

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.121 OF 2024

Vishwajeet Vinayakrao Jadhav ... Applicant

V/s.

Nikita Vishwajeet Jadhav, Alias Nikita
Jagannath Shetty ... Respondent

Mr. Sangramsingh R. Bhonsle, Mr. Siddharth A. Mehta, Adv. Samridhi S. Jain, Adv. Nrupal A. Dingankar, Adv. P A. Bhonsle, Adv. Harshada Shrikhande, Advocate for the Applicant.
Ms. Seema Sarnaik a/w Harshad Sathe, Adv. Saurabh Butala, Adv. Manvi Sharma, Adv. Shubham G. Advocate for the Respondent.

CORAM : RAJESH S. PATIL, J.

DATED : 28 MARCH 2024

PC.:

1. This Civil Revision Application challenges an Order dated 22 January 2024, passed by Family Court, Pune, on Order below Exhibit-14.
2. The application Exhibit-14 was filed by husband under the provisions of Order 7 Rule 11 of Civil Procedure Code, in P. D. No.76 of 2023. The wife filed a petition for a custody of minor daughter, viz, P. D. No.76 of 2023 before the Family Court at Pune under section 25 of Guardians and Wards Act,1890.
3. The said application of the husband filed under the provisions of Order 7 Rule 11 of Civil Procedure Code was rejected

by the Family Court on the grounds that the said issue about granting custody of a minor daughter will be decided on merits. It was further held that the Guardians and Wards Act, 1890, grants guardian right to file petition for custody of ward (daughter). It was further held that under the Protection of Children from Sexual Offences Act, 2012 there is no statutory bar to file the petition for custody by the mother. It was further held that the wife had every right to file the petition and the application filed by the husband will not fall under the purview of Clause '(d)' of Rule 11 of Order 7 of Civil Procedure Code. Hence, the application of the husband was rejected.

4. Mr. Bhonsle submitted that under the provisions of Rule 4 (14) of the Protection of Children from Sexual Offences Rules read with item no.8 form A, and more particularly the petition has filed under the Provisions of Section 25 of Guardians and Wards Act, was not maintainable and also in terms of Section 42 (A) of the Protection of Children from Sexual Offences Act, the petition was not maintainable.

5. In the said proceedings the present petitioner / husband filed an application under Order 7 Rule 11 of Civil Procedure Code, praying that the petition should be rejected on the grounds that as the wife is an accused in criminal case in which her minor daughter is a "Victim" therefore, if the minor daughter comes in contact with the wife, the entire evidence of criminal case will be destroyed by tutoring the daughter. It was submitted on behalf of the husband that under the Protection of Children from Sexual Offences Act, 2012, victim daughter should be kept away from the

accused under the provisions of Rule 4 (14) of the Protection of Children from Sexual Offences rules, read along with form No.A. Therefore, according to the husband the petition itself was not maintainable.

6. Mr. Bhonsale relied upon the judgment of Supreme Court passed in *Independent Thought Vs. Union of India* reported, in *(2017) 10 SCC 800*.

7. Ms. Sarnaik appearing for the respondent submitted that the Order dated 28 November 2023, passed by the Division Bench of this Court whereby the access of the girl child to meet every day between 5:00 p.m. to 7:00 p.m. and on Saturday between 9:00 a.m. to 8:00 p.m. has been continued for a period of 4 weeks, the said Order dt. 28/11/2023 has not been challenged by the husband. She submitted that based on liberty granted by Division Bench of this Court, the custody application was filed before the Family Court.

8. She further submits that even when the matter was referred to mediation there were no positive steps taken by the husband hence, the mediation also failed. She submits that Section 42(A) of the Protection of Children from Sexual Offences Act is in addition and mentions that the Protection of Children from Sexual Offences Act is not in derogation of any other law. She submits that from 21 September 2023, the Division bench of this Court examined the daughter in Chambers and thereafter, on the same day granted access of the minor daughter to the mother between 5:00 p.m. to 7:00 p.m. every day and between 9:00 a.m. to 8:00 p.m. on

Saturday's.

9. She submits that she has no objection if the Section 25 petition filed under the Guardians and Wards act, filed by the wife is expedited and in the meantime, the arrangement of access which was granted by the Division Bench of this Court on 21 September 2023 and which is complied by the husband as of date to continue till the disposal of the Section 25 petition.

10. She submits that there is no merits in this Civil Revision Application which is challenging a dismissal of the interim application filed under Order 7 Rule 11 of Civil Procedure Code.

11. She submits that the application filed by the husband under Order 7 Rule 11 (d) of Civil Procedure Code all that the court as to see is the statements made in the petition.

12. I have heard both the counsel appearing for the parties and I have gone through the records produce before me.

13. The present Civil Revision Application challenges an order passed by the Family Court thereby rejecting an application of the husband filed under Order 7 Rule 11 (d) of Civil Procedure Code. The petitioner and respondent got married to each other in the year 2018, and on 9 October 2018 a girl child was born. It seems that thereafter there were dispute and differences between the husband and wife later, on 18 June 2023 the wife had filed and First Information Report against the husband. Thereafter, it seems First Information Report has been lodged against the wife. On 14 September 2023 the wife filed habeous corpus writ petition before this Court. In the said petition this Court on 15 September 2023,

issued notice to the state and directed to produce 'the daughter' before this Court on 21 September 2023. When 'the daughter' was present in Court, the Division Bench of this Court interacted with 'the daughter' in Chamber and thereafter an order was passed allowing the wife to meet the daughter every day between 5:00 p.m. to 7:00 p.m. in the society premises, where the husband resided also the access was granted.

