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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4852 OF 2023

Shamprasad Vishwanath Dev

PETITIONER

VERSUS

Manjiri Shardul Dev and Others

RESPONDENTS

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Mr. R. S. Deshmukh, Senior Advocate i/b Mr. Sanket S. Kulkarni,
Advocate for the petitioner

Mr. L. V. Sangit, Advocate for respondents No.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 25th APRIL, 2023

ORDER :

1. Being aggrieved by the order passed by District Judge-2, Kopergaon below Exhibit-477 in Civil Miscellaneous Application No. 3 of 2020, the petitioner has filed the present writ petition under Article 227 of the Constitution of India.
2. Respondent No.1 filed Civil Miscellaneous Application No. 3 of 2020 for custody of minor Reyansh, aged 4 years, against the petitioner and other respondents.
3. Time and again, the parties have approached this Court by filing various petitions, wherein from time to time, orders are

passed. Pursuant to the directions issued in Writ Petition No. 14587 of 2021, filed by respondent No.1, the Trial Court is directed to decide the matter by 13th February, 2023. The said time is further extended up to 13th May, 2023. In view of the said directions, the Trial Court is proceeding with the matter on day to day basis.

4. The petitioner – original respondent No.3 filed application Exhibit-477 for examination of 17 witnesses in support of his pleadings, contending that respondent No.1 has claimed that she was subjected to forceful abortions by the respondents many times prior to the birth of Reyansh, they have neglected her during the pregnancy, they have not taken care of sons i.e. Reyansh and Raghav. Respondent No.1 and her parents have incurred all the expenses towards the sons. The respondents are of ill health, cruel and try to endanger the health of the children. Respondent No.1 also objected record in respect of medical treatment of sons. Respondent No.1 has further claimed that the petitioner and his family members have neglected Reyansh and his education. He was admitted in bad school. Money was demanded from brother of respondent No.1 to pay school fees. Petitioner, therefore, claimed that considering the nature of *lis* and the aspect of welfare, surrounding environment and development

of Reyansh, is the most important factor to be considered in the case. He, therefore, sought permission to examine 17 witnesses to bring on record medical treatment given to the minor and respondent No.1 and to prove cognitive development, academic progress, extra curricular and social activities, so also personality, maturity and judgment of the minor.

5. Said application was strongly opposed by respondent No.1. The Trial Court rejected the application on the ground that prime fact in issue in the case is welfare of the child. Birth of the child in question and respective medical conditions are not at issue. The matter is directed to be disposed of in time bound manner by the High Court. The petitioner is intending to examine 17 witnesses. Their evidence is not germane and relevant. Hence, the Trial Court rejected the application.

6. Heard learned Senior Advocate for the petitioner and learned advocate for respondent No.1, who is the only contesting party.

7. By relying on section 13 of the Guardians and Wards Act, learned Senior Advocate submits that the Trial Court has erred in rejecting evidence sought to be led by the petitioner. Reasonable and fair opportunity to lead evidence, in support of his case, is

denied to the petitioner. By relying on "*Nil Ratan Kundu and Another V/s Abhijit Kundu*" [2008] 11 SCR 111 and decision of the learned Single Judge of this Court in Writ Petition No. 9033 of 2012 (Vijay Baburao Katore and Others V/s Bhausahab Baburao Katore and Others) dated 5th November, 2012, he submits that the impugned order is unsustainable and is liable to be quashed and set aside.

8. Per contra, learned advocate for respondent No.1 strongly opposed the petition, by supporting the impugned order. By relying on the observations of the Trial Court, in the impugned order, he submits that birth of the minor and medical conditions are not at issue and, therefore, the Trial Court has rightly held that witnesses No.1 to 8 are irrelevant, insignificant and unnecessary. Further, by relying on the observations of the Trial Court, he submits that schooling and school activities of the minor are not seriously disputed. Therefore, according to him, the Trial Court is right in rejecting the prayer of the petitioner of examination of 9 witnesses in that behalf. According to him, this is an attempt on the part of the petitioner to prolong the matter in spite of knowing the fact that the matter is time bound by the orders of this Court. He, therefore, submits that there is no merit in the petition and the petition, therefore, is liable to be dismissed

by imposing costs on the petitioner.

