

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

**FIRST APPEAL NO.1920 OF 2022
WITH
CIVIL APPLICATION NO.11328 OF 2022**

Sandeep s/o Ramdhan Jadhav

Age : 26 years, Occu.: Agri. & Business,

R/o.: Mungashi, Tq. Mahur,

District : Nanded

.... APPELLANT

VERSUS

Sushama w/o Sandeep Jadhav,

Age : 25 years, Occu.: Household,

R/o.: Mungashi, Tq. Mahur,

District : Nanded

At present at Bendi Tanda

Tq. Kinwat, District : Nanded

... RESPONDENT

.....

Advocate for Appellant : Mr. A. V. Hon

Advocate for Respondent : Ms. Sunita G. Sonawane

....

CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 20/06/2023

PRONOUNCED ON : 22/06/2023

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JUDGMENT :

1. The appellant-father, who is original opponent in Civil Miscellaneous Application No.39 of 2022, has challenged the order dated 13/07/2022 passed by the Additional District Judge-1, Nanded (hereinafter referred to as 'the learned trial court) below Exhibit-7 in the said application, whereby custody of minor son -

Ritham of the rival parties, was ordered to be given to the present respondent - wife i.e. original applicant being an interim arrangement till final disposal of the aforesaid Miscellaneous Application No.39 of 2022.

2. Admittedly, the material on record shows that the respondent - wife got married with appellant - husband on 25/03/2019 and she gave birth out of this wedlock to son Ritham on 23/05/2020. Thereafter, dispute arose between the parties. The respondent - wife had filed an application No.159 of 2021 under section 97 of Cr.P.C. before the Judicial Magistrate (First Class), Kinwat for getting custody of Ritham, but it was rejected and thereafter she filed the aforesaid Miscellaneous Application No.39 of 2022 numbered as RJE No. 39 of 2022, wherein she filed an application Exhibit-7 for grant of interim custody of Ritham, which has been allowed by the learned trial court.

3. The learned counsel for the appellant - husband strongly argued that under Section 7 of the Guardians and Wards Act 1890 the court has to consider only welfare of child as paramount consideration and not the rights of the parties under the statute. He pointed out that the interim custody is ordered to be given to the respondent - wife only by considering her right under the statute but there is no objective analysis in the impugned order as regards to the welfare of the child. He pointed out that the judgments relied upon by the appellant - husband before the trial court were misconstrued.

4. On the contrary, the learned counsel for the respondent-wife supported the judgments and claimed that there is no substance in the appeal as the learned trial court rightly decided the aspect of custody of son - Ritham in favour of the respondent - wife.

5. Heard rival submissions and also perused the impugned order alongwith other material placed on record.

6. The learned counsel for the appellant - husband relied on the following judgments :

*I) Mausami Moitra Ganguly vs. Jayan Ganguli
(2008)7 SCC 673 &*

*II) Sumedha Nagpal vs. State of Delhi and
others, (2000)9 SCC 745.*

7. It is significant to note that though by the impugned order the learned trial court has directed to hand over the custody of son - Ritham to the respondent - wife, but due to order dated 05/08/2022 passed by this court the operation of impugned order is stayed during pendency of this appeal and therefore, the custody of son - Ritham remained with the appellant - husband.

8. On perusal of the impugned order it appears that the learned trial court has granted only interim custody of son - Ritham till disposal of the case and it is passed mainly on the ground that son - Ritham has not completed age of 5 years and in view of Section 6 of the Hindu Minority and Guardianship Act 1956 the custody of minor below the age of 5 years shall ordinarily be with the mother. Further, it appears that the learned trial court has also relied

upon the provisions of Protection of Women from the Domestic Violence Act 2005 under Section 21, wherein it is provided that notwithstanding anything contained in any law for the time being in force, the Magistrate may at any stage of hearing of the application for the protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved woman. Thus, it appears that the trial court has granted custody of son Ritham to the respondent - wife mainly on the ground that he is under the age of 5 years. However, there is no discussion in the order as regards the welfare of the minor Ritham, which is the aspect of the paramount consideration while deciding the custody of the child under Section 7 of the Guardians and Wards Act under which the main application has been filed.

9. The Hon'ble Supreme Court in case of ***Mausami Moitra Ganguly*** (supra) has observed in para 19 as follows :

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or

obliterate the vital factor of the welfare of the minor."

Further, it is also observed in para 22 about Halsbury's Laws of England, the law pertaining to the custody and maintenance of children, as follows:

"22. In Halsbury's Laws of England (4th Edn., Vol.13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms :

"809.Principles as to custody and upbringing of minors.- Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

10. Likewise, the Hon'ble Apex Court in the case of ***Sumedha Nagpal*** (supra) though did not interfere the order of retaining the child, aged about 2 years with mother, but has in clear terms observed that the right of mother under Section 6(a) of Hindu Minority and Guardianship Act 1956 does not militate against the concept of welfare of the child. This fact can be put in another

words that it has been clarified by the Hon'ble Apex Court that unless there is an objective analysis of the capacity of the litigating parties in the light of facts and material placed on record as regards the maintenance of a child keeping in mind its welfare, the custody cannot be given to mother merely on the basis of aforesaid provision.

11. The impugned order indicates that the learned trial judge has given custody of the child to the respondent - mother mainly by considering her right under statute i.e. under the provisions of Section 6 of the Hindu Minority and Guardianship Act without any discussion on the aspect of the welfare of the child. Further, it is also important to note that the child is still in custody of the appellant- father and therefore, till the final disposal of the main application i.e. R.J.E. No.39 of 2022 by considering the aspect of welfare of the child the custody of son - Ritham needs to be retained. At the most, the learned trial court can be directed to decide the main application R.J.E. No. 39 of 2022 in time bound manner. In the light of aforesaid discussion, following order is passed.

ORDER

- I) The first appeal is hereby allowed and the impugned order dated 13/07/2022 passed by the Additional District Judge-1, Nanded below Exhibit-7 in R.J.E. No.39 of 2022 is hereby quashed and set aside.
- II) The learned Additional District Judge-1, Nanded is directed to dispose the main

application i.e. R.J.E. No.39 of 2022 finally as early as possible and within a period of six months from the date of receipt of this order.

- III) No order as to costs.
- IV) Pending civil application, if any, stands disposed of.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-