

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 2532 OF 2021

Manoj S/o Dwarka Mewate -- Petitioner

Vs.

Ratna Manoj Mewate -- Respondent

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. Kamal Anandani, Advocate for Petitioner
Mr. U.J. Deshpande, Advocate for Respondent

CORAM : MANISH PITALE, J.

DATE : 16th MARCH 2022

By this petition, the petitioner has challenged the order dated 17/03/2021, passed by the Family Court at Akola, whereby application for interim custody of the minor children filed by the respondent (mother of the children) has been allowed and certain other directions have been given.

2. The respondent has filed an application under Section 25 of the Guardians and Wards Act, 1890, seeking custody of the minor children. There appears to be matrimonial discord between the parties, leading to their living separately and necessitating filing of the aforesaid application by the respondent. In the said application,

the respondent filed an application for interim custody of the minor children at Exh.7. It is undisputed that the respondent is living at Washim with her parents. She is a home-maker. The impugned order records that the petitioner i.e. the father of the minor children lives at Akola with his two widowed sisters.

3. The Family Court, taking into consideration the material available on record and after considering the contentions raised by the rival parties, allowed the application for interim custody filed by the respondent in the following manner :

Page 53 operative portion of the order

“ORDER

- 1) Application is allowed with costs of Rs.2,000/- (Rupees Two Thousand).
- 2) Respondent-husband Manoj Mewate is hereby directed to hand over custody of both the children to the applicant-wife Ratna Mewate.
- 3) Respondent-husband is hereby directed to pay Rs. 5,000/- (Rupees Five Thousand) towards the maintenance and educational expenses of both the child.
- 4) Respondent-husband is permitted to have the visiting right on first **“Sunday”** of every month between 11.00 to 5.00 p.m.”

4. Mr. Anandani, learned counsel appearing for the petitioner submitted that the minor children (two sons) have been living in the company of father for a considerable period of time and that if the impugned order is implemented, it would cause harassment

and discomfort to the children. Attention of this Court is invited to the report of a Marriage Counsellor from the Family Court at Akola, who submitted the report in pursuance of the directions given by this Court. The Counsellor interacted with the rival parties as well as the minor children and made certain observations. According to the learned counsel for the petitioner, the observations made in the report dated 09/09/2021 indicate that it would be in the interest of justice that interim custody of the minor children continues with the father. It is emphasized that the schooling of the children is at Akola and that since the respondent lives at Washim, it would result in the children being removed from the existing school, which would also cause grave inconvenience. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **DSG V/s. AKG** reported in **2020 ALL SCR 218**.

5. On the other hand, Mr. U.J. Deshpande, learned counsel appearing for the respondent submitted that the Family Court has taken into consideration all the aspects of the matter and upon applying the position of law in the correct perspective, the impugned order has been passed in favour of the respondent. It is emphasized that both the children are of tender age and they are in need of maternal care. It is emphasized that at Akola, there is no person to properly take care of the minor children and this is evident from the observations made in the impugned order. As

regards the report of the Marriage Counsellor, it is submitted that the observations made therein do indicate that interim custody being given to the mother would not entail any particular trauma or discomfort to the children and insofar as visiting rights are concerned, this Court can give appropriate directions, including the father i.e. petitioner to have custody of the minor children during the weekends. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **Gaurav Nagpal V/s. Sumedha Nagpal** reported in (2009) 1 Supreme Court Cases 42 and judgment of this Court in the case of **Ratnamala V/s. Pandurang Udhav Zate in First Appeal No. 393 of 2021 with Civil application No. 3803 of 2021 dated 03/07/2021**.

6. This Court has considered the contentions raised on behalf of the rival parties. The matter is concerning custody of children. Such matters are of sensitive nature and in such cases, the Hon'ble Supreme Court has repeatedly laid down that the interest of the children is the paramount consideration. In the present case, the children are of tender age, the younger one being about 3 years old and elder one about 6 years old. At this stage of their life, the children certainly need company of their mother. It is unfortunate that due to matrimonial discord between their parents, the minor children have been deprived of the company of their mother.

