IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.393 OF 2021
WITH
CIVIL APPLICATION NO.3803 OF 2021

Ratnamala w/o Pandurang Zate,
Age 29 yrs., Occ. Household,
R/o Gangalwadi, Tq. Aundha (Nagnath),
Dist. Hingoli
At present r/o Chandgavan, Tq. Basmatnagar,
Dist. Hingoli.

… Appellant

… Versus …

Pandurang Udhav Zate,
Age 31 yrs., Occ. Agri.,
R/o Gangalwadi, Tq. Aundha (Nagnath),
Dist. Hingoli.

… Respondent

...

Mr. Y.B. Bolkar, Advocate for the appellant

Mr. D.M. Shinde, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 23rd JUNE, 2021

PRONOUNCED ON : 03rd JULY, 2021

JUDGMENT :

1 **Admit.**

2 Though a separate Civil Application has been filed for the custody of the minors till the final hearing and disposal of the appeal; with consent of both the parties, since all the documents have been produced on record and especially when both the parties had not led oral evidence before the learned District Judge-1, Basmathnagar and matter was considered only on the point of submissions of both the parties by the Trial Court, the First Appeal itself is taken for final hearing at the admission stage.

3 Heard learned Advocate Mr. Y.B. Bolkar for the appellant and learned Advocate Mr. D.M. Shinde for the respondent.

4 It has been vehemently submitted on behalf of the appellant-mother that it is not in dispute that the marriage between the appellant and the respondent-husband was solemnized on 03.05.2013 as per the Hindu rites and they have two children – daughter Pranjal, aged 6 and son Prajwal, aged 2. Further, it is also not in dispute that the respondent-husband has filed Hindu Marriage Petition No.28/2020 for divorce. The appellant-applicant had filed Civil Miscellaneous Application No.8/2020 before learned District Judge-1, Basmathnagar, Dist. Hingoli for custody and her appointment as guardian under Section 25 of the Guardian and Wards Act,

1890. She had contended that she was treated well for the initial years, however, later on she was harassed by the husband and his family members. The husband used to beat her. Whenever the daughter used to get ill, inspite of accompanying the appellant along with her, the respondent used to send his brother and then used to raise suspicion over her character. Later on the husband's behaviour changed and he used to come under the influence of liquor and used to beat the wife. He used to be instigated by husband's uncle and thereafter there was demand of Rs.3,00,000/- for the construction of the house. Husband used to say that his brother has been given dowry of Rs.5,00,000/-, but he has received only Rs.2,00,000/-, and therefore, she should bring amount of Rs.3,00,000/-. He also threatened to perform second marriage if she fails to bring the amount. It was then the contention of the wife that husband took her on 16.04.2020 to Basmath for the work in the bank and told that the children should not be taken. She was then taken to her father's house at Basmath. Husband went by saying that he would go to the bank and come. But thereafter he gave a phone call and told that he is not in need of her and he would perform second marriage. Thereafter, on the same day the wife went to the matrimonial home at Gangalwadi, but she was threatened by husband and all other family members to kill. She was then driven out of the house along with the children. Then on the next day i.e. on 17.04.2020 his family members went to Basmath, opposed the applicant-

wife, threatened her and her family members and forcibly took the children with them. Thereafter, the Hindu Marriage Petition was filed with concocted story. The children are minor. She had attempted to get the custody by making application under Section 97 of the Code of Criminal Procedure, 1973 before Judicial Magistrate First Class, Basmathnagar, however, it was refused by saying that it has civil angle, and therefore, she had filed the said application.

5 It has been further submitted on behalf of the appellant that in the say that was filed by the respondent-husband he has made wild allegations. Parties did not lead any evidence but only on the submissions the learned District Judge has decided the matter. He has not considered the legal aspects involved in the matter. The son of the parties is only two years old and in view of proviso to Clause (a) of Section 6 of the Hindu Minority and Guardianship Act provides for the custody of the child, who is below five years of age to the mother, as she is considered as the natural guardian. Though the Trial Court held that she had the custody of the minor children and the children were removed from her custody, yet, the custody was not handed over to the mother, and therefore, the rejection of the application filed by the present appellant before the learned District Judge is illegal.

