

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.657/2023

(Sandeep Uddhav Kamble & anr. Vs. Kalpana Sandeep Kamble)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Mr. R. D. Karode, Advocate for petitioners.
 Mr. U.V. Chakraborty, Advocate h/f Ms. D. Sapkal, Advocate for
 respondent.

CORAM: M. M. NERLIKAR, J.

DATED : 01/12/2025.

Heard.

2. The challenge is raised to the judgment and order dated 10.11.2022 passed below Exh.05 by the Judicial Magistrate First Class, Chikhali which allowed the application of the respondent-wife, thereby granting temporary custody of child to her. Further challenge is raised to the order dated 04.08.2023 passed by the Additional Sessions Judge, Buldana, wherein the aforesaid order has been upheld and the appeal of the petitioner-husband has been dismissed.

3 The entire issue revolves around the custody of the child who was aged 4 years in the year 2022 and now he is approximately 6 to 7 years of age.

4. After perusal of the impugned orders and after hearing the counsel appearing for the parties, it appears that it is alleged by the wife that the husband has performed second marriage and thereafter, third marriage.

Under such circumstances, it is not proper to give custody of the child to the husband. It further appears from the record that after calling inquiry report of the Protection Officer, the Protection Officer has recommended that the custody of minor child should remain with the mother. It is a matter of record that in spite of order passed by the learned Judicial Magistrate to produce the child before the Court, the petitioner-husband failed to produce the child before the Magistrate on a presumption that the child will show his inclination to go with his mother, therefore the child was not produced by the petitioner before the Magistrate.

5. From all the aforesaid facts, it appears that paramount consideration is the welfare of the child. Admittedly, the child at present is of 6 to 7 years. On Court's query about their income source, the respective learned counsel informed that husband is doing labour work and wife is doing household work. It is a settled principle of law that money is not the criteria for granting the custody of the minor child, but paramount consideration is the welfare of the child. The Apex Court in the case of ***Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413*** while considering the legal position in respect of custody has observed in para nos. 25, 26 and 27 as under:

“25. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept

in view by a writ court is “welfare of the child”.

26. In Habeas Corpus, Vol. I, p. 581, Bailey states:

“The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate.”

6. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be in the best interest of a child to grant its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.

27. In McGrath (infants), Re [(1893) 1 Ch 143 : 62 LJ Ch 208 (CA)] Lindley, L.J. observed: (Ch p. 148)

“...The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

7. Therefore, while considering the aspect of custody of minor child, the Hon'ble Supreme Court has considered observations from the English Law, which states that child's welfare is not to be measured by money only, nor by physical comfort. The word 'welfare' must be taken in widest sense so as to include moral or religious welfare as well as physical well being. Most importantly, ties of affection cannot be disregarded. Under such circumstances, when the minor is aged 6-7 years and when the mother of the child does not suffer from any disqualification in such an eventuality, paramount consideration being welfare of child, therefore the custody should remain with the mother. Even it is alleged that the petitioner-father has performed second marriage therefore, in such circumstances when natural mother is alive it is not desirable for the minor son to reside with step mother. The report of the Protection Officer also shows that custody of minor should remain with the mother which further strengthens the case of the respondent-wife.

8. In view of concurrent findings of the Court that the temporary custody should be with the mother, this Court does not find any perversity or error in both the impugned orders and therefore, the petition is dismissed.

(M. M. NERLIKAR, J.)

Gohane