



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 739/2025

1. Vinayak s/o Narhari Shinde,
aged about 35 yrs., Occ. Service,
2. Narhari s/o Munjappa Shinde,
Aged about 65 yrs., Occ. Retired,
3. Sau. Ratnamala w/o. Narhari Shinde,
Aged about 55 yrs., Occ. Household,

All R/o. Bank Colony, Vasmat,
Tah. Vasmat, Dist. Hingoli.

...PETITIONERS
(Ori.N.As.)

VERSUS

Sau. Ashwini w/o Vinayak Shinde,
Aged about 31 yrs., Occ. None,
R/o. C/o. Shri Gajanan Bappurao
Sakhare, Gochar Swami Ward,
Umarkhed, Tah. Umarkhed,
Dist. Yavatmal.

...RESPONDENT
(Ori.Applicant)

Mr. Anil Mardikar, Sr. Advocate assisted by Mr. V. R. Deshpande,
Advocate
Mrs. Renuka S. Sirpurkar, Advocate assisted by Ms. N. Pathan,
Advocate for respondent.

CORAM : M. M. NERLIKAR, J.
DATE : 29.09.2025

ORAL JUDGMENT :

Heard.

2. By way of this petition filed under Article 227 of the Constitution of India, the petitioners are seeking to quash and set aside the impugned judgment and order dated 23.07.2025 passed by the learned Judicial Magistrate First Class (Court No.2), Umarkhed, District Yavatmal in PWDVA No.40/2024 and judgment and order dated 03.09.2025 passed by the learned Additional Sessions Judge, Pusad, District Yavatmal in PWDVA Appeal No.5/2025, wherein both the Courts' below have directed to give temporary custody of minor child namely Mayuresh Vinayak Shinde to the respondent-wife herein. The petitioner No.1 is the husband, whereas petitioner Nos. 2 and 3 are the parents of petitioner No.1 and the respondent is the wife of petitioner No.1.

3. Factual matrix of the case appears to be that:

The marriage of the petitioner No.1 and respondent was solemnized on 08.03.2020. Out of the said wedlock, they got blessed with a son. After cohabiting for four years, a dispute arose between the husband and wife and since 28.10.2024, both the husband and wife are living separately. It appears that the wife filed a complaint with the learned Judicial Magistrate First Class under Section 12 of the Protection of Women from Domestic Violence Act, 2005 ('D.V. Act') on 06.11.2024, praying therein that she be granted protection order under Section 18, residence order in terms of Section 19 and custody order as per Section 21 of D.V. Act thereby claiming custody of minor child Mayuresh. Further prayer was made claiming maintenance of Rs. 40,000/- per month under Section 20 of the D.V. Act. A separate application was made on 06.11.2024 itself, seeking interim maintenance as well as temporary custody of the minor child. The petitioners herein resisted the claim of the respondent-wife by filing reply. By an order dated 23.07.2025, the application of respondent-wife was

allowed by the learned Judicial Magistrate First Class thereby directing the petitioner no. 1 herein to provide interim maintenance to the respondent-wife to the tune of Rs.10,000/- per month till the decision of the application, from the date of filing of the application. Even it was directed to give temporary custody of child to the respondent-wife within 10 days from the date of order. This order was challenged before the learned Sessions Judge, Pusad by filing an appeal bearing No.5/2025 on various grounds. Initially, by an order dated 02.08.2025, stay was granted to the order dated 23.07.2025 only to the extent of handing over the interim custody of the minor child. Eventually, after hearing both the parties, the learned Additional Sessions Judge, Pusad, District Yavatmal was pleased to partly allow the appeal by an order dated 03.09.2025, whereby the order dated 23.07.2025 was modified only to the extent that the petitioner-husband Vinayak is allowed to visit the minor child Mayuresh once in two weeks in between 10.00 a.m. to 06.00 p.m. However, order dated 23.07.2025 was confirmed to the extent of grant of temporary custody and

interim maintenance. Being aggrieved by both the orders, the petitioners approached this Court by filing the present Criminal Writ Petition, however both the orders are challenged only to the extent of handing over of the custody of minor child to the respondent-wife.

