minor Nitisha can be given to the applicant by way of interim arrangement till decision of the appeal filed by the applicant ?

10) It is well settled that in the matters of custody of the minor child, paramount consideration shall be the welfare of the said child. In the instant matter, even if it is accepted that Nitisha will get better treatment at Jalgaon and though the applicant has further undertaken that he will take every care that

Nitisha is being looked after whole of the day, even in his absence when he goes on duty, by his mother and/or by his sister, who is a nurse, the question still remains whether Nitisha will be mentally comfortable, if she is withdrawn from the company of her mother ? Mental comfort of Nitisha assumes more importance in view of the fact that she is suffering from intractable epilepsy. Since Nitisha is residing with her mother, it goes without saying that she may be having all emotional attachment with her mother. In the circumstances, at the tender age, if she is withdrawn from the company of her mother, the possibility of her ailment getting severe cannot be ruled out.

11) In the impugned order, the learned District Judge has observed that he had interviewed the minor children and it was noticed by him that the children were reluctant to go along with their father, i.e. the present applicant. In the circumstances, even though it

appears to me that the applicant is genuinely concerned with the health of his minor daughter Nitisha, and his bonafides in submitting the proposal, as aforesaid, cannot be doubted, his request for interim custody cannot be considered. Hence, the following order, -

ORDER

. The application is rejected.

sd/-
(P.R.BORA)
JUDGE

bdv/
fldr 25.8.16