

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

CRIMINAL REVISION APPLICATION NO.94 OF 2021

Priyanka Nilesh Aaher,
Age : 25 Years, Occ. Household,
R/o. Avhane Khurd, Tq. Shevgaon,
At present C/o. Balasaheb Janardhan Shelke,
R/o. Aapegaon, Tal. Shevgaon,
District Ahmednagar.

.. Applicant
(Ori. Applicant)

V E R S U S

Nilesh Gangadhar Aaher,
Age : 33 Years, Occ. Agriculture,
R/o. Aavhane Khurd,
Tal. Shevgaon, District Ahmednagar.

.. Respondent
(Ori. Opponent)

...
Advocate for Applicant : Mr. N. S. Jaju
APP for Respondent: Mr. S. R. Wakale
...

CORAM : S. G. MEHARE, J.

DATE : 10.03.2023

ORAL JUDGMENT :

1. Rule. Rule returnable forthwith. By consent of the respective counsels, heard finally.
2. The wife has impugned the order of the learned Additional Sessions Judge passed in Criminal Appeal No. 74 of 2020 dated 16.07.2021 reversing the order of the learned Magistrate and allowing the husband to continue with the custody of the children.

3. The learned Judicial Magistrate, First Class, Shevgaon, had passed an order under Section 21 of the Protection of Women from Domestic Violence Act 2005 (“D.V.Act”, for short) below Exhibit-11 in Criminal Misc. Application No. 32 of 2019, dated 03.07.2020, directed the present respondent to hand over interim custody of the minor children to the wife until the Court of competent jurisdiction decides the custody of the minor children.

4. The learned counsel for the petitioner/wife has vehemently argued that the reason assigned for setting aside the order of the learned Judicial Magistrate is extraneous and against the provisions of law. Only the weak financial condition of the mother is not a ground to refuse custody. He would argue that children between six and four years old need a mother’s care. However, the learned Additional Sessions Judge, ignoring the settled provision of law, has erroneously set aside the order of the learned Judicial Magistrate F.C. Shevgaon. He would argue that the welfare of the children is the paramount consideration. To buttress his arguments, he relied upon the judgment of this Court of *Swapnil S/o Dinesh Adhypak and other Vs. Mansi Swapnil Adhypak Criminal Revision No 60 of 2021 dated 17.07.2022* and *Vivek Singh Vs. Romani Singh AIR 2017 Supreme Court 929*

5. Per contra, the learned counsel for the respondent/ husband would argue that children are happy with the father. They live in a joint family. His parents are taking care. He is able to take children's care properly. His family atmosphere has been suited to them as they have been living there since childhood. They are not willing to go to the mother. The financial condition of the mother is one of the grounds to be considered for handing over the custody of the children. The impugned order of the learned Additional Sessions Judge, Ahmednagar, is legal, proper and correct. Hence, the petition deserves to be dismissed. The facts of the case of Swapnil Adhyapak Vs. Mansi Adhyapak and Vivek Singh Vs. Romani Singh is altogether different. Hence, it would not help the applicant.

6. The appellate Court as well as the trial Court, have given go bye to the well-settled practice of interviewing the wards before granting custody. The Court has to have dialogues with children to ascertain the facts and their reactions. The welfare of the child is the paramount consideration. The welfare of the child should be material and moral. It also includes the treatment and *inter-se* relationship with and between parents and the children. The learned Judicial Magistrate had reason to give go-by the procedure as it was the pandemic Covid-19 period. However, it was possible for the appellate Court. Therefore,

this Court is of the view that in the absence of any such interview of the children, it would be inappropriate to decide the welfare of the children. In the facts and circumstances of the case and to have a justifiable decision, the Court is of the view that the application deserves to be remitted to comply with the legal formality and decide the matter afresh. Hence, the following order :-

- (a) The impugned order of learned Judicial Magistrate First Class Shevgaon, District Ahmednagar in Criminal Misc. Application 32 of 2019 dated 3rd July 2020 and impugned Judgment in Criminal Appeal No. 74 of 2020 dated 16.07.2021 passed by learned Additional Sessions Judge Ahmednagar has been quashed and set aside.
- (b) The case is remitted to the learned Judicial Magistrate F.C. Shevgaon for deciding afresh in view of the above observations.
- (c) Till disposal of the application on merits, as regards the interim custody of the children, the visiting right of the mother, on every Sunday during morning hours up to 12.00 noon at the house of Mr. Kalyan Bhaurao Aher, residing at Avhane, Taluka Shevgaon, District Ahmednagar as per the order passed by this Court dated 4th August 2022, shall continue.
- (d) Both parties are directed to appear before the learned Judicial Magistrate Shevgaon on 31st March 2023.
- (e) The learned Magistrate is directed to decide the application within three weeks from the date of the appearance of both parties.
- (f) Rule is made partly absolute.

(S. G. MEHARE)
JUDGE