

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

**29 WRIT PETITION NO.6826 OF 2022**

1. Anita Balu Chavn  
Age: 33 years, Occu.: Household,  
R/o. C/o. Bajranga Dudha Rathod,  
At Post. Laul, Tq.Majalgaon,  
Dist.Beed.
2. Swapnil Balu Chavan  
Age: 15 years, Occu.: Education,  
R/o. As above.
3. Shreyas Balu Chavan  
Age: 13 years, Occu.: Education,  
R/o. As above.

(Petitioners 2 & 3 being minor  
U/g. Of Real mother Anita Balu  
Chavan, Petitioner No.1)

..Petitioners

VERSUS

- .
- Balu S/o. Anna Chavan  
Age: 35 years, Occu.: Service,  
R/o. House No.J-11/12,  
Aurangabad Central Jail Colony,  
Harsul, Aurangabad.  
Tq. & District Aurangabad.  
At present residing at  
Central Jail, Dhule, Dist.Dhule.

..Respondent

...  
Advocate for Petitioners : Shri Bhagwan S. Kudale  
Advocate for Respondent : Smt.Manjushri V. Narwade

...  
**CORAM : M.G.SEWLIKAR, J.**

**DATE : 1<sup>st</sup> August, 2022**

**ORAL JUDGMENT :-**

1. Rule. Rule is made returnable forthwith.

2. Heard learned counsel for both the parties at the time of admission for final hearing.

3. Respondent and petitioner No.1 are husband and wife. Petitioner Nos.2 and 3 are children from their marriage. Their marriage is on the rocks, therefore, respondent filed an application before the District Judge, Majalgaon under Sections 7 and 25 of the Guardian and Wards Act, for getting the custody of petitioner Nos.2 and 3.

4. During the pendency of the application, petitioners filed application for production of documents at Exhibit-25 for leading oral and documentary evidence. On 15<sup>th</sup> June, 2022, the learned District Judge rejected the application on the ground that both the parties and their Advocates were absent despite calling them repeatedly till 03:30 p.m. He, therefore, rejected the application and posted the matter for argument.

5. Shri B.S.Kudale, learned counsel for the petitioner submits that this is a custody matter. The matter involving the important rights of the parties cannot be decided without recording evidence. He placed reliance on the Judgment of this Court in *Ratnamala Pandurang Zate vs Pandurang Udhav Zate* [LAWS (BOM)-2021-7-3]. Paragraph No.17 of the Judgment reads as under :

*“17. The procedure that was adopted by the learned Trial Judge was itself wrong. He ought to have given proper opportunity to lead the evidence to both sides. The point, which could not have been decided only on the basis of affidavits have been considered in that way. The learned Advocate for respondent though relied on Smriti Madan Kansagra's case (supra), it can be seen that in that case also there was oral evidence and the parties were allowed to cross examine each other. That means, the procedure that was contemplated was not merely on the basis of the affidavits and this ought to have been considered by the learned Trial Judge. This fact is also observed in Nil Ratan Kundu's case (supra). At the costs of repetition that the Hon'ble Supreme Court has stated that, "In deciding a difficult and complex question, a Court of law should keep in mind relevant statutes and the rights flowing there from, but such cases cannot be decided solely by interpreting legal provisions." Thereafter, how the guardian is to be selected has been laid down, and therefore, for proving comfort of the child, contentment, health, education, intellectual development and favourable surroundings etc., an opportunity should be given to the parties to lead evidence. This Court feels that since the proper opportunity appears to have not been given to the parties to lead evidence, it is necessary to relegate the matter back to the Trial Court and in the meantime, till the decision of the said application on its merits, the custody of both the children deserves to be given to the mother.”*

6. I find substance in the contentions raised by the learned counsel for the petitioners. However, this application was

rejected because of absence of the Advocates and the parties. Shri Kudale, learned counsel for the petitioners submits that parties should not suffer because of the mistakes committed by the Advocates. He is right in making this submission. Therefore, costs is to be paid by the Advocates themselves.

7. In view of this, petition is allowed.

8. Learned District Judge, Majalgaon, shall permit the parties to lead oral and documentary evidence subject to costs of Rs.500/- each to be paid by both the Advocates for the petitioners and respondent. Rule is made absolute accordingly.

**( M.G.SEWLIKAR )**  
**JUDGE**

SPT