

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

CRIMINAL WRIT PETITION NO.1630 OF 2023

SARLA GANESH MAHALE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

Mr. N. R. Shaikh, Advocate for the petitioner
Mr. S. B. Jadhav, APP for the respondent/State
Mr. A. D. Pawar, Advocate for respondent No.2

CORAM : R. M. JOSHI, J.

DATE : 30th NOVEMBER , 2023

P.C. :-

1. This petition takes exception to the order dated 18/10/2023 passed in Criminal Appeal No. 76/2023 against the order dated 11/10/2023 passed in PWDV No.105/2023. Record indicates that an application was moved by the petitioner under the provisions of Domestic Violence Act against respondent who is her real sister. The dispute sought to be made is with regard to the custody of girl child aged about 6 years. Petitioner who claimed herself to be a biological mother kept the child with her sister and had since tow years moved an application under the DV Act seeking child's custody. Learned Magistrate passed ex-parte order directing the respondent to hand over the custody of the child to the petitioner. When respondent moved the Appellate Court, that Court also granted ex-parte relief to the respondent by staying the order passed by

the Magistrate.

2. In case of custody of child, the interest of child is of paramount importance. If it is case of petitioner herself that at least for last 2 years the child is staying with respondent along with her real sister, it was absolutely necessary for any Court to ascertain the psyche of child before directing hand over of custody from one person to another. In order to ascertain as to whether there is case for passing any urgent orders of change in custody, this Court interacted with the child. This Court does not find any urgent need to pass any order with regard to the custody of the child.

3. Admittedly, present case is not the one wherein custody of child is obtained forcibly by respondent. As per case of petitioner herself the child was voluntarily given into the custody of sister/respondent. All these facts are apparent from the application filed before the Magistrate. In such circumstances there was no propriety to pass ex-parte order without ascertaining facts and most importantly without considering the effect of abrupt change in the atmosphere for the child.

4. Without making any further observations, this Court finds that since both orders are not passed after taking into consideration of welfare and interest of child, they can not sustain. In any case these

orders are passed without hearing other side. Hence, orders passed by learned Magistrate and learned Addl. Sessions Judge are hereby set aside.

5. Learned Magistrate can be directed to decide application filed by petitioner expeditiously on merit after hearing both sides. However, considering the manner in which order came to be passed by learned Magistrate, it would be just and necessary to request learned Principal District and Sessions Judge, Jalgaon to assign proceeding of PWDV No. 105/2023 to another Magistrate.

6. Learned Magistrate to decide the application on merits and in accordance with law, within a period of one month from appearance of parties. Parties are directed to appear before the Trial Court on 4th December, 2023. Trial Court is not required to issue fresh notice to the parties.

7. Petition stands disposed of in above terms.

(R. M. JOSHI, J.)

ssp