

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

**FIRST APPEAL NO.1272 OF 2022
(WITH CIVIL APPLICATION NO.8564 OF 2022)**

Ravindra S/o Prakash Kharat
Age : 29 years, Occ : Nil,
R/o Karanjkhed, Tq. Kannad,
Dist. Aurangabad.

. .. APPELLANT
(Orig. non-applicant)

VERSUS

Kalpana W/o Ravindra Kharat
Age : 25 years, Occ : Household,
R/o Near New High School, Harsul,
Tq. & Dist. Aurangabad.

. ..RESPONDENT
(Ori. Applicant)

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Mr.Y.K. Bobade, Advocate for the appellant.
Mr.P.P. Uttarwar & Mr.P.S. Mundhe, Advocates for
respondent.

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CORAM : S.G.DIGE, J.

RESERVED ON : 24.06.2022
PRONOUNCED ON : 05.07.2022

JUDGMENT :

1. This appeal is directed against the order passed
by the learned District Judge-6, Aurangabad in Civil M.A.
No.40/2022 directing that the permanent custody of the

minor child Kartik shall be given to his mother (respondent).

2. The mother (respondent) had filed the application under section 25 of the Guardians and Wards Act, 1890 claiming permanent custody of her minor son Kartik, who was in custody of appellant.

3. The respondent and the appellant got married in February, 2019. Out of their wedlock, two sons namely Kartik and Atharv are born. Kartik is 2 and 1/2 years old. The marital relations between the appellant and the respondent are strained. There were litigations between them. After that, they resided together to solve the disputes, but in vain. The respondent is residing with her parents. Minor Kartik is in custody of the appellant, whereas the younger son Atharv is in custody of the respondent. In application it was alleged that the appellant is a teacher. So he remain out side the house for whole day. He cannot take care of the minor Kartik. There is no one in the house of

the appellant to look after son Kartik. Kartik is 2 and 1/2 years old. Hence, his custody was sought permanently by the respondent.

4. The husband (appellant) filed say to the said application. He denied all the allegations made against him. In the say, it is stated that the respondent is harassing the appellant. The respondent herself has left the minor Kartik with the appellant. The respondent has not inquired about minor Kartik for one year. The appellant has tried to stay with the respondent, but the respondent is not giving response to the efforts of the appellant. It is further stated that the appellant is taking proper care of a minor Kartik. The minor Kartik is taking education in Anganwadi. The respondent is not able to take proper care of minor Kartik. The respondent is pressurizing the appellant to live separately from his parents. The respondent's behaviour with the minor son Kartik is not proper. The appellant is trying to save the future of minor Kartik. The place where the respondent is at presently residing is not suitable for

stay of minor Kartik. The appellant is father of Kartik. Therefore, it is in the interest of the child the father should have custody of minor child.

5. The learned District Judge considering the evidence on record came to the conclusion that the welfare of the child is paramount consideration and for a child of 2 and 1/2 years, undoubtedly, the mother would be the proper person to have the custody of the child. The appellant is teacher, when he goes for duty Kartik would remain with the old parents of the appellant. Thus they may not be in a good position to take overall care of Kartik. As against this, the respondent is residing with parents and married brothers. Respondent has no job, for whole day she can look after Kartik. Moreover, there are other two family members in the family, who are also available with the respondent to look after the minor. The younger brother of Kartik is already in custody of the respondent. Thus, Kartik may get company and love and affection of younger brother. Hence, the learned District Judge directed to give

permanent custody of Kartik to the respondent. The visiting rights are given to the appellant on every Saturday of each month between 11.00 a.m. to 2.00 p.m. The appellant is given liberty to have talk with Kartik on mobile phone on every Sunday in between 10.00 a.m. to 11.00 a.m.

6. Heard Mr.Y.K. Bobade, the learned counsel for the appellant and Mr.P.P. Uttarwar, the learned counsel for respondent.

7. The learned counsel for the appellant in assailing the impugned judgment of the learned District Judge raised following contentions :-

(a) The application filed by the respondent was required to be filed under section 12 of the Guardians and Wards Act, 1890.

(b) The learned District Judge ought to have considered that the love and affection of the father is equally important for overall development of the minor.

(c) The learned District Judge has failed to consider

that the appellant can very well maintain minor Kartik and there are other family members of the appellant to take care of Kartik.

(d) The minor son Atharv is already in custody of the respondent. The appellant is taking proper care in respect of education of Kartik.

(e) The learned counsel for the appellant relies upon the judgments reported in the case of ***Arun Sharma Vs. Roxann Sharma*** reported in ***2015(1)Mh.L.J. 326***, ***Sau Anasuyabai V/s Trymbak Balwant Rakshe*** reported in ***MANU/MH/0679/1985*** and ***Ratnamala Vs. Pandurang Udhav Zate*** reported in ***MANU/MH/1611/2021***.

8. It is the contention of the learned counsel for the respondent that the respondent is the mother of Kartik. Kartik is 2 and 1/2 years old. Hence he requires love of the respondent. The appellant is a teacher. He required to attend the duty daily, there is no one in the family of the appellant to look after Kartik. Having the custody of the younger son Atharv is no bar to claim custody of Kartik.

9. I have heard both the learned counsel. Perused the order passed by the learned District Judge. Before I proceed to examine the rival contentions, it is necessary to see settled law.

10. It is settled principle of law that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. What would be in the welfare of the minor is to be judged in all attending circumstances.

11. In the present case, the minor Kartik is 2 and 1/2 years old. Hence he requires love and affection and proper care, which is normally expected from the mother. It is settled law that in respect of child of tender age, the mother is more suitable to have the custody. The appellant is working as a teacher. So he may not remain with Kartik

for whole day. Though it is pointed out that the appellant's parents and other family members are there to look after Kartik, but other family members cannot take a place of mother or father. The respondent is staying with her parents. She has no job. She does housework, she can look after the welfare of Kartik. Moreover, there are other family members in their family to look after Kartik. Younger brother of Kartik is in custody of the respondent, Kartik can get company of his younger brother Atharv.

12. Application was filed under Section 25 of the Guardians and Wards Act. It reads as under :-

“Section 25:-Title of guardian to custody of ward.-

(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be

arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.”

13. This section does not state about giving permanent custody, the learned District Judge has granted permanent custody to the respondent, which is illegal. The appellant is father of the minor Kartik. The permanent custody cannot be given to the respondent. Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 reads as under :-

“Section 6(a)- in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor

who has not completed the age of five years shall ordinarily be with the mother;”

14. This section provides that the mother is supposed to have the custody of the child who has not completed the age of 5 years. Therefore, in my view, the custody of minor Kartik shall be with respondent till he attains five years of age.

15. The learned counsel for the appellant has contended that the application ought to have been filed under section 12 of the Guardians and Wards Act instead under section 25. It appears from record that such contention was not raised before the learned District Judge nor even in the memorandum of appeal filed before this Court. In this view, it is futile to urge on this point now.

16. I have gone through the case laws cited by the learned counsel for the appellant. The facts in the cited cases and the case at hand are different, hence not applicable to this case.

17. In view of the above, the appeal is partly allowed. The custody of Kartik shall be given to the respondent till he attains five years of age. The appellant is entitled to file appropriate proceedings after completing five years age of Kartik.

18. The First Appeal is disposed of accordingly.

19. In view of the disposal of Appeal itself, nothing survives in Civil Application No. 8564/2022 and hence the same stands disposed of.

(S.G.DIGE, J.)