4. I have heard learned Senior Counsel Mr. Anil Mardkikar for the petitioners and the learned counsel Mrs. Renuka S. Sirpurkar, for the respondent-wife. The learned Senior Counsel for petitioners submit that since the birth of the child, the petitioners are having custody of the minor child. He further submits that the minor child Mayuresh is suffering from autism and requires special care. He is undergoing treatment in Nanded as well as Hyderabad and the petitioners are residing at Vasmat which is 30 to 40 k.m. away from Nanded. Both the learned Courts below, gave much importance to the job of the petitioner No.1 as he is working as an Assistant Teacher and it was observed that he would be required to go to the School and therefore, he would not be in a position to look after the child. However, the same is misconceived as the petitioner No.1 goes

to School at 07.00 a.m. and returns till 12.00 noon, thereafter he is fully capable to look after and take care of the child. So far as the time period between 07.00 a.m. to 12.00 p.m. is concerned. the petitioner Nos. 2 and 3 are competent to take due care of the minor child.

5. The learned Senior Counsel further submitted that the respondent-wife does not have any source of income and therefore, it would be very difficult for her if the custody of the minor child is handed over to her. So as to substantiate the above, he has placed reliance on the affidavit filed by the respondent-wife before the learned Judicial Magistrate First Class in respect of assets and liabilities, wherein in Col.No. 4 of Personal Information, it is stated that wife is staying in the house of her father at Gochar Swami Ward, Umarkhed, Tahsil Umarkhed, District Yavatmal; whereas in Col.No. 7 of the same, she states that she is completely dependant on present petitioner No.1 as she is claiming Rs.40,000/- per month towards maintenance. My attention has been further invited to Part (F) which deals with details of income of the dependant,

wherein it is shown that the respondent is not having any source of income, she is completely dependant upon the petitioner No.1, as she is unable to maintain herself and therefore, submits that under such circumstances when there is no source of income as well as she is residing with her parents, it would be very difficult for her to take care of the minor child and to provide the best treatment required for autism. He further submits that, the order of the learned Judicial Magistrate First Class is passed without detail reasons so far as welfare of the minor child is concerned and therefore, he submits that learned Judicial Magistrate First Class has failed to apply his mind properly in the given set of facts. It was also submitted that as since the birth of the child, the petitioners are having continuous custody of the minor child, if the custody is uprooted then it would have a psychological impact on the child. Under such circumstances, he submits that both the Courts below have miserably failed to take into consideration the above facts and circumstances of the case and therefore,

erred in directing the grant of custody of minor child to the respondent-wife.

6. So as to substantiate his contentions, the learned Senior Counsel of the petitioners has relied on five judgments which are-

- a) *Gaytri Bajaj Vs. Jiten Bhalla, (2012) 12 SCC 47.*
- b) *Mausami Moitra Ganguli Vs. Jayant Ganguli, (2008) 7 SCC 673.*
- c) *Mamta Alias Anju Vs. Ashok Jagannath Bharuka, (2005) 12 SCC 452.*
- d) *Nil Ratan Kundu and another Vs. Abhijit Kundu (2008) 9 SCC 413.*
- e) *Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42.*

7. Per contra, learned counsel for respondent-wife submits that custody of child below age of five years cannot be granted to any one except mother and when the impugned order was passed, the child was of three and half years. Since the birth of the child, she was taking care of the child, however

thereafter, the petitioners dragged the wife out of the house and deprived the respondent-wife from taking care of her own child. She further submits that treatment of autism is also available at Yavatmal and so far as treatment at Nanded is concerned, it is hardly 70 k.m. from Umarkhed. The respondent-wife and her parents will manage everything so far as the treatment is concerned and they will do everything in their power in order to give best treatment to the child. Lastly, it was submitted that it is only a temporary custody which has been granted and the rights of the parties are yet to be determined and therefore, prayed to reject the petition.

8. So as to substantiate the above arguments, she has relied on the judgment of the Hon'ble Supreme Court in the case ***R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and others, (2001) 4 SCC 71***, wherein the Supreme Court has observed in para 11 as under:-

“11. The High Court appears to have overlooked the settled principle that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children.

In a sensitive matter like this no single factor can be taken to be decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. Here we may refer to the decision of this Court in Jai Prakash Khadria vs. Shyam Sunder Agarwalla, (2000) 6 SCC 598. In such matters usually, Courts while granting the custody of minor children to one party extend the facility of visiting them to the other. At the cost of repetition we may state that we are not discussing the merits of the case pleaded by the parties in detail since the application for the custody is pending for adjudication before the Family Court at Hyderabad.”