6 The learned Advocate for the appellant has relied on the decision

in **Pushpa Singh vs. Inderjit Singh, 1990 (Supp) SCC 53**, wherein it has been held that the paramount interest of the child lies in giving his custody to mother when the custody of child below 5 years is involved, and therefore, in that case the father was directed to hand over custody of the child to the mother and was permitted to meet the child twice a month. Similar view was taken by this Court in **Sau. Ansuyabai vs. Trymbak Balwant Rakshe, II (1985) DMC 60**.

6.1 Further, in **Smt. Surinder Kaur Sandhu vs. Harbax Singh Sandhu and another, AIR 1984 SC 1224** Hon'ble Apex Court held that Section 6 of Hindu Minority and Guardianship Act, 1956 could not supersede the paramount consideration as to what was conducive to the welfare of the minor.

6.2 Further, in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318** it has been held that -

> "Custody of a child aged below 5 years should be given to his/her mother unless father discloses cogent reasons that are indicative of likelihood of welfare and interest of child being undermined or jeopardised if custody is retained by mother. Use of word "ordinarily" in proviso to Section 6(a) of Hindu Minority and Guardianship Act ordains a presumption, albeit a rebuttable one, in favour of mother. Said proviso places onus on father to prove that it is not in welfare of child to be placed in custody of his/her mother. Father's character

and background in case of a child below 5 years would be relevant only after the court strongly and firmly doubts the mother's suitability. Even in such a case the comparative characteristic of the parents would come into play. Section 6(a) of Hindu Minority and Guardianship Act preserves the right of father to be guardian of property of minor child but not the guardian of their person whilst the child is below 5 years of age. Said provision carves out the exception of interim custody, in contradistinction of guardianship. However clarified, Section 6(a) of Hindu Minority and Guardianship Act or for that matter any other provision including those contained in Guardians and Wards Act, 1890 does not disqualify the mother to custody of child even after the latter crosses the age of 5 years."

6.3 Further reliance has been placed on the decision in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67**, wherein it has been observed that -

"While deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands, then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must, therefore, be

very wary of what is said by each of the spouses.

A child, especially a child of tender years, requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. Courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her his parents."

7 It was also submitted that though the girl is more than five years, yet, she being the girl should be placed in the custody of the mother. The approach of the learned Trial Judge in interacting with the girl and coming to the conclusion that she has no desire to go with the mother itself has been

wrongly arrived at. The child of 6 years cannot be said to be of such an age to make choice of either mother or father, and therefore, observations to that effect by the learned Trial Judge were uncalled for.

8 Learned Advocate for the appellant, therefore, prayed for allowing the appeal and placing both the children with the appellant.

9 Per contra, the learned Advocate appearing for the respondent-husband vehemently submitted that the procedure, that is, adopted by the learned Trial Judge is perfectly proper. The story which was told in the application that on 16.04.2020 initially the husband took wife with him and left her to her father's place and at that time, the children were not with them. She then states that on the same day she went to matrimonial home, but she was not allowed to come inside, but she along with children were driven out and then she states that on the next day itself the husband and his family members came to the house of father of the appellant and took the children away. If these persons wanted the custody of the children, why they would have driven them out of the house ? It was the contention of the husband that she has developed illicit relations. She used to call that person oftenly. Even the wife had left the matrimonial home and went with that person and then asked for the custody of the minor in his Hindu Marriage Petition. He has produced evidence in the form of photos, audio and video

recording in respect of the illicit relations. So also, it is the contention of the husband that the wife had gone along with that person in the month of February, 2020 at different places and stayed along with him in a lodge. Such adulterous life of the mother would definitely affect the welfare of the children. The wife is not in a position to look after the children, as she is leading adulterous life. Therefore, the custody is not required to be given to her and accordingly it is not given. The learned Trial Judge had interaction with the daughter. He found her to be intelligent and was not tutored at all when he had interacted with her. The girl had specifically stated that she was not willing to go with mother and not even looked towards her. The girl and her brother were ill-treated by the mother and she is comfortable with her grand parents, uncles and aunts, as they are living in a joint family. Therefore, taking into consideration these aspects the custody has been rightly refused. There is absolutely no necessity to interfere with the impugned Judgment.

