

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO.6290 OF 2015

SMT. NEERJA W/O VINAY DHARMADHIKARI
VS
VINAY S/O SUMANT DHARMADHIKARI

Office Notes, Office Memoranda of Coram,
orders
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's

Mrs. R. S. Sirpurkar, Advocate for the petitioner.
Mr. C. S. Kaptan, Senior Advocate with Mr. M. B. Naidu,
Advocate for the respondent.

CORAM : A.S. CHANDURKAR, J.
DATED : JULY 26, 2016.

The learned Counsel for the parties have been heard
at length.

The challenge in the present writ petition is to the
order dated 7-11-2015 passed by the learned Judge of the
Family Court on the interim application that was moved by the
respondent under Section 12 of the Guardian and Wards Act,
1890 (for short, the Act) seeking interim custody of the minor
child – Vedant during pendency of the proceedings.

The petitioner and the respondent were married in
the year 2001. Son - Vedant was born on 9-12-2001. Due to
differences between the petitioner and the respondent they
started residing separately in April, 2014. The respondent
initiated proceedings for seeking divorce by mutual consent
which proceedings are pending. The respondent also filed a
petition under Section 7 of the said Act seeking custody of the
minor child. In those proceedings, an interim application was
moved under Section 12 of the said Act seeking interim custody.
The application was contested by the petitioner and by the

impugned order, the Family Court allowed the said application and held the respondent entitled for interim custody of the minor child.

Mrs. R. S. Sirpurkar, the learned Counsel for the petitioner submitted that the Family Court was not justified in allowing the application in question. It was submitted that on 13-2-2015, a pursis came to be filed before the Family Court in which both the parties agreed to an interim arrangement which was to operate during pendency of the proceedings. The proceedings were thereafter adjourned on various dates. According to the learned Counsel on 27-4-2015, the proceedings were adjourned to 10-8-2015, but before said date on 30-6-2015 the case was taken on board by moving an application in that regard. An application below Exhibit-26 came to be moved to decide the aspect of interim custody and the case was adjourned to 7-7-2015. The proceedings were again adjourned on various dates and thereafter on 28-8-2015 the matter was posted to 3-9-2015. On that date, though the proceedings were adjourned to 19-9-2015, the petitioner was directed by the incharge Court to keep the child present for being interviewed on said date. The learned Judge of the Family Court interviewed the child on the said date and thereafter posted the matter on 28-9-2015 for passing orders. It was submitted that again the proceedings were adjourned to 27-10-2015. However, on 26-10-2015 an application for taking the case on board was moved as the case was fixed on 27-10-2015. On that date an application to place on record a pen-drive containing certain video recordings in support of the arguments by the respondent came to be moved. Thereafter on 7-11-2015, the impugned order came to be passed.

The learned Counsel submitted that the contents of the pen-drive were viewed by the learned Judge of the Family Court without the same being duly proved in terms of Section

65A of the Indian Evidence Act and being prejudiced by the same, the impugned order came to be passed. In that regard, the learned Counsel placed reliance on the decisions of the Hon'ble Supreme Court in *Anvar P. V. Vs. P. K. Basheer and others* (2014) 10 SCC 473.

It was further submitted that the learned Judge did not assign any cogent reason as to why the petitioner was not fit to have the custody of the minor child. Merely by observing that she was a working mother, the custody was directed to be handed over to the respondent. The learned Counsel placed reliance on the judgment in *Smita Shetty Vs. Vinay Shetty* 2004(2) Mh.LJ 1066 in that regard. The impugned order resulted in granting of final relief to the respondent without leading any evidence. Reliance was placed on the decision of the Hon'ble Supreme Court in Civil Appeal No.1788/2009 (*Mehul Thakkar Vs. Meena Thakkar*) in support of said submission. It was then submitted that by filing a joint pursis the petitioner had custody of minor child which arrangement was to continue during pendency of the proceedings. Without any justifiable reason and without recording any finding whatsoever, the custody of the minor child was removed from the mother and handed over to the father. According to her, though the welfare of the minor child had paramount importance, there had to be some reason to deny custody of the minor child to the petitioner. The learned Counsel placed reliance upon the decision in *Gaytri Bajaj vs. Jiten Bhalla* (2012) 12 SCC 471, *Nil Ratan Kundu V. Abhijit Kundu* (2008) 9 SCC 413, *Mausami Moitra Ganguli v. Jayanti Ganguli* AIR 2008 SC 2262, *Palmira Fernandes Vs. Cruz Fernandes* 1992 Mh.L.J. 1048 and *Arwa Saifuddin Vs. Taha Saifuddin* 2016(2) Mh.L.J. 322 in support of her submission. It was urged that the aspect of guardianship and custody are two distinct matters and even if the respondent was the natural guardian of the child, said aspect

was not very relevant while considering the prayer for custody. The decision on *Athar Hussain Vs. Syed Siraj Ahmed and Ors* AIR 2010 SC 1417 was relied upon. It was, therefore, submitted that the order passed by the Family Court was liable to be set aside and the application deserved to be dismissed.