Further, reliance is placed on the judgment of the Hon’ble Supreme Court in case of ***Roxann Sharma Vs. Arun Sharma, (2015) 8 SCC 318***, wherein the Supreme Court observed in para 10 as under:-

“10. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very

briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be over-emphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of word "ordinarily" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment."

A reliance is also placed on the judgment of this court in the matter of ***Dr. Parijat Vinod Kanetkar & ors. Vs. Mrs. Malika Parijat Kanetkar & another*** in Criminal Writ Petition No.750/2016, decided on 21.12.2016. It was submitted that this Court has considered identical facts and circumstances and has given the custody of the minor child to the mother by observing thus:-

"28. Now, reverting to the rival submissions, I find that learned counsel for the respondent No.1 is right when she submits that in writ jurisdiction the scope of interference

does not go beyond examining the impugned order from the view point of it being perverse, arbitrary or going against well settled principles of law or statutory provisions or exfacie illogical. When the impugned orders are examined from such a perspective, I find that they do not contain any such illegality or perversity as would warrant any interference with them. The Courts below have considered all the points raised before them, which were similar to those raised here and decided them by taking a view, which is neither arbitrary nor illegal nor illogical nor of the nature as would cause miscarriage of justice.

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31. About deficiency of respondent No.1 in breastfeeding her infant son, I find that there is no disputing this fact. But, as seen from the medial papers, there appears to be a reason for it. It was probably the premature birth of Ayaan, and for this, surely respondent No.1 cannot be lambasted. Even otherwise, if lactation is not established, the mother cannot be blamed as that is something which is part of her body metabolism and genetics over which she would never have any control. One thing is certain, there is no nexus between lack of lactation and motherly attachment to one's own baby. In the present case, by seeking custody of the child, I think the respondent No.1 has shown that she is concerned about the welfare of her child and desirous of giving him all that care, love and affection which only a

mother can give. If this is so, any denial of interim custody to her would result in harming her mental health and thus cause domestic violence to her. But, of course this would not be the primary consideration for deciding custody of the child. Welfare, of the child, as held in several cases, including those relied upon by both sides, is of the paramount consideration. In the fact situation of this case, I find that the baby is so small that his being with mother, who is yearning for her reunion with her child, would only help him grow and develop, physically, psychologically and mentally well, at least for the present. The facts and circumstances of this case discussed earlier would also show that the respondent No.1, for the time being, has established herself to be a fit person to have the custody of the baby. Her conduct for about two and half months during the period from 17.2.2015 till about early May 2015 has also been found to be not showing indifference or non-attachment towards Ayaan. All this would show that welfare of Ayaan, for the present, will be well achieved, if his interim custody is given to respondent No.1.

32. About the medical treatment that is being given to Ayaan at Mumbai, I must say there is nothing available on record showing that equally competent and professional medical treatment is not available at Amravati. Learned counsel for the petitioners has filed on record a Pursis along with documents including a medical report dated 23.8.2016 which shows that Ayaan has been diagnosed to be suffering from mild Autism and he is undergoing treatment for Speech and Behavioral Therapy,

Occupational Therapy, Hearing and Vision Assessment, Thyroid Profile Assessment and Autism Assessment. As stated earlier, if at all this is true, similar treatment could also be given to the child at Amravati and if parties feel that this is not possible it would constitute a change of circumstances justifying modification of the interim order of custody by invoking power under Section 25(2) of the DV Act. That apart, from the record it is seen that these documents were not available for consideration before the Courts below and therefore, it would be unjust to question the legality and correctness of the impugned orders by considering these documents for the first time in exercise of writ jurisdiction. For this reason also, the impugned orders cannot be faulted with. All said and done, I may say that a custody order by its very nature being temporary is amenable to change or modification subsequently if it is necessitated by the change of circumstances.”

9. I have heard both the parties and their rival submissions. I have also gone through both the impugned orders as well as other material placed before me.

10. Considering the above submissions made on behalf of the parties, it is a settled principle of law that paramount consideration is the welfare of the child. Considering the fact that the petitioner is an Assistant Teacher, he is required to

attend the School, maybe from 07.00 a.m. to 12.00 noon. The fact remains that he is required to leave the child at the mercy of petitioner Nos. 2 and 3. The role of the father in Indian Society as compared to mother in respect of nurturing a child is somewhat different and therefore, it cannot be equated with the role of the mother in a child's life. In the present case, admittedly, the petitioner No.1 is an Assistant Teacher and petitioner Nos. 2 and 3 are the parents of the petitioner No.1 who are about 65 years and 55 years respectively. No doubt since the birth, both father and mother are taking care of minor child Mayuresh and it is only after October 2024, the differences arose between the husband and wife. The custody of the minor child remained with the father as it is alleged by the respondent-wife that she is deprived from meeting her child since from October 2024. There is also no dispute so far as the child suffering from autism is concerned and the father is providing treatment in the Hospital at Nanded and Hyderabad.

