

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

CRIMINAL WRIT PETITION NO.239 OF 2022

Petitioner : **Rahul s/o Ashokrao Darokar,**
Aged about 33 years, Occupation : Labour,
R/o. Jarud, Tah. Warud, District Amravati.

– Versus –

Respondent : **Sau. Harshali w/o Rahul Darokar,**
Aged about 25 years, Occupation : Household,
R/o C/o. Dilip Makode, Tarasawanga,
Tah. Ashti, District Wardha.

Mr. R.M. Bhongade, Advocate for the Petitioner.
Mr. Mahesh Rai, Advocate for the Respondent.

CORAM : **VINAY JOSHI, J.**
DATE : **19th JULY, 2022.**

ORAL JUDGMENT :-

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

02] The petitioner-father has posed a question to be answered as to who would be the proper person to have interim custody of a minor female child aged 2½ years, who is now 3 years and 4 months of age. The first Court i.e. the Court of Judicial Magistrate First Class, leaned in favour of the petitioner-father, whilst the appellate Court leaned in favour of the respondent-mother.

By invoking writ jurisdiction, the petitioner-father has questioned the legality and sustainability of the impugned order passed in appeal.

03] The petitioner got married with the respondent-wife on 16/05/2017. The couple had a female child born on 04/03/2019. The marriage does not run smooth for long as due to matrimonial flue, the wife started to reside separately with her parents from the month of August, 2021. The child remained with the father for which both are fighting for custody.

04] The respondent-wife has filed application to the Magistrate in terms of Section 12 of the Protection of Women from Domestic Violence Act seeking multiple reliefs as made available under the statute. The wife has filed application for interim custody of child, which was rejected. The said order was reversed in appeal. The learned Counsel appearing for the petitioner-husband strenuously argued that the appellate Court seriously fell in error in reversing the order of the Magistrate. It is argued that the wife is financially as well as mentally not capable to maintain child. She was of cruel nature as she used to beat the child and thus the child also dislikes her. It is submitted that in the month of August, 2021, the wife left matrimonial house leaving child and thereafter never turned. During long span, she had even not asked for visitation rights.

05] *Per contra*, the respondent-wife's learned Counsel supported the impugned order by stating that having regard to the tender age of the child, mother would be the proper option. It is submitted that the mother is running a boutique as well as taking tuition and thus she is capable to maintain her daughter. The wife has also levelled certain allegations against the husband contending that it was his second marriage and the husband is liquor addict. She expressed her desire to maintain her own kid for child's proper upbringing.

06] Undisputedly, the child born on 04/03/2019 meaning thereby on the date of applying to the Magistrate, the age of child was barely 2½ years. In that context, the matter is to be viewed. Certainly, we must give regard to the current age of child, which is barely 3 years and 4 months. The appellate Court while reversing the order of trial Court expressed that welfare of child is a paramount consideration. It is stated that since it was a female child, for the physical, psychological and emotional development, mother would be the proper custodian.

07] The legal position is no more *res integra*. In catena of decisions, it is held that welfare of the minor is the prime consideration for deciding the custody matters. 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.

08] It is to be remembered that the issue involved is about interim custody of a minor child. Yet the evidence is to be recorded before the trial Court. The learned Magistrate while refusing interim custody application expressed that since wife is claiming maintenance, she has no source and, therefore, she would not be in a position to maintain the child. The respondent-wife has come up with an affidavit filed in this Court stating that though earlier she was jobless, by the time, she started boutique, taking tuitions and earning Rs.8,100/- per month. Her endeavour was to show her financial capability to shoulder the responsibility of tender child. On the other hand, the petitioner-husband makes out a case that he has admitted the child in kindergarten, for which a receipt of payment of fees has been produced. It was learnt that the distance between two places, where the parties are living, is hardly 20-25 kms. The parties can have avail visitation rights without any hindrance.

09] The core issue is, what would be the best option on the premise of welfare of child. In series of decisions, it has been held that the mother is entitled for custody of child which is below five years. In a reported case of

Nithya Anand Raghavan vs. State (NCT of Delhi) and another – (2017) 8 SCC 454, the Supreme Court observed that guardianship of mother is of utmost significance for development of a girl child's personality, especially when she is around seven years of age, unless circumstances indicate that it would be harmful for her. I am aware that currently for the period for more than six months, the child is living in father's family, however, that cannot be a sole criteria in view of the child's extreme tender age. Though, it is stated that there are female members in the father's family, however, hardly there can be any option than mother for small female child. It is to be borne in mind that the child was barely 3 years of age having different kind of requirements from the parents. Needless to say that the mother can cater multiple needs of child, especially having regard to the gender of child. In order to carve out exceptions to the rule that mother would be custodian of a child below 5 years of age, a specific case adverse to the mother has to be made out.

10] At present, there is nothing to suggest that welfare of child would get staked if she lives with mother. When such type of dispute arose, the question is of delicacy as in the fight of parents, the children would be sufferer. The father is naturally supposed to devote time for his earning, herein it is said that he is doing labour work. *Per contra*, the mother is doing some miscellaneous work from her house for survival. Considering the very

tender age of child and particularly her gender, it would be in the interest of minor that at this growing age, she should live with mother. In that view of the matter, the impugned order of the appellate Court cannot be termed as unjust and contrary to law. In the circumstances, the petition stands rejected.

11] At this juncture, the learned Counsel appearing for the petitioner-husband seeks to stay the order, as the petitioner desires to challenge the order before the higher forum. It reveals that though the appellate Court has directed husband to hand over child's custody to the mother, however, this Court has granted stay, which was prevailing till date. Having regard to the said fact, the impugned order of handing over custody shall be executed after three weeks from the date of uploading of this order.

12] The petition is disposed of in the above terms. The rule stands discharged.

(VINAY JOSHI, J.)

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