Shri C. S. Kaptan, the learned Senior Counsel for the respondent supported the impugned order. He submitted that in the impugned order the Family Court had expressly stated that the contents of the video recording had not been taken into consideration and after considering the welfare of the minor child, the order had been passed. He submitted that the welfare of the minor being of paramount importance, his wishes deserved to be kept in mind while deciding the aspect of custody. He, therefore, submitted that despite the interim arrangement that was directed on 7-11-2015, the earlier arrangement as per the joint pursis was being followed by the respondent even today.

I have heard respective Counsel for the parties at length. The order under challenge is an interlocutory order directing interim custody of the minor child during pendency of the proceedings. In the impugned order, the Family Court has given importance to the wishes of the minor child which it could ascertain after interviewing him. In para 12 of the order, it noted that importance was not being given to the video recording that was placed on record by the respondent. After considering the wishes of the child and after considering the number of family members who were available at the residence of the petitioner as well as of the respondent, the impugned order came to be passed.

It is well settled that in matters of grant of custody, especially, at an interim stage, the wishes of the minor child have to be given paramount consideration. With that aspect in mind, the minor child was interacted with by this Court on

22-7-2016 in chambers. During said interaction, it was found that the child had equal love and affection for both his parents. He expressed that he desired the company of family members to interact and in that backdrop, he stated that as the parents of the respondent and other relatives were present at the respondent's residence, he was in a position to interact with them more frequently. He stated that he also enjoyed the company of his cousins who were available at his father's place. He then stated that while staying with his mother there were not many family members at her place with whom he could interact and thus he felt lonely at times. He thus, reiterated what was recorded by the learned Judge of the Family Court when he was interviewed during consideration of the interim application by the Family Court. In that backdrop, therefore, I do not find that the consideration of the matter by the Family Court was on the basis of evidence that was sought to be placed on record in the form of some video recording. I find that the interests of the child were kept in mind while passing the impugned order.

At this stage, it is not necessary to go into the detailed submissions regarding the value of the evidence on record. The question of giving weightage to the video recording in the light of the decision of the Hon'ble Supreme Court in *Anwar P. V (supra)* could be the subject matter of debate before the Family Court. At this interlocutory stage, when the proceedings are still pending before the Family Court, I do not find that the order passed by the Family Court deserves to be modified. However, the aforesaid observations should not be construed to mean that the petitioner was not capable of acting as guardian of the minor child for having his custody. The order passed by the Family Court is being confirmed in the backdrop of the views expressed of the minor child. As stated above, his views carry paramount importance and hence, they deserve to be given preference as against the rival contentions.

The decisions in *Nil Ratan Kundu*, *Gayatri Bajaj*, *Mausami Moitra Ganguli*, *Athar Hussain*, *Palmira Fernandes* and *Arwa Saifuddin (supra)* all unequivocally hold that in matters seeking grant of custody, paramount consideration is the welfare of the minor child. Merely because the father is the natural guardian of the child would not by itself be a factor to grant custody in his favour.

In fact, in *Mausami Moitra Ganguli (supra)*, the custody of the child with his father was maintained by the Hon'ble Supreme Court after noticing that the child was more comfortable in the company of his father. It would ultimately depend on the facts of each case and the Court would be required to take a decision by keeping the welfare of the child in mind.

In view of aforesaid, I am not inclined to interfere with the impugned order. It is, however, clarified that the proceedings for custody shall be decided on their own merits without being influenced by any observations made herein above. The writ petition is accordingly dismissed with no order as to costs.

At this stage, Mrs. R. S. Sirpurkar, the learned Counsel for the petitioner prays for keeping the order in abeyance.

Mr. Naidu, the learned Counsel for the respondent states that the present arrangement between the parties shall continue to operate for a period of four weeks.

Statement accepted.

JUDGE

/MULEY/

C E R T I F I C A T E

“ I certify that this Order uploaded is a true and correct copy of original signed Order.”

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