

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO. 52/2022

Swapnil Bhajandas Kamble,
Aged about 36 years, Occ. Service,
R/o. 3rd Floor, Prerana Tower, P & T
Colony, Trimulgherry, Secunderabad,
Dist – Hyderabad (Telangana).

....**PETITIONER**

VERSUS

Sau. Manisha w/o Swapnil Kamble,
Aged about 33 years, Occ. Household,
R/o. Sangadi, Tah. Sakoli,
Dist. Bhandara.

....**RESPONDENT**

Mr. M. V. Rai, Advocate for petitioner.
Mr. K. J. Topale, Advocate for respondent.

CORAM : **VINAY JOSHI, J.**

CLOSED FOR JUDGMENT : **09.06.2022.**

DATE OF JUDGMENT : **17.06.2022.**

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally
by consent of the learned counsel appearing for the parties.

2. Whether the father or the mother shall be preferred for temporary custody of a female child aged 5 years 5 month, is the short question for consideration in this petition. The petitioner/husband has challenged the impugned orders passed by both the Courts below directing to handover temporary custody of child to the respondent/wife. By invoking writ jurisdiction, petitioner/father has called in question the legality and sustainability of both impugned orders.

3. The petitioner got married with the respondent/wife on 07.09.2014. The parties are governed under the Hindu Law. The petitioner/husband was hailing from District Jalna whilst the parental house of the respondent/wife is at village Sangadi, District Bhandara. The petitioner was serving as a Scientist/Technician at Hyderabad. Soon after the marriage, couple started to reside at Hyderabad. During Wedlock, they had a female child born on 02.01.2017. In the year 2020, after Dasera festival, the couple came to Jalana and thereafter, respondent alongwith her minor child stayed at her parental house due to differences.

4. On 27.02.2021, the petitioner/husband went to the respondent's maternal house and took child under one or other pretext, but never returned. The respondent/wife has filed application under Section 12 of the Protection of Women from the Domestic Violence Act, 2005 ('D. V. Act') in the Court of jurisdictional Magistrate. In said proceedings, she has applied for temporary custody of minor child in terms of Section 21 of the D.V. Act. The petitioner/husband resisted for grant of temporary custody to the wife. After hearing both sides, the learned Magistrate vide order dated 24.12.2021 has granted temporary custody of child to the respondent/wife till disposal of main petition. The said order was carried by the petitioner/husband in Criminal Appeal No. 49/2021, however the appeal was dismissed vide order dated 17.01.2022.

5. Undisputedly for initial 4 years from marriage, the couple lived with child at Hyderabad. It is not in dispute that while the respondent/wife was staying at her maternal house, on 27.02.2021, the petitioner/husband took away child to Hyderabad. The learned counsel for the petitioner has primly canvassed that since the child is comfortably living with father from 27.02.2021, it is not conducive for the welfare of child to transmit her during pendency

of lis. It is submitted that the child was suffering from physical as well mental problem. The father has extended necessary medical aid to the child at Hyderabad. Moreover, father has admitted the child in nursery and looking towards welfare of the child. On the other hand, the learned counsel appearing for respondent wife would submit that the petitioner/husband has forcibly taken the custody of child. It is submitted that the child was barely 4 ½ years old at relevant time, and therefore, the mother being legal custodian of female child below 5 years of age, she is entitled for custody. Both learned counsels have relied upon various decisions to support their respective stand.

6. The learned counsel for petitioner, by relying on the decision of this Court in case of ***Arun Sharma Vs. Roxann Sharma (Writ Petition No. 79/2014)*** decided on 02.08.2014 advanced submission that when the child is with her father for more than one year, it is not appropriate to change the custody at interim stage. He has also relied on the decisions of the Supreme Court in cases of ***Mausami Moitra Ganguli Vs. Jayant Ganguli, (2008) 7 SCC 673, Athar Hussain Vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654, Sumedha Nagpal Vs. State of Delhi and others, (2000) 9 SCC 745 and R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and others,***

(2001) 4 SCC 71 to impress that welfare of child is the paramount consideration in the matters of custody.

7. On the other hand, learned counsel for respondent by placing reliance on the decision of this Court in case of ***Smt. Manjita Naik Tuenkar Vs. Soiroo @ Sarvesh C. Naik Tuenkar & Anr, 2013 ALL MR (Cri) 2456***, submitted that when the custody of child was obtained by deceitful means, father is not entitled for the same. Besides that, he relied on the decision of the Supreme Court in case of ***Nithya Anand Raghavan Vs. State (NCT of Delhi) and another, (2017) 8 SCC 454*** to contend that in case of minor girl child, guardianship of mother is of utmost significance for her personal development. The respondent also relied on the decisions of this Court in case of ***Dr. Parijat Vinod Kanetkar & ors. Vs. Mrs. Malika Parijat Kanetkar & anr, 2017 ALL MR (Cri) 368*** and ***Pramod Prakash Mulik and others Vs. Manisha Pramod Mulik and another, 2019(6) Mh.L.J.(Cri.) 653*** to contend that mother should be preferred than father in cases of custody of minor. Lastly the respondent relied on the decision of this Court in case of ***Sneha Milind Kale Vs. Milind s/o Shrikrishna Kale and others, (Criminal Writ Petition No. 93/2021)***, decided on 26.11.2021 to state that in similar circumstances, this

Court has preferred the mother than the father.

