

PMB

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2027 OF 2018

Sonali Rahul Wani .. Petitioner

vs.

Rahul Rajan Wani .. Respondent

Smt. Prabha U. Badadare for the Petitioner.

Mr. Mohammd Umar Kazi for the Respondent.

CORAM : M.S.KARNIK, J.

DATE : AUGUST 26, 2021

P.C.

Heard learned counsel for the parties.

2. The order under challenge in this Petition under Article 227 of the Constitution of India is passed by the District Judge rejecting the application made by the Petitioner-wife under Order IX Rule 13 of the Civil Procedure Code, 1908 ('CPC' for short) for setting aside the ex-parte judgment and order dated 03.11.2017 passed by the District Judge in Civil Miscellaneous Application No.161 of 2017.

3. The Civil Miscellaneous Application No.161 of 2017 was filed by the Respondent-husband for custody of the minor child 'Sulekh' now aged 12 years. The custody of the son is with the Petitioner-mother.

4. Despite the service of summons, the Petitioner did not remain present to contest the Civil Miscellaneous Application No.161 of 2017. The ex-parte judgment and order therefore came to be passed against the Petitioner and she was directed to hand over the custody of child 'Sulekh' forthwith to the Respondent-husband. The application made by the Petitioner under Order IX Rule 13 of the CPC was rejected by the judgment and order dated 02.02.2018. Learned counsel for the Petitioner submitted that she had to look after the son. There was some misconception on her part in attending the Court which was unintentional, resulting in the default. She tenders an unconditional apology through her counsel.

5. Learned counsel for the Respondent opposed the Petition. According to him, the Petitioner has been negligent and despite service of notice, the Petitioner failed to remain present. He invited my attention to the findings recorded by the District Judge to contend that the orders passed by the District Judge cannot be said to be perverse.

6. I do find some substance in the contention of learned counsel for the Respondent, in that the Petitioner has failed to attend the proceedings before the District Judge. However, it cannot be forgotten that ultimately it is the question of the custody of minor child whose welfare is a paramount consideration. The custody was all along with the mother. Learned counsel on instructions of

the Petitioner tendered her apology and requests that she may be given an opportunity to contest the application before the District Judge.

7. In my opinion, having regard to the facts and circumstances of the present case, considering the interest of minor child is paramount, it is necessary to give an opportunity to the Petitioner to contest the application as what has been directed is handing over custody of the minor to the father by an ex-parte order. No doubt the Petitioner failed to remain present which she regrets. In the interest of justice, the impugned order deserves to be quashed and set aside. The application made under Order IX Rule 13 of the CPC is allowed. The Civil Miscellaneous Application No.161 of 2017 is restored to file to be heard on its own merits. The District Judge is requested to hear and decide the Civil Miscellaneous Application No.161 of 2017 as expeditiously as possible and preferably within a period of six months from 02.09.2021 when the parties undertake to appear before the District Judge.

8. The Application is allowed subject to the cost of Rs.1,000/- payable to the Maharashtra Legal Aid Services Authority.

9. The Writ Petition is disposed of.