



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

**APPEAL FROM ORDER NO. 29 OF 2022
WITH
CIVIL APPLICATION NO. 7461 OF 2022**

1. Deepak s/o Tukaram Mahipal,
Age : 36 Years, Occ. Agriculture,
R/o. Takalgavan, Tq. Pathri,
Dist. Parbhani
 2. Tukaram s/o Madhav Mahipal,
Age : 64 Years, Occ. Agriculture,
R/o. As above
- ..Appellants
(Orig. Respondent Nos.1 & 2)

VERSUS

Mira w/o Dinesh Mahipal,
Age : 32 Years, Occ. Household,
R/o. Takalgavan, Tq. Pathri,
Dist. Parbhani At present : Ukalgaon,
Tq. Manwat, Dist. Parbhani.

.. Respondent
(Orig. Applicant)

.....

Shri. Kalyan S. Chavan, Advocate for the Appellants.
Shri. Vivekanand B. Deshmukh, Advocate for the Respondent

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CORAM : SANDIPKUMAR C. MORE, J.
Reserved for Judgment : 01.07.2024
Pronounced on : 01.08.2024

JUDGMENT :

1. The appellants, who are the original respondents, have challenged the judgment and order dated 29th April 2023 passed by the learned Principal District Judge-1, Parbhani i.e.

the learned trial Court in Misc. Civil Application No. 495 of 2018 filed by the present respondent/mother for getting custody of her minor daughter Ashwini from the present appellants. The respondent is mother of minor child Ashwini, whereas appellant No.1 is her parental uncle and appellant No.2 is her grand father.

2. Background facts are as under :-

The aforesaid application filed by the respondent/mother was under Section 8 of the Guardian and Wards Act, 1980 for getting custody of her minor daughter Ashwini. According to her, she got married with Dinesh Tukaram Mahipal i.e. son of respondent No.2 in the year 2008 and thereafter she gave birth to minor daughter Ashwini. However, her husband Dinesh unfortunately died in an accident on 07.11.2010. She claimed that before death of her husband Dinesh, there was partition between her husband and both the respondents in respect of all the ancestral joint family properties and accordingly, an agricultural land bearing Gut No. 62 admeasuring 2 Hectar situated at village Takalgavan came to the share of deceased Dinesh. After the death of Dinesh, her name along with her daughter Ashwini has been mutated in the record of rights of the said land. She also received certain compensation in the Motor Accident Claim Petition filed in respect of an accidental

death of her husband. Certain amount is also directed to be invested in the Fixed Deposit in the name of minor daughter Ashwini till she attains majority. According to her, when she inquired about the amount of Ashwini kept in fixed deposit and also expressed her wish to cultivate the land allotted to her husband, she was driven out of the house in the month of August 2018 by the respondents by retaining Ashwini with them forcibly. According to her, she is not allowed to meet her daughter by the respondents and therefore, she was constrained to file the application as mentioned above.

3. On the contrary, the respondents resisted the application on the ground that the application is filed by the respondent/mother only to grab landed property of her husband Dinesh and also the amount of minor Ashiwni kept in Fixed Deposit by the concerned Motor Accident Claim Tribunal. According to them, she did not even try to meet the minor daughter since last one year and on her own, she left their house without any reason. They claimed that they are taking every care of minor Ashwini by depositing substantial amount in her name besides the amount of aforesaid Fixed Deposit. According to them, they have borne all the expenses regarding education of the minor. They further claimed that Ashiwni is also not ready to go with her mother and despite

attempts to that effect, minor Ashiwni herself refused to go with respondent/mother.

4. The learned trial Court after conducting the trial has allowed the application of respondent/mother and the appellants are directed to handover the custody of Ashwini to her. Hence, this appeal.

5. The learned counsel for the appellants vehemently argued that the appellants are taking every care of minor daughter Ashwini by providing her good education and nourishment. According to him, minor Ashiwni herself refused to go with her mother despite several attempts made to that effect. He pointed out that the respondent/mother has filed an application only with an intention to grab the movable and immovable property of minor. He placed reliance on the judgment in the case of **Nil Ratan Kundu & Another Vs. Abhijit Kundu** reported in **2008 ALL SCR 2016**

6. On the contrary, the learned counsel for the respondent/mother supported the impugned judgment and prayed for dismissal of the appeal.

7. Heard rival submissions and also perused the documents on record along with citations and impugned

judgment.

