

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8273 OF 2018

Lisha Abhay Jagtap ... Petitioner
Vs.
Abhay Kamalakar Jagtap ... Respondent

Mr. Shekhar Jagtap a/w. Ms. Sairuchita Chowdhary i/b. J. Shekhar &
Co. for Petitioner.
Mr. Abhay Jagtap, Respondent in person.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 04, 2018

P.C. :

Heard Mr. Shekhar Jagtap, learned Counsel for the petitioner and
Mr. Abhay Jagtap, respondent in person at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner-wife has challenged the judgment and order dated 03.07.2018 passed by the learned Judge, Family Court No.2, Pune below exhibit-5 in P.A.No.585 of 2017. By that order, the learned trial Judge allowed the application exhibit-5 filed by the respondent husband and directed the petitioner to handover interim custody of minor son Ayush, aged about 14 years to the respondent within 4 weeks. The learned trial Judge held that petitioner is entitled to have overnight access of minor son Ayush from 6.00 p.m. of 2nd and 4th Friday till 8.00 p.m. The arrangement was ordered to remain in force till the decision of the main Petition.

3. The matter was heard from time to time and on 24.09.2018, I have interacted with the parties herein as also elder son, Siddhesh, aged about 20 years. I have also interacted separately with minor son Ayush in my Chambers. After interacting with Ayush, I found that he genuinely

desires to reside with the respondent and accordingly, I directed the petitioner to handover custody of minor son Ayush to the respondent forthwith. The respondent was permitted to take minor son Ayush from the Chambers and matter was ordered to be listed today for further hearing.

4. In support of this Petition, Mr. Jagtap strenuously contended that while considering the aspect of interim custody, welfare of child is the paramount consideration. He submitted that flat No.101 situate at Dreams Aakruti, Hadapsar is jointly owned by the petitioner and the respondent. Respondent has filed application for issuing direction to the petitioner to pay their Equal Monthly Installments. He submitted that in fact, respondent and petitioner have joint custody of Ayush. Respondent drops the child to the school. The conduct of the respondent also disentitles him from granting of interim custody. There are 4 N.C. complaints made against the respondent and in fact, respondent has assaulted the petitioner and the elder son Siddhesh in the past. He submitted that after the order was passed on 24.09.2018 permitting respondent to take the custody of the child Ayush, Ayush is going to the office of the respondent after the school is over. This is not in the best interest of Ayush and the latest mark-sheet of Ayush shows decline in his marks. He submitted that the respondent is not residing alone in flat No.101 and it is common residence of both the parties. In short, respondent is not denying the access of son Ayush. He submitted that the respondent has also refused to pay the tuition fees as he did not have custody of son, Ayush. Son Ayush did not get opportunity to attend classes and clarify his doubts due to which his academics have been affected. He, therefore, submitted that the impugned order deserves to be set aside and the Petition requires consideration.

5. On the other hand, respondent in person has supported the

impugned order. He invited my attention to the report dated 21.05.2018 at exhibit-53 made by the learned Judge of the Family Court. The learned trial Judge, after interviewing the child, found that son Ayush desires to stay with the father and not with the mother. He also clarified that respondent father takes his more care than petitioner mother. Respondent, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by the parties. I have also perused the material on record. As noted earlier, I have interviewed the parties. I have interacted separately with elder son Siddhesh as also separately with minor son Ayush in my Chambers on 24.09.2018. During the course of interaction with minor son Ayush, he informed me that after the school is over, he goes to his grandmother's house (petitioners' mother). Along with the petitioner - mother, his elder brother Siddhesh, he returns to flat No.101, Hadapsar at night on Scooty. Though the respondent claims that he alone is residing in flat No.101, minor son Ayush on the contrary stated that all are staying together in flat No.101, *albeit* at night. A perusal of report at exhibit-53 as also my interaction with minor son Ayush clearly shows that he has preferred to stay with his father. Minor son Ayush is aged about 14 years. I find him to be bright and intelligent boy. He is intelligent enough to make his choice. During the course of interaction, I also informed him that his elder brother Siddhesh is residing with petitioner-mother. I asked him whether despite this position, he still wants to reside with the respondent-father. Ayush unequivocally stated that still he wants to reside with respondent-father. I found him to be mature enough to take independent decision.

7. Section 26 of the Hindu Marriage Act, 1955 lays down that in any proceeding under the said Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may

deem just and proper with respect to the custody, maintenance and education of minor children, **consistently with their wishes, wherever possible**. After ascertaining the wishes of minor son Ayush as also after perusing the material on record, I do not find that the learned trial Judge has committed any error in passing the impugned order. In my opinion, while considering the matter of custody what is of paramount importance is a welfare of the child. The learned trial Judge has rightly applied the principles to the present case. In my opinion, the welfare of the child is properly taken care of by the respondent father. Hence, no case is made out for interfering with the impugned order. The Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal
Sandip
Parab

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by Minal Sandip
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Date: 2018.10.09
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