

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11735 OF 2015

Ravindra M. Joshi and anr.

.. Petitioners

vs.

Aashish D. Kinkar

.. Respondent

Mr. Aditya Aklekar i/b Mr. Rahul Kadam for the Petitioners.
Mr. Yuvraj P. Narvankar for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 20 JULY 2016.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The challenge in this petition is to the order dated 21 November, 2015 made by the Additional Sessions Judge Kolhapur, awarding interim custody of minor daughter Swaranjali to the respondent-Aashish, who is the father of Swaranjali.

3] The operative portion of the impugned order reads thus:

ORDER

- “1. Applications are allowed.
2. Interim custody of minor daughter Swaranjali be given to

applicant Ashish Kinkar immediately.

3. Opponent Nos.1 and 2 are directed to hand over the custody of minor daughter Swaranjali to applicant before this Court on or before 30/11/2015.

4. If opponents failed to comply the above said order then applicant will have right to take police aid in order to get the custody of minor daughter Swaranjali, by following due procedure of law.”

4] Mr. Aditya Aklekar, learned counsel for the petitioners, has submitted that the impugned order has been made in breach of principles of natural justice. This is because the petitioners' advocate, though absent at the appointed hour, did reach the Court soon thereafter, but was declined a hearing in the matter. Further Mr. Aklekar submitted that Swaranjali's mother died in suspicious circumstances on account of burn injuries. It is the case of the petitioners, who are the grandparents of Swaranjali that the respondent was responsible for such demise. Mr. Aklekar submitted that the impugned order has ignored this as well as other relevant circumstances. Mr. Aklekar further submitted that the impugned order fails to take into consideration the interests of minor daughter, which is paramount in matters of this nature.

5] On the other hand, Mr. Yuvraj Narvankar, learned counsel appearing for the respondent, has submitted that several

opportunities were granted to the petitioners to proceed with the matter, but the petitioners for one or other reason sought to delay the matter. In such circumstances, there was no violation of principles of natural justice. Mr. Narvankar pointed out that the respondent has been honorably acquitted, since in the incident which led to demise of Swaranjali's mother, even other members of the family suffered burn injuries. The impugned order has dealt with this aspect and there is no warrant for any interference. Mr. Narvankar also submitted that since there was no interim relief in this petition, the interim custody of Swaranjali is with the respondent since November 2015 and at this stage, it will not be in the interests of Swaranjali that there is any disturbance to her academic routine.

6] The rival contentions now fall for determination.

7] In matters of this nature, the Court should be a little cautious before making *ex-parte* orders, in the matter of transfer of custody of minor children from one parent to other or from grandparents to the parents. Unless, the record indicates that the custodial parent or grandparents is intentionally delaying the hearing on the application

seeking interim custody, some flexibility or accommodation, may not be out of place. Thus construed, in the facts and circumstances of the present case, another opportunity could have been granted to the advocate appearing for the petitioners to putforth the petitioners' case in the matter of interim custody.

8] Be that as it may, there is no dispute that since November 2015, Swaranjali who is about five years old, resides with her father at Gadhinglaj, where she attends primary school. The respondent-father stays at Gadhinglaj with his own father. The Additional Sessions Judge, Gadhinglaj in Sessions Case No. 28 of 2013 has already acquitted the respondent and his father from the charges levelled against them in the matter of unfortunate demise of Swaranjali's mother. Taking into consideration such circumstances, no useful purpose will be served by restoring the interim custody to the petitioners-grandparents at this stage. Such restoration in midst of the academic year, might not be in the best interest of Swaranjali herself.

9] Instead, the interests of justice will be met if the impugned order is modified and suitable access is granted to the petitioners to

meet Swaranjali. Such arrangement, will be in the interests of Swaranjali as well. Besides, suitable directions can be issued to the learned Additional Sessions Judge to dispose of the respondent's main application under Section 25 of the Hindu Guardian and Wards Act (said Act) on merits and in accordance with law, within a time bound schedule. This is because the impugned order in the present case, is only an interim order, which shall be subject to final orders that shall be made in the main application under Section 25 of the said Act.

10] The impugned order is required to be modified, since, the same makes no provision whatsoever for grant of access to the petitioners whilst restoring the custody of Swaranjali from them to the respondent. In the facts and circumstances of the present case, directions with regard to access were required to be given, considering the age of Swaranjali and the unfortunate circumstances leading to the demise of Swaranjali's mother, who is daughter of petitioners. The petitioners are grandparents of the Swaranjali. The petitioners have lost their daughter in an unfortunate incident. At this stage, it would be harsh to deprive the petitioners of suitable

access to Swaranjali. Such access will be in the interests of Swaranjali as well.

11] In view of the aforesaid, this petition is disposed of with the following order:

a] The impugned order, insofar as it grants interim custody of Swaranjali to the respondent is not interfered with;

b] The impugned order is, however, modified and it is directed that the petitioners shall have access to Swaranjali each fortnight on weekend, i.e., Saturday or Sunday, as per the convenience of the petitioners and Swaranjali. Such access shall be for a duration of at least five hours. The respondent is directed to demonstrate sufficient flexibility in this regard and not be too rigid about the timings of the weekend access;

c] In case, there are any logistical difficulties like precise dates, timings or venues, the parties shall be at liberty to apply to the Additional Sessions Judge at Kolhapur taking up the main petition. The Additional Sessions Judge, shall expeditiously make orders in this regard. This liberty is not to

be construed as liberty to make any variation in the order of access hereby made;

d] The access as aforesaid shall be at some suitable venue at Gadhinglaj itself, in case, the petitioners have any reluctance to avail access at the residence of the respondent;

e] The respondent's main petition under Section 25 of the said Act shall be disposed of in accordance with law and on its own merits as expeditiously as possible and in any case within a period of one year from today. Full opportunity will be accorded to both the parties for leading their evidence in the matter. Both parties are directed to cooperate in the matter of expeditious disposal of the main proceedings. In particular, the respondent is directed to cooperate in the matter of expeditious disposal of the main proceedings, now that the interim custody of Swaranjali is to remain with the respondent.

(f) In disposing off the main petition as aforesaid, the Additional Sessions Judge shall not be influenced by the order

impugned in this petition or for that matter, by any observations in this order.

12] Rule is accordingly, made partly absolute to the aforesaid extent.

13] All concerned to act on the basis of authenticated copy of this order.

14] There shall, however, be no order as to costs.

(M. S. SONAK, J.)

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