7. Perusal of the impugned order shows that while the mother i.e. the respondent, is a home-maker and hence, she is in a position to devote her entire time to the minor children. Such is not the case with the petitioner, who is father of the children. There can be no doubt about the fact that the father would also have equal love and affection, as also attachment with the minor children, but what is of paramount importance is as to the circumstances that could be made available to the children, given the matrimonial discord between the parties, for their overall development.

8. The expenses that need to be taken care of for the interests of the minor children can be met by the directions given in the impugned order to the petitioner, but it cannot be said that merely because the minor children have continued in the company of only the petitioner and his sisters for some period of time that, he deserves to have continued custody of the minor children.

9. A perusal of the report given by the Marriage Counsellor itself indicates that continued deprivation of company of the mother has started to have some effect on the minor children, particularly, the elder son. In such circumstances, the Court has to draw a fine line and to play a balancing act while keeping the interest of the children as the paramount consideration.

10. This Court is of the opinion that the Family Court in the present case has indeed taken into consideration the relevant aspects of the matter and by applying the principles laid down by the Hon'ble Supreme Court and this Court from time to time, the interim custody has been granted to the respondent (mother). The petitioner has not been able to make out a case for interference with the impugned order. Yet, the direction pertaining to the visiting rights given to the petitioner deserves to be modified in an appropriate manner.

9. Insofar as the judgment on which reliance is placed on behalf of the petitioner i.e. the case of **DSG Vs/. AKG** (supra), the facts of the said case are clearly distinguishable, because in the said case, the Court was concerned with a 12 years old girl child. It was the opinion of the Court that the said 12 years old girl child was in a position to form an opinion as regards the parent with whom she desired to reside. In the present case, admittedly both the minor sons are of tender age i.e. about 3 years and 6 years of age, who could be said to be incapable of independently forming an opinion to choose between the parents. This is a factor which has been commented upon by this Court in its judgment in the case of **Ratnamala V/s. Pandurang Udhav Zate** (Supra). In the said case also, the Court was concerned with the minor children aged about 2 years and 6 years. Even with regard to the child aged about 6 years, this Court observed that such a child may be intelligent and

able to comprehend his / her surroundings, but it could not be said that at such an age, the child will be able to form an opinion as regards which of the parents would such a child wish to reside with. In the said case also, the custody of the said minor children was granted to the mother.

10. In the case of **Gaurav Nagpal V/s. Sumedha Nagpal** (supra), the Hon'ble Supreme Court also took into consideration the factors that arise in the present case, including the fact that for some period of time, the minor children have lived with the father. Despite such facts, the Hon'ble Supreme Court held that the custody of the child would have to be given to the mother and that appropriate directions could be given for visiting rights to the father, so that the minor child is able to enjoy the company of the father also.

11. In view of above, this Court is of the opinion that no case is made out by the petitioner for interference in the impugned order, directing interim custody of the minor children to be given to the respondent. At the same time, appropriate directions can be given for visiting rights to the petitioner beyond the direction that has been granted in clause 4 of the operative order of the Family Court.

12. In view of above, the Writ Petition is disposed of by confirming Clauses 1 to 3 of the operative portion of the impugned order passed by the Family Court.

13. Clause 4 of the impugned order is modified and it is directed that the petitioner shall be permitted to enjoy visiting rights with the minor children during the weekends. The petitioner would be entitled to take the minor children with him during weekends on Saturdays at 10:00 AM and he shall ensure that they are returned to the mother by 6:00 PM on Sundays. The respondent shall co-operate with the petitioner in that regard.

14. It would be in the interest of justice that the main proceedings i.e. the application under Section 25 of the Guardians and Wards Act, is decided expeditiously. Accordingly, while disposing of the Writ Petition in the aforesaid manner, the Family Court is directed to take up the application filed by the respondent under the provisions of the said Act and to decide it as expeditiously as possible.

JUDGE