11. No doubt, the respondent-wife is having no source of income, which could be gathered from the affidavit of assets and liabilities. It is also not in dispute that the presently she is residing at the house of her father at Umarkhed. However, this itself would not be a sole criteria to deny the custody. Under such circumstances, it would be useful to refer to the judgment in the case of *Nil Ratan Kundu and another (supra)* wherein the Hon'ble Supreme Court while considering the legal position in respect of custody has observed in para Nos. 25, 26, 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, page 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."

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 for 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)* , 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 the child is not to be measured by money only nor by physical comfort. 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."

Therefore, while considering the aspect of custody of a 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. Therefore, one thing is clear that money is not the criteria for granting the custody of the minor child, but paramount consideration is the welfare of the child. Under such circumstances, when the child is of four years of age suffering from autism, therefore, it is only a mother who would be able available and provide care, affection 24 x 7. In order to take care of minor child, proper environment, love and affection and other similar factors are required to be taken into consideration. It is always said that, "the moment a child is born, the mother is also born. The woman existed before, but the mother never did. Therefore, it is the only a mother who can nurture, take care of and look after the child at every moment. To deprive her of a minor child's

custody would deprive her of that right itself.” Similarly, the same can be said in respect of minor child also, that the child would be deprived from getting mother’s love and affection. No doubt, father is capable too, however, the role of mother cannot be compared with the role of the father.

12. So far as the treatment of the child is concerned, learned counsel for the respondent has assured that the respondent- wife would take every effort and would provide best treatment which is available at Nanded or Hyderabad.

13. Two important factors are necessary to be considered in the present matter, firstly, that the minor is of four years of age at present and secondly, the petitioner No.1-father is working as an Assistant Teacher. Both the aforesaid factors compel me to pass order against the petitioners. No doubt, paramount consideration is the welfare of the child and in my opinion welfare of the child in these peculiar circumstances when he is suffering from autism is availability of a person 24 x 7 so as to nurture and take care of him.

14. The judgments relied upon by the learned Senior Counsel are not helpful to the petitioners as principally they discuss about the welfare of the child. In Gaytri Bajaj (*supra*) much emphasis is given to the desire, interest and welfare of the minor. So also, availability of a conducive and appropriate environment for proper upbringing together with the ability and the means of the parent concerned to take care of the child. In the case of Mausami Moitra Ganguli (*supra*), the Hon'ble Supreme Court has said that heavy duty is cast upon the Courts to exercise its discretion judiciously in the background of all the relevant facts and circumstances bearing in mind the welfare of the child as a paramount consideration. In Mamta Alias Anju (*supra*), the importance is given to the psychological impact, if any, on change in custody. Further, in the case of Tejaswini Gaud and others (*supra*), in paragraph No.26, the Hon'ble Supreme Court has reiterated that the paramount consideration is the welfare of the child.

15. After considering the ratios laid down by the Supreme Court as well as this Court, the only conclusion that can be drawn is that custody of the child is required to be given to the respondent-wife (mother) herein. So far as psychological impact on child is concerned due to change in custody, passage of time will help the child settle. Further, the fact remains that it will not be a new environment as his mother will be there with him. Therefore, I find that both the Courts below have taken into consideration the welfare of the child. So also, the learned Appellate Court has further balanced the rights of the parties by permitting the present petitioner No.1 to visit the child once in two weeks.

16. Needless to mention at this juncture that the impugned orders are dealing with the temporary custody of the child and the matter is not completely disposed off as the proceedings are pending, therefore without giving any finding further, which would amount to passing of final order.

17. It is needless to mention that merely giving custody to the mother would not preclude the petitioners from giving financial aid to the respondent-wife in case of emergency, and the petitioners have bounden duty to help in providing the treatment to the minor child. The order is passed in the best interest of the minor and the petitioners may not consider this order as adverse to their interest, hence the following order:-

(I). Criminal Writ Petition is dismissed.

(M. M. NERLIKAR , J.)