

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CIVIL APPLICATION NO. 5828 OF 2022
IN
FIRST APPEAL NO.792 OF 2022**

**SALIM YOUSUF JAMADAR
VERSUS
RESHMA SALIM JAMADAR**

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Mr. D.R. Jethliya, Advocate for the Applicant
Mr. Parag V. Barde, Advocate for the Respondent

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CORAM : SHRIKANT D. KULKARNI, J.

DATE : 20th APRIL, 2022

PER COURT:-

1. It is an application for stay moved by the appellant / husband.
2. Heard Mr. D.R. Jethliya, learned counsel for the appellant / husband and Mr. Parag Barde, learned counsel for the respondent / wife at length.
3. The matrimonial discord between the parties has resulted in fight for the custody of children.

4. The parties to the appeal entered into wedlock on 19.05.2010 at Pune according to Mohammedan law. Out of wedlock, they blessed with one male child namely Arsalan and female child namely Akira. Now both children are minor. The criminal proceedings on the basis of F.I.R. lodged by the wife at Murum Police Station and Domestic Violence Act before the Judicial Magistrate, First Class at Omerga are born. The respondent / wife filed proceedings under Section 8 of the Guardians and Wards Act, 1890 before the District Judge at Omerga and sought custody of the children. The interim custody was also sought by the wife by moving an application dated 06.09.2021. The appellant / husband raised objection and prayed for rejection of the application by taking aid of Order VII Rule 11 of the Code of Civil Procedure. The learned District Judge-1, Omerga, after hearing both the sides and perusing the papers was pleased to allow the application filed by the respondent / wife and directed to the appellant / husband to hand over the custody of children to his wife within two weeks from the date of order.

5. Feeling aggrieved by the impugned order passed by the learned District Judge, Omerga in Civil Misc. Application No. 45 of 2020, the appellant / husband has preferred this appeal on various grounds and it is under scrutiny and *inter alia* prayed for stay.

6. Mr. Jethliya, learned counsel for the appellant vehemently submitted that the impugned order passed by the District Judge-1, Omerga is without jurisdiction and liable to be stayed. The learned District Judge did not consider the issue of jurisdiction, though specifically raised by the appellant, which has resulted in causing injustice to the appellant. He submitted that for more than two years the children are residing with the father / appellant. The appellant is providing the best education to his children, who is resident of Pune. The best interest of the children is being taken care of by the father. On the other hand, the wife is residing at remote village, where no education facility is available. The wife is given visiting rights in view of order passed by the Judicial Magistrate, First Class in the Domestic Violence Act proceedings. Mr. Jethliya has also referred various citations during the course of argument in

order to support his submissions. He, therefore, urged to grant stay.

7. Per contra, Mr. Barde, learned counsel for the respondent / wife supported the impugned order passed by the learned District Judge, Omerga. He submitted that the respondent being mother of the children, may look after them in a better way than the father. The appellant / father is doing transport business and always out of home to look after his business. There is nobody to look after the children in the home. The learned District Judge has taken into consideration all the aspects and rightly allowed the application. The learned District Judge has also taken into consideration the jurisdiction point raised by the appellant / husband and turned down the same though specific point is not framed. He submitted that there is no need to stay the impugned order.

8. I have considered the submissions canvassed by the learned counsel appearing for the respective sides. Perused the impugned order passed by the learned District Judge, the copy of the application filed by the wife under Section 21 of the Domestic Violence Act and the order passed thereon.

9. In case of *NilRatan Kundu and another Vs. Abhijit Kundu* reported in *AIR 2009 SC (Supp) 732*, it is held by the Hon'ble Supreme Court that, "in deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, may bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such

preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor”.

In determining custody of child, it is not the ‘negative test’ that the father is not ‘unfit’ or disqualified to have custody of his son/daughter is relevant but the ‘positive test’ that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian.

10. It is revealed during the course of argument that since last two years, the children residing with their father / appellant, who is resident of Yerwada, Pune. By looking to the grounds raised in the appeal memo and looking to the fact that at present the appellant / father is looking after his children, there is need to maintain the *status quo* by looking to the best interest of the children. The appellant / father is residing at Yerwada, Pune, where best education facilities are available. It is not the case that the appellant / father is not taking proper care. Moreover, grounds raised on behalf of both the sides would be considered at the time of final hearing of the appeal.

The respondent / wife is given visiting rights in view of the decision in the proceedings under the Domestic Violence Act. It would be proper to continue the same visiting rights so that the respondent / wife can meet her children as per the arrangement made in the order passed under the proceedings of Domestic Violence Act and let the appellant / husband shall bear the expenses of travelling quantified at Rs. 2,000/-. The same arrangement made by the Judicial Magistrate, First Class, Omerga while passing the order below exhibit 5 in D.V. Application No. 58 of 2019 would take care of visiting rights of the respondent / wife.

11. Having regard to the above reasons and discussion, I am convinced to grant stay to the operation and execution of the impugned order passed by the District Judge-1, Omerga. By looking to the issue of child custody and the academic year, which may begin from the mid of June, 2022, it would be just and proper to decide the appeal at admission stage.

ORDER

(i) The application for stay is hereby allowed in terms of prayer clause (B).

(ii) The arrangement made by the learned Judicial Magistrate, First Class, Omerga regarding visiting rights of wife by order dated 02.03.2020 in D.V. Application No. 58 of 2019 shall be continued till the final decision of the appeal.

(iii) List the appeal on 15.06.2022 for final disposal at admission stage/

(iv) Inform the concerned Court accordingly.

(v) The civil application is accordingly disposed of.

[SHRIKANT D. KULKARNI]
JUDGE

S.P Rane