8. At the inception, it is worthwhile to note that the Supreme Court in above referred case of *Mausami Moitra Ganguli*, held that welfare of the child is the paramount consideration for custody matters. Inasmuch as it is observed that in case of custody of minor child as regards to the factual aspect of the case, the precedents would not govern the situation. It is settled law that question of welfare of the minor child has to be considered on the background of the relevant facts and circumstances. Each case has to be decided on its own facts and the other decided cases can hardly serve the purpose.

9. The principle which can be culled out from various decisions is that the welfare of the minor is the prime consideration for adjudicating the issue. The Court is not bound by mere legal rights of the parties, but the factual circumstances relating to the welfare of child would take precedence. Undoubtedly, nothing can stand in the way of the Court exercising its *parens patriae* jurisdiction in the matter.

10. In the light of above settled position of law, the facts are to be assessed. Admittedly, from 27.02.2021 till date i.e. for the

period of more than 1 year and 4 months, the child is living with her father at Hyderabad. It has come on record that petitioner/father is living with child along with his parents, brother and brother's wife at Hyderabad. On the other hand, the mother is living at village Sangadi, District Bhandara with her parents and brother. The petitioner/father persistently made out a case that since child was suffering from various ailments, he took her to Hyderabad for treatment. In that regard, petitioner/father has produced medical papers showing that the child was treated at Neocare Children Clinic from the month of March 2021. He has also produced medical paper to show that he took psychological treatment for the child at MindKrafts Assessment and Counseling Center. The medical paper discloses that the child was suffering from skin disease, breathing and emotional problems. The medical paper discloses prolonged treatment for the period of six months given at Hyderabad.

11. Besides that, the petitioner/father has admitted the child into the playgroup namely Kidzee Trimulgherry, of which the receipts of payment of fees from month of April 2021 to November 2021 are produced. These documents prima facie supports the

petitioner's contention that though he took child in the month of February 2021, however he has extended medical treatment as well as admitted child in the playgroup. Besides that, the petitioner has produced an admission form of child admitted at taekwondo academy which is an extra curricular activity. On that basis, it is urged that the petitioner husband is looking after the well-being of the child.

12. As against this, it is the stand of respondent/wife that she is postgraduate and able to cater the needs of child. On query, it is informed that respondent's father is pensioner. At present, there is nothing to suggest that the welfare of the child is at peril, if child lives with the father. The matter can also be viewed from the angle of stability and consistency of the living of the child. While dealing with the application for interim custody, generally the custody shall not be disturbed without adequate reasons. It is essential to see the impact of frequent change of custody from one person to another. One has to bear in mind that the child is living with father for the period more than 1 year. The record indicates that during pendency of this petition, child was interviewed by Dr. Mrs. R. S. Sirpurkar as a Mediator who in turn informed that the child dislikes her mother and her reaction towards mother is adverse. During pendency,

limited custody access was given to the mother. The report of protection officer dated 02.05.2022 and 24.05.2022 indicates that the child showed reluctance to meet her mother during visitation hours.

13. The trauma that the child is likely to experience in the event of change of custody, pending proceeding, shall have to be necessarily borne in mind. I am conscious about tender age and gender of the child, but still, I feel that at this interim stage of the proceeding, it would not be appropriate to interfere in the existing state, especially on the background of prolonged residence of child with father.

14. The report of Mediator as well as Protection Officer prima facie assures that the child is comfortable with his father. Thus, considering the peculiar facts and especially the child is in custody of petitioner/father admittedly from 27.02.2021, change in custody in absence of cogent material that too at this interim stage would be against the welfare and mental set up of the child.

15. Having regard to the current situation, it is in the interest of minor to allow to prevail the situation for some time i.e.

upto final adjudication of the proceeding by Magistrate. Considering the nature of dispute, I find it appropriate to direct the learned Magistrate to dispose of the petition for custody as expeditiously as possible and in any event within three months from the date of the receipt of this order. In view of above, both impugned orders would not sustain in the eyes of law. Hence, following order:-

- (i) Petition stands allowed and disposed of.
- (ii) Impugned order dated 17.01.2022 passed by the learned Additional Sessions Judge, Bhandara in Criminal Appeal No. 49/2021 and order dated 24.12.2021 passed by the Magistrate on Exh. 1 in PWDVA Appl. No. 15/2021 are hereby quashed and set aside.
- (iii) The interim custody during pendency of the proceedings shall be continued with the petitioner/father subject to the visitation rights in the manner provided by this Court to the respondent/wife.
- (iv) The learned Magistrate is at liberty to modifying the arrangement of access as per convenience of parties.
- (v) The Learned Magistrate is directed to decide the D. V. Application No. P.W.D.V.A. Appl. No. 15/2021 within a

period of three months from the date of receipt of the intimation of this order.

16. Rule is made absolute in above terms.

JUDGE

Gohane

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signed by
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