10 Learned Advocate for the respondent relied on the decision in **Nil Ratan Kundu and Another vs. Abhijit Kundu, 2008 DGLS (SC) 1051**. It has been laid down that -

> "The paramount consideration in such matters is welfare of the child and this law is fairly well settled in deciding a difficult and complex question, a court of law should keep in mind relevant statutes and the

rights flowing there from, but such cases cannot be decided solely by interpreting legal provisions. It is humane problem and requires to be solved by human touch. While dealing with such matters, Court is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. Need no repetition, paramount consideration should be welfare and well being of the child. In selection of guardian, court exercise parens patriae jurisdiction, it is expected, any, bound to give due weight to childs comforts, contentment, health, education, intellectual development and favourable surroundings. Over and above, physical comforts, moral and ethical values cannot be ignored. If minor is old enough to form an intelligent preference or judgment, same must be considered as well."

10.1 Further reliance has been placed on the decision in **Smriti Madan Kansagra vs. Perry Kansagra, 2020 DGLS (SC) 593**. In this case all the earlier decisions uptill now have been considered and the law has been reiterated that the paramount consideration should be the welfare of the child and in this case it was found that the father was in a better position and could give all the comforts and would look after the child properly. The father in this case was from Kenya.

11 The learned Advocate for the respondent, therefore, prayed for the dismissal of the appeal and the Civil Application.

12 At the outset, it can be seen that the procedure, that is, adopted

by the learned District Judge-1, Basmathnagar appears to be not correct. No doubt, both the parties had given pursis before him stating that they do not want to lead evidence and it appears that both the parties had relied on their affidavits, which are at Exhs.5 and 15. Interesting point to be noted is that taking those affidavits as affidavit-in-chief there could have been an opportunity to the either side to cross-examine each other. Now, whatever has been stated in the affidavit has been stated as gospel truth by the learned Trial Judge, especially that of the respondent-husband. Taking into consideration the affidavits, he came to conclusion that the wife had proved that she had the custody of the children as alleged by her. That means, the finding has been given that on 16.04.2020 the wife had custody of children with her. On that day the son was 1 year 11 months old and the daughter was 6 years old. The Trial Judge has further given a finding that the wife has proved that the minor children have been removed from her custody and definitely it can be stated that learned Trial Judge wanted to say that children were removed from the custody of their mother by the father only. Inspite of these findings the learned Trial Judge went on to consider who could be the natural guardian. First of all he ought to have restored the custody and then allowed the parties to lead evidence. Here, evidence means a full-fledged evidence, that is, required for the decision of the application. It is surprising to note that the husband has not filed any appeal challenging these findings

of learned Trial Judge.

13 Another fact, for which definitely objection will have to be taken in respect of the observations in para No.66 of the impugned Judgment, which are in respect of allegations of adultery. It appears that the opponent had produced on record the transcription of the mobile conversation between the applicant and the said person and the copies of their photos showing closeness along with his affidavit. That evidence has been considered by the learned Trial Judge without it was proved in all legal aspects. For the mobile conversation it appears, as there is absolutely no discussion, there was no mandatory certificate under Section 65-B of the Indian Evidence Act. So also, as regards the photos are concerned, it appears that the concerned photographer was not examined and these documents have not been separately exhibited. There was no opportunity to the wife to cross-examine the husband, and therefore, when, though the fact of adultery is alleged and it has not been proved by cogent and conclusive evidence by the husband, the Trial Judge ought not to have even considered it for a sentence also. Further, in para No.68 the learned Judge went on to observe that those allegations regarding relationship of the wife and the said person were not without foundation or reckless. That was a factor, which has been taken by him for considering/deciding the custody of the children. This is totally illegal.