8. Significantly, in the application for custody of minor under the Guardian and Wards Act, 1890, paramount consideration is the welfare of minor and it is evident from the judgment relied upon by the appellants in the case of **Nil Ratan Kundu Vs. Abhijit Kundu (supra)**. There cannot be any dispute in respect of this settled principle of law. However, what would be the real welfare of child, is dependent upon facts of each case. Here in this case, an important aspect reveals from the record that during the life time of Dinesh i.e. husband of respondent, there was partition amongst himself and respondents regarding all the joint family properties and the land which is allotted to Dinesh in the said partition is still in possession of the appellants. Though original respondent No.1 in his cross-examination consented for giving possession of the said land to respondent/mother, but his conduct appears to be contrary to that, since he admitted that when the application was filed by the respondent/mother before Tahsildar Pathari for getting possession of the said land which stood in her name, he opposed for that. Thus, it clearly indicates that, though the appellants are blaming respondent/mother about having an ill eye on the movable and immovable properties of deceased Dinesh, but they themselves

are denying for giving possession of the land of Dinesh to his wife i.e. the respondent.

9. It is extremely important to note that, this Court considering the aspect of providing income source to the respondents, had directed the appellants to produce on record statement of accounts in respect of income getting from the land of Dinesh in their possession and utilization thereof for the welfare of the child, under order dated 07.08.2023, during pendency of this appeal. However, the appellants belatedly filed such statement of account specially mentioning that they did not get any income from the said land. On going through the said statement, it appears that it is prepared by clever drafting with *malafide* intention. It is highly unbelievable that, the appellants are not getting any income from five Acres agricultural land i.e. Gut No. 62. As such, the conduct of the appellants is definitely contrary to their assurance given in the form of their contention that they are utilizing the income of said land for the welfare of minor Ashwini.

10. It is to be noted that, the appellants are also coming with the case that Ashiwni herself is not ready to go with respondent/mother and for that purpose they relied on the instances or attempts made to that effect wherein Ashwini

refused to go with her mother. However, it is to be noted that though at present Ashwini is residing with the appellants, but for longer period she cannot reside with the appellants. The appellant No.2 is her grandfather aged 64 years, whereas appellant No.1 i.e. her paternal uncle is having his own family to look after. As against this, the respondent is mother of Ashwini and thereby a natural guardian in absence of her father. Thus, in long term, only respondent can provide proper maintenance and care to the minor, specially when Ashwini is at the age of puberty. So far as refusal by Ashwini to go with respondent/mother is concerned, obviously she must be tutored by the appellants for doing so. The respondent is mother of Ashwini and therefore, she would definitely provide proper maintenance, love and care to Ashwini. It can be reflected from the order of this Court, passed during the pendency of this appeal on 2nd March 2023 that a proposal was also given by respondent/mother, according to which, she was ready to reside with the appellants to have proper rapport with minor Ashwini. However, the appellants were not ready for the same and they turned down the said proposal by saying that Ashwini was not willing to stay with the respondent.

11. It would not be out of place to mention here that this

Court in the said order had formed an opinion after hearing the parties that the impugned order did not require any interference, as there were no adverse remarks against the respondent, who is mother and natural guardian of the minor child -Ashwini. It was also held by the Court in the said order that when mother is found fit and capable for taking care of her child Ashwini, there was no reason to continue the custody of Ashwini with the appellants. The said order further reflects that despite such opinion, this Court at the relevant time did not pass any order finally only with a view to work out some amicable arrangement, which would be the best in the interest of Ashwini and only for that purpose, the Court was inclined to give time as requested by learned counsel for the appellants to enable him to take appropriate instructions and respond to the suggestions made by the learned counsel for the respondent. However, despite the said order, the appellants thereafter never cared to respond for the proposal from the side of respondent/mother and filed a fabricated statement of account mentioning that they did not get any income from the land of respondent and minor Ashwini. This very act definitely suggests that the appellants are not willing to give the property of deceased Dinesh to the respondent/mother and minor Ashwini. Therefore, the

observation of learned trial Court that the cause of a deep hatred in the mind of Ashwini and must be because of the act of the appellants of poisoning her mind against the respondent/mother, appears appropriate.

12. On going through the impugned order, it is evident that the learned trial Court has rightly concluded that the appellants are in fact having an ill eye on the property of respondent and minor Ashwini and only to retain the said property, they have forcibly kept custody of minor Ashwini with them. Even if it is presumed for the sake of argument that Ashwini is at present happy with the appellants, but in long term this will not remain as it is. It is extremely important to note that appellant No.1 is having his own family and the appellant No.2 grandfather of Ashwini is an old aged person. Therefore, considering the future of Ashwini, it is only the respondent/mother who can take her care properly and that would be the best for minor daughter Ashwini. Therefore, considering the observations of learned trial Court and also of this Court that the impugned order needs no interference, there appears no substance in the appeal and in the result it stands dismissed along with pending civil applications.

13. The interim relief granted by this Court under order

dated 13.07.2022 stands vacated.

14. The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)

Later on

Learned counsel for the appellants seeks continuation of interim order dated 13.07.2022, since he wants to challenge this order before the superior Court. Though, the learned counsel for the respondent strongly opposed the request, but considering the fact that aforesaid interim relief was running during the pendency of appeal, it stands continued for further period of four weeks only.

(SANDIPKUMAR C. MORE, J.)

YSK/