9. It is a matter of record that, in the Trial Court, defence of respondent No.1 - husband is struck off, no written statement order is passed against respondents No.2 and 4, therefore, only the petitioner / respondent No.3 is contesting the matter on merits before the Trial Court.

10. According to the petitioner, respondent No.1 has alleged that no proper medical care of the minor was taken, though he suffered serious ailments. In rebuttal of these allegations, the petitioner wants to examine witnesses No.1 to 8, doctors, who were giving treatment to the minor and to respondent No.1.

11. Respondent No.1 has alleged that the minor had taken pre-primary education at her maternal place. Whereas according to the petitioner, the minor has taken pre-primary education in the school at Kopargaon and to prove this fact, he wants to examine witness No. 9, Principal of the said school. By examining witnesses No. 9 to 17, the petitioner wants to bring on record the best schooling made available to the minor, his extra curricular activities and relevant material to bring on record his overall development.

12. During the course of arguments, on a specific query by the Court, learned Senior Advocate, on instructions, restricted his prayer to examine witness No.1, 2, 7, 9, 10, 11, 12, 15 and 17 in support of his case. He also made a responsible statement that all the witnesses, except witness No. 17, are from Kopergaon, where the trial is going on and witness No. 17, who is from Nashik, will be made available for recording of his evidence. The petitioner will examine all these witnesses within a period of one week. Said statement is accepted as undertaking to the Court.

13. Since the proceedings are in respect of custody of a minor child, welfare of the minor is of paramount consideration. Learned Senior Advocate is justified in placing reliance on section 13 of the said Act. The petitioner is entitled to lead evidence to bring on record material that interest of the minor would be subserved by keeping his custody with the father. Opportunity to lead best possible evidence in support of his case cannot be denied to the petitioner. The impugned order is passed in violation of the principles of the natural justice and right of fair trial, which is held to be the fundamental right by the Hon'ble Supreme Court, is denied to the petitioner.

14. In "*Nil Ratan Kundu*" (*supra*), the Apex Court held:

“In deciding a difficult and complex question as to custody of a minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child’s ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable consideration. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.”

The above observations support the case of the petitioner.

15. Whether the evidence of the proposed witnesses is relevant or not, can be considered by the Trial Court at the time of final adjudication of the proceedings. In Writ Petition No. 9033 of 2012 this Court held :

“6. What is the relevancy of said evidence, what is the weightage given to the said evidence all these aspects can be considered by the Court at the time of final adjudication. At this stage, it was improper for the Court to discard the said evidence itself. If at the time of final trial the Court finds the said evidence to be irrelevant, not proved, then at that stage, the Court

ay say that, it does not rely on the said evidence. But at this stage, the Court could not have discarded the said evidence.

7. The plaintiff wil have every opportunity to cross-examine the said witness and thereafter the significance, relevancy of the said evidence would be considered by the Court at the time of adjudicating the suit.”

16. In view of the above observations, the Trial Court shall decide the issue of relevancy of the evidence of the proposed witnesses, at the time of final adjudication of the case.

17. In the result, following order.

ORDER

- I. Writ petition is partly allowed.
- II. The impugned order dated 18th April, 2023 passed by District Judge-2, Kopargaon, below Exhibit-477 in Civil Miscellaneous Application No. 3 of 2020 is modified as follows:
- III. The petitioner is permitted to examine witnesses No. 1, 2, 7, 9, 10, 11, 12, 15 and 17 mentioned in application Exhibit-477.
- IV. Since the hearing of the case is going on, on day to day basis, the petitioner shall examine these witnesses within a

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

- V. Parties are permitted to act upon copy of this order duly authenticated by Sheristedar of this Court.

[NITIN B. SURYAWANSHI]
JUDGE

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