14. Thereafter, on 6 October 2023 apart from the earlier order allowing the wife to have access of the daughter every day from 5:00 p.m. to 7:00 p.m. in addition, on Saturday the access was allowed from morning 10:00 a.m. to 9:30 p.m. Thereafter, on 28 October 2023, the Division Bench of this Court, allowed the wife overnight access of the daughter. The said order of 28 October 2023 was challenged by the husband before the Supreme Court. While the matter was argued before the Supreme Court the counsel appearing for the wife submitted that the overnight access could not be pressed by the wife, hence the matter was disposed of. The Supreme Court directed the High Court to make an endeavor to dispose of the main matter by taking into consideration the allegations made, by the end of the month. It further noted that they are not expressing anything on the merits of the case and it was upon to the parties to raise all the contentions before the High Court. Thereafter, the Division Bench of the High Court heard both the parties and on 28 November 2023, disposed of the Writ Petition. Thereby continuing the interim orders of 'access' of daughter, as per Orders dated 21 September 2023 and 6 October 2023, for a further period of 4 weeks, so as to

enable the parties to approach the appropriate forum for seeking appropriate relief. The Division Bench further recorded that they had not gone into the merits of the case and as such kept all contentions of all parties open on merits.

15. It was the contention of advocate appearing for the respondent wife immediately thereafter on 2 December 2023, the wife filed a petition under Section 25 of Guardians and Wards Act, seeking a permanent custody of minor daughter. So also an interim application was preferred by the wife for temporary custody and to allow and also prayer for continuing the access order passed by the High Court and also for temporary custody during the major vacations. I have been told that the said interim order is pending for hearing and is due to 30 March 2022, in the meantime, the husband after been served with a copy of petition filed under the Guardians and Wards Act preferred an application under Order 7 Rule 11(d) of Civil Procedure Code. Thereby, submitting that since there are criminal proceedings filed against the wife wherein, daughter is a victim therefore, under the Provisions of Protection of Children from Sexual Offences the petition filed under section 25 is barred by law and the same should be rejected.

16. While considering the provisions of Order 7 Rule 11(d) of the Civil Procedure Code the court has to look into the averments made by the plaintiff in the plaint. The petition is filed by the wife under Section 25 of the Guardians and Wards Act, after an Order been passed by Division Bench of this Court on 28 November 2023. While this Court on 28 November 2023, further continued the Order for a period of 4 weeks, granting liberty to the parties to

file appropriate proceedings.

17. I have gone through the contents of the plaint / petition filed under Section 25 wherein the facts on the date of the marriage have been narrated . In paragraph No.23 and 24 of the petition it has been mentioned about the Order passed by this Court and the Orders passed by the Supreme Court. It has further submitted that hence, the petition under Section 25 to custody of minor daughter is filed.

18. The order of access passed by the Division Bench of this Court on 21 September 2023, has been followed by the respondent till date and there is no dispute about it. The order passed by Family Court on 1 March 2024 continuing the order of access of the daughter, has been challenged by the husband in this Court by way of Writ Petition. Therefore, admittedly today the wife has access of the daughter on every day in the evening from 5:00 p.m. to 7:00 p.m. on Saturday from 10:00 a.m. to 9:30 p.m.

19. In the present proceeding mother/who is made an accused in the criminal case, the husband is denying her right to seek custody of daughter under the Guardian and Wards Act. In my view there is no such bar under Guardians and Wards Act and POCSO Act, to deny the mother of a minor daughter to file petition under section 25 of the Guardians and Wards Act.

20. The learned counsel for the husband relied upon the judgment of *Independent Thought (Supra)*. The said judgment is considering the facts mainly on the ground of a person committing sexual intercourse or acts with his own wife aged between 15 to

18 years; whether he is exempted from the offence of rape, regardless of the fact that victim is his wife. The facts in the said Supreme Court judgment and the present proceedings are quite different, therefore in my opinion the ratio of the said judgment does not help the Petition in the present proceedings. According to me, suffice would be the purpose while dismissing the CRA, the hearing of P.D. No.76 of 2023 pending before the Family Court at Pune, which is filed under Section 25 the Guardians and Wards act is expedited.

21. I find no merits in the present Civil Revision Application hence, the same is dismissed. No cost. Hearing of P. D. No.76 of 2023 is expedited.

22. At this stage Mr. Bhonsle seeks stay to the execution of this order. Mr. Butala appearing for the wife submits that by dismissing the Civil Revision Application all this Court has done, in that it has continued the hearing of the petition filed under Section 25, therefore, in effect there is nothing which is passed against the petitioner husband and there was in any case stay of the proceeding pending before the Family Court. The request made by Mr. Bhonsle hence, is rejected.

(RAJESH S. PATIL, J.)