

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

FIRST APPEAL NO. 204 OF 2023

01 Sandip s/o Babasaheb Dahiphale,
age: 33 years, Occ: Service;

02 Babasaheb s/o Dnyandeo Dahiphale,
age: 58 years, Occ: Agril;

03 Reshma Babasaheb Dahiphale,
age: 55 years, Occ: Household;

04 Arohi Sandip Dahiphale,
since minor, through natural
guardian i.e. father – appellant no.1.

All R/o Ganeshwadi (Sonai),
Tq. Newasa, District Ahmednagar.

Appellants

Versus

Sow. Ashwini Sandip Dahiphale,
age: 23 years, Occ: Household,
through Shri Jagannath Raghunath
Avhad, R/o Vitthalwadi (Sonai),
Tq. Newasa, District Ahmednagar.

Respondent

Mr. R. R. Karpe, advocate for the Appellants.
Mr. R. B. Temak, advocate for the Respondent.

CORAM : SANDIPKUMAR C. MORE, J.

Reserved on : 16th February, 2023.

Pronounced on : 16th March, 2023.

JUDGMENT :

1 The appellants, who are original respondents in Civil Misc. Application No. 05 of 2022, have challenged the order dated 16.08.2022, passed by the learned District Judge-2, Newasa, District Ahmednagar, (hereinafter referred to as “the learned trial Court”) in the aforesaid application whereby custody of present appellant no.4-Arohi is directed to be given to present Respondent i.e. original applicant.

2 The background facts are as under:

Appellant no.1 and Respondent are husband and wife, whereas, appellant no.4 is their daughter, presently aged about two and half years. Appellants no.2 and 3 are the parents of appellant no.1 and in-laws of Respondent-wife.

3 According to the Respondent-wife, she gave birth to Arohi on 20.08.2020. Since it was a female child, appellants no.1 to 3 started harassing her on getting dejected. They were also demanding amount of Rs.7 lakhs for construction of their house and ultimately on 13.12.2021, they drove the Respondent out of

their house by snatching Arohi from her. The Respondent-wife, therefore, filed application under Section 97 of the Code of Criminal Procedure for getting custody of Arohi, but the same was rejected by the concerned Judicial Magistrate, First Class, Newasa. Further, the Criminal Revision Application arising out of said rejection, filed by the respondent-wife, also got dismissed. Thereafter, Respondent-wife was constrained to file aforesaid application, being Civil Misc. Application No. 05 of 2022 for custody of Arohi.

4 Appellants No.1 to 3 have strongly resisted the application on the ground that appellant no.1, being father and natural guardian of Arohi, is entitled for custody of Arohi. Moreover, appellant no.3 i.e. grand mother of Arohi is also capable of taking care of her. According to them, they can maintain Arohi properly since they are residing at the central place of the village having all amenities. The learned trial Court, considering the evidence and material on record, allowed the application of Respondent-wife and directed appellants no.1 to 3 to hand over custody of Arohi to Respondent-mother. However, visitation right for the present appellants no.1 to 3 was given once in a month i.e. on fourth Sunday.

5 Learned Counsel for the appellants vehemently argued that Respondent-wife is unable to maintain herself since she is maintained by her father. He pointed out that appellant no.3, who is grand-mother of Arohi, is taking every care of her and the trial Court has ignored the said fact and did not consider welfare of the child. He especially pointed out that the learned Judicial Magistrate, First Class, Newasa, had also rejected the application filed by Respondent-wife whereby search warrant in respect of Arohi issued asked for getting her custody. According to him, the Criminal Revision Application, filed by Respondent-mother against that rejection, has also been dismissed. As such, he prayed for setting aside the impugned order.

6 On the contrary, learned Counsel for the Respondent-wife has strongly opposed the submissions and claimed that appellant no.1-husband is doing job and, therefore, he is unable to take proper care of Arohi. Moreover, his parents, being old-aged persons, are also unable to take proper care of Arohi. He strongly submitted that there are so many judgments passed by this Court as well as by the Hon'ble Apex Court wherein custody of a minor child up to the age of five years, is held to be given to the mother

irrespective of financial position of the parties. He placed reliance on following three judgments:

- 01 **Pushpa Singh Vs. Inderjit Singh**, 1990 (Supp) SCC 53;
- 02 **Smt Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and another**, AIR 1984 SC 1224; and
- 03 **Ravindra s/o Prakash Kharat Vs. Kalpana w/o Ravindra Kharat** (F.A. No. 1272 of 2022, decided by this Court on 05.07.2022).

