

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 196 OF 2016**

Sou.Padmini Arun Pawar

..Petitioner

Vs

Ravindra Bapu Ghosalkar

.. Respondent

Mr. Kedar P. Lad, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 11/01/2016

PC:

1. Heard Mr. Kedar Lad, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner-wife has challenged the Judgment and order dated 26.11.2015 passed by the learned District Judge-5, Kolhapur below Exhibit-41 in Misc. Civil Application No.64 of 2007. By that order, the learned trial Judge rejected the application dated 4.8.2015 made by the petitioner at Exhibit 41 for interviewing minor daughter Akansha for ascertaining her wishes.
3. Mr.Lad strenuously contended that the learned trial Judge ought to have interviewed the child with a view to ascertaining her wishes. At the time of filing application in 2007, minor daughter Akansha was aged about 5 years and presently she is 14 years old. He submitted that while deciding the custody

matter, the learned trial Judge ought to interview the minor child so as to ascertain the wishes. He relied upon the decision of the Apex Court in the case of Nil Ratan Kundu V Abhijit Kundu, (2008) 9 Supreme Court Cases 413 and particular paragraphs 73 and 74 thereof. He also relied upon the order dated 17.12.2015 passed by this Court (Coram: M. S. Sonak, J.) in Joseph Mendonca Vs. Mrs Annie Menezes and Ors (Writ Petition No.7413 of 2015) and in particular paragraph 11.

4. I have considered the submissions advanced by Mr. Lad. I have also perused the material on record. As noted earlier, the petitioner made application dated 4.8.2015 for interviewing the minor child for ascertaining her wishes. Perusal of that application itself shows that in the application it is stated that the parties have completed their evidence and matter is posted for arguments. While rejecting the application, the learned trial Judge noted in paragraph 2 that by filing purshis Exhibit 28, the petitioner has closed her evidence. By filing purshis Exhibit-40, the respondent has closed evidence. It is also apparent from the application that the matter is posted for arguments. In that context, the learned trial Judge observed in paragraph 4 that the application is filed under sections 5 and 25 of the Guardians and Wards Act, 1890, where welfare of the minor is a paramount consideration. He thereafter observed that he did not find just

and reasonable grounds to allow the application **at this juncture**. In other words, the learned trial Judge has not concluded the issue against the petitioner and has kept that issue open while deciding the main proceedings.

5. In the case of Nil Ratan Kundu (supra), the Apex Court observed in paragraphs 73 and 74 thus:

“73. As already noted, Antariksh was aged six years when the trial Court decided the matter. He was, however, not called by the Court with a view to ascertain his wishes as to with whom he wanted to stay. The reason given by the trial Court was that none of the parties asked for such examination by the Court.

74. In our considered opinion, the Court was not right. Apart from statutory provision in the form of Sub-section (3) of Section 17 of 1890 Act, such examination also helps the Court in performing onerous duty, in exercising discretionary jurisdiction and in deciding delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the Court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given.”

6. In the order dated 17.12.2015, at the request of learned counsel for respondents no. 4 and 5, this Court interviewed the child.

7. As the learned trial Judge has kept the issue of ascertaining the wishes of minor child open, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. It is, however, needless to observe that

while finally deciding the proceedings the learned trial Judge will bearing in mind the observations made by the Apex Court in paragraph 74, extracted herein above. Subject to above, Petition fails and is dismissed.

(R.G.KETKAR, J.)