

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

WRIT PETITION NO.4827 OF 2023

**SOW. SHEETAL HIRAJI GAIKWAD
VERSUS
HIRAJI TULSHIRAM GAIKWAD**

...
Advocate for Petitioner : Mr. Avinash R. Borulkar
Advocate for Respondent : Mr. A.R. Vaidya
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 05th JULY, 2023

PER COURT :

1. By this petition filed under Article 227 of the Constitution of India, petitioner/mother takes exception to the order dated 20/04/2023, passed by learned District Judge-1, Omerga, below Exhibit-5 in Civil M.A. No.14/2023, thereby directing petitioner to give interim custody of the child to respondent/husband – father of the child.

2. Husband filed Civil M.A. No.14/2023, under Section 7 of the Guardians and Wards Act, 1890 (for short 'said Act'), for custody of minor Jaysinh (aged 4 years and 10 months), from the mother. By filing application Exhibit-5 under Section 12 of the said Act, interim custody of the minor is sought on various grounds. The main ground being wife has attempted to kill the minor child on several occasions and attempted to commit suicide along with the

child on many occasions. In support of the claim, husband has filed voluminous documents including transcript of telephonic conversations, video clip, photographs, etc.

3. Wife failed to appear in response to the notice issued in the interim custody application. Hence, the Family Court passed ex parte order against her on 17.04.2023. By allowing the interim custody application, the wife is directed to give interim custody of child Jaisinh to the husband. Being aggrieved by the said order, the wife has filed the present petition.

4. Heard learned advocate for petitioner and learned advocate for respondent. Perused the memo of writ petition, annexures thereto, impugned order, citations relied upon by the parties and the affidavit-in-reply filed by respondent and the documents placed on record along with the same.

5. Learned advocate for petitioner assailed the impugned order on the ground that *ex parte* order is passed without giving opportunity of hearing to the petitioner. He submits that wife was suffering from viral fever, for which she was under treatment of Dr. A. S. Bahukhandi, from 15/04/2023 to 19/04/2023 and the impugned order is passed on 20/04/2023. He submits that, since respondent was not maintaining the petitioner and child, out of

frustration and so as to compel the respondent to maintain them threats of committing suicide along with the minor were given by the petitioner. He submits that the petitioner never intended to actually implement the said threats. He further submits that elder daughter is already with the respondent and now he is trying to take custody of minor child of tender age from the petitioner. He submits that the opportunity of hearing needs to be given to the petitioner to contest the interim custody application on merits, by setting aside the impugned order.

6. Per contra, learned advocate for respondent vehemently opposed the petition contending that voluminous record was placed before trial Court, which indicates that there is threat to life of minor, if he remains with the petitioner. According to him the said record *prima facie* indicates that the petitioner is constantly giving threats to commit suicide along with the minor child, therefore trial Court has rightly granted interim custody of the minor to the respondent. By relying on ***Mausami Moitra Ganguli Vs. Jayanti Ganguli, AIR 2008 SC 2262*** and ***Sashanka Prakash Naidu Vs. Prakash S/o Balkrishna Naidu, 2020 SCC OnLine Bom 3497***, he submits that in the interest of welfare of the minor his custody should be given to the respondent/ father as there is danger to his life, if he stays along with the petitioner/mother.

7. The order impugned in the present petition is passed on 20/04/2023, the same is challenged by filing the present petition on 24/04/2023. The matter was circulated for urgent admission on 25/04/2023 and on that date notice was issued to the respondent, returnable on 16/06/2023. On 16/06/2023, petitioner pressed for stay to the impugned order. After hearing the parties and considering the fact that the Trial Court while granting the interim custody of the child to the respondent has relied upon voluminous documents and as those documents are not placed on record, this Court passed following order:

"1. The learned advocate for petitioner requests for stay to the impugned order stating that respondent has filed application before the learned Judicial Magistrate First Class for direction to petitioner to produce the child for execution of the interim custody order.

2. Learned advocate for respondent has raised an objection that Trial Court has relied upon voluminous documents while deciding the application for interim custody of the child and those documents are not placed on record by petitioner. He further opposed the prayer for grant of ad-interim relief stating that due to the threats given by petitioner to commit suicide along with the child, the interim custody of the child is directed to be given to respondent. If custody remains with petitioner, there is threat to the life of the child.

3. It appears from record that in support of his prayer for interim custody, respondent has produced voluminous documents in the Trial Court. It is therefore the duty of respondent to produce those documents on which he wants to rely upon.

4. The order impugned in the present petition is

passed on 20.04.2023 and since then two months period is passed. No untoward incident has happened till this date. Learned advocate for petitioner submits that since respondent was not maintaining petitioner and the child, out of frustration and under pressure, threats of committing suicide with child were given by the wife. She was not intending to actually implement the said threats and the said threats were given so as to force the husband to maintain her and the child.

5. Prima facie , this Court is inclined to accept the contention of learned advocate for petitioner that out of frustration the said threats were given and petitioner did not intend to carry out the said threats.

6. Petitioner is present in the Court along with son and her maternal uncle. Petitioner to file undertaking before this

Court that the child will be safe in her custody and she shall not do any act to put the life of the child in danger.

7. The maternal uncle of petitioner to file undertaking before this Court that he along with the family members of petitioner shall supervise and monitor petitioner and the child and shall not allow her to do any act which would endanger the life of the child. The undertaking to be filed by tomorrow i.e. 17.06.2023.

8. The respondent shall produce the relevant transcripts and documents, on the basis of which, according to him the Trial Court has granted interim custody of the child to him.

9. Stand over to 26.06.2023, in urgent category.

10. Let both the parties remain present in this Court on 26.06.2023."

Pursuant to the said order, petitioner and her maternal uncle have filed undertaking.

8. For the reasons recorded in the order dated 16/06/2023, in paragraph 4 and 5, and in view of the undertaking filed before this Court the apprehension of threat to life of minor

expressed by the respondent cannot be said to be well founded. Period of more than two and half months have passed since the impugned order is passed and during this period custody of the minor is with the petitioner and nothing has happened to the child. Admittedly, the custody of the elder daughter is with the respondent.

9. Admittedly, no opportunity of hearing was given to the petitioner before passing the impugned order. Fair and reasonable opportunity to contest the matter on merits needs to be given to the petitioner. Since, the impugned order is passed ex parte, the same is unsustainable in law and facts of the case. The matter needs to be remanded back to the Trial Court for decision afresh on merits. While passing the order on application Exhibit-5, the Trial Court shall keep in mind the settled legal position that welfare of minor is the prime consideration in the custody matters. In the result, following order:

ORDER

- I) Writ petition is allowed.
- II) Impugned order dated 20/04/2023, passed below Exhibit-5 in Civil M.A. No.14/2023, is quashed and set aside.
- III) The matter is remanded back to the Trial Court. The Trial Court shall decide application Exhibit-5 on merits, after giving opportunity of hearing to the parties, within a

period of one month from the date of receipt of writ of this order.

- IV) Till the Trial Court decides application Exhibit-5, the custody of the minor child shall remain with the petitioner.
- V) It is made clear that observations made in this order are *prima facie* and trial Court shall not be influenced by these observations while deciding the application Exhibit-5 on merit.

(NITIN B. SURYAWANSHI, J.)