7 Heard rival submissions and perused the entire documents on record. Since the appellants have produced on record pleadings in Civil Misc. Application No. 05 of 2022 along with copies of evidence recorded in the matter, the original record and proceedings are not called.

8 Admittedly, the trial Court has given custody of Arohi to Respondent-mother by reserving visitation right to appellants no.1 to 3 once in a month. The appellants have claimed that the application under Section 97 of the Code of Criminal Procedure, filed by the Respondent-wife, was rejected and the Criminal Revision Application, filed by her against such rejection, also got

dismissed. However, the application under Section 97 of the Code of Criminal Procedure is on different footing and it does not relate to handing over custody. On the contrary, the concerned Judicial Magistrate, First Class, Newasa, needs to take appropriate decision considering the facts and circumstances of each case. Moreover, it relates to unlawful custody. Obviously, Arohi was in the custody of her father i.e. appellant no.1, at the relevant time and, therefore, on that ground only, that application along with Criminal Revision Application was rejected. However, such rejection cannot be a barrier for the Respondent-mother to file an application under Section 25 of the Guardians and Wards Act, 1890, as filed in the trial Court.

9 It is settled position that while considering the application for custody of a minor child, paramount consideration is the welfare of a minor. So far as Section 25 of the Guardians and Wards Act is concerned, it also speaks about handing over the ward in proper custody considering welfare of the ward. Therefore, welfare of a minor ward is of utmost importance while dealing with custody matters. The Hon'ble Apex Court, in the case of **Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and another** (*supra*), has held that even the jurisdiction of English Court was

not ousted bearing in mind welfare of minor son since the spouses have made England their home and the husband removed the boy to India from England. In that case, it was held that welfare of a minor son would be served by handing over his custody to the mother. In that judgment, Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956, were also considered for welfare of the minor.

10 Further, the Hon'ble Apex Court, in the case of **Pushpa Singh Vs. Inderjit Singh** (*supra*), relied upon by the learned Counsel for the Respondent-wife, has also considered Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956, and held that paramount interest lies in giving his custody to the mother.

11 The same view is taken by this Court in First Appeal No. 1272 of 2022 (*supra*) by discussing the provisions of Section 25 of the Guardians and Wards Act, 1890 and Section 6 of the Hindu Minority and Guardianship Act, 1956. Section 6 (a) of the Hindu Minority and Guardianship Act, 1956, reads as under:

Section 6: Natural guardians of a Hindu minor

– The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are ---

(a) in the case of a boy or an unmarried girl – the father, and after him, the mother: provided that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother.

Thus, as per Section 6 of the Hindu Minority and Guardianship Act, mother is supposed to have custody of the minor till its age upto five years.

12 In the instant matter, Arohi was only one and half years old when Civil Misc. Application No. 05 of 2022 was filed by the Respondent. Even today also, she is two and half years old and, therefore, considering her age below five years, her custody needs to be given to Respondent-mother in the light of the aforesaid judgments. Therefore, the impugned order, whereby custody of Arohi, is given to Respondent-mother, appears quite reasonable and proper. Moreover, visitation right of appellants no. 1 to 3 is also reserved by the learned trial Court.

13 Hence, considering all these aspects, I do not find any substance in the present appeal and it stands dismissed. Since the appeal itself has been dismissed on merit, pending Civil Application No. 16862 of 2022, for interim relief, also stands dismissed, being infructuous.

(SANDIPKUMAR C. MORE)
JUDGE

Later on:

14 The appeal has been dismissed by this Court on merit. The learned Counsel for the appellants requested for continuation of interim relief, which was in force during the pendency of this appeal. However, the learned trial Court has directed to hand over custody of minor daughter – Arohi to her mother I. e. present respondent and this Court has also confirmed the same relief on merit. In view of the same, I am not inclined to continue the interim relief further.

(SANDIPKUMAR C. MORE)
JUDGE

adb