When the full-fledged evidence was not led, the Court had not come to the conclusion that the allegations of adultery are proved, merely, because some documents have been produced, it cannot be taken as supporting evidence and then a conclusion can be drawn that wife/mother is not entitled to get custody. It will have to be held that at this stage, in this matter, allegations of adultery are not proved by the husband. There was an opportunity for him to prove it by leading the appropriate evidence, which he has not availed.

14 As regards the point of consideration of welfare of the child in deciding such applications is concerned, the law is crystal clear. In the earlier paragraphs also, the ratio has been considered on the basis of the various decisions by Hon'ble Apex Court. The decision in **Pushpa Singh**, referred above, has been given by the Three Judge Bench of the Apex Court, and therefore, it has to be followed. Further, the ratio in **Roxann Sharma** (supra) is also important for consideration in the present case. When it has been laid down that the presumption under the proviso to Section 6(a) of the Hindu Minority and Guardianship Act is rebuttable presumption, then the husband in this case i.e. the respondent should have led cogent evidence to rebut that presumption. That would be applicable except to the minor son in this case, who is presently aged 2.

15 The ratio in **Nil Ratan Kundu**'s case (supra) is also applicable

while deciding the custody. Comfort of the child, contentment, health, education, intellectual development and moral as well as ethical values will have to be considered, but until the things are not proved we cannot presume that there is some unethical, immoral with the mother, in the present case.

16 A child of 6 years may be intelligent, in a way that he/she would be answering all the questions, those have been put, but as regards the choice that he/she was supposed to make between the father and the mother, which itself is a complex question, then the ordinary intelligence alone should not be considered. It will have to be decided as to whether the child is tutored or not. In this case, no doubt, the Trial Judge has stated in the Judgment that he did not find the girl to be tutored. However, it is to be noted from what the observations have been made that the girl told that she was not interested even to talk with her mother and they do not want to go with her because they were ill-treated. It will not be out of place to mention here that this Court also had called the girl on 21.06.2021 and interacted with the girl in child friendly atmosphere in chamber, in presence of the Advocates of both the parties. Since the son is only 2 years old there was absolutely no necessity to ask him about the wish. The tender age itself is sufficient to speak for the reason. Those observations in respect of conversation were noted by this Court in its order on 21.06.2021. Important point to be noted

is that when the girl was asked, as to why she does not want to go with the mother, she told that she was assaulted by the mother. Further question, which the learned Trial Judge did not ask, was asked by this Court, as to how many times the mother had assaulted her. Then she told that she was assaulted twice or thrice. Important point to be noted is that definitely the mother if she find that the child is doing some wrong thing, then at some point of time due to anger may assault, but that would be with the intention that the child should not commit such wrong in future. No doubt, it appears that the girl is affectionate to the grand parents and it is obvious. The grand parents always love their grand children and they pamper them like anything. They equally give moral education and good treatment, so that the child should develop as a good human being. It is universally observed that grand parents protect their grand children more than the parents of the children. Whenever parents of the children either scold them or beat them, for any reason, the child immediately goes to the grand parents, where he or she would be consoled. Therefore, the comfortable point is concerned, definitely, the girl would have said that she is more comfortable in that house. However, it is the basic fact, as to whether the girl, who is aged 6, was in a better position to make the choice. When the children were removed by the husband from the custody of the mother and finding has been given to that effect by the learned Trial Judge, the application ought not

to have been allowed, on the ground of so called paramount consideration of child and a 'not proved' allegation of adultery. Further, in fact, without there being any proper evidence before him, the learned Trial Judge went on to observe that the mother is living separately since April, 2020 due to her behaviour, without taking any interest in the affairs of the children. Therefore, such order deserves to be set aside. The effect of non-filing of appeal challenging the findings of first two points by husband is also required to be considered.

17 The procedure that was adopted by the learned Trial Judge was itself wrong. He ought to have given proper opportunity to lead the evidence to both sides. The point, which could not have been decided only on the basis of affidavits have been considered in that way. The learned Advocate for respondent though relied on **Smriti Madan Kansagra**'s case (supra), it can be seen that in that case also there was oral evidence and the parties were allowed to cross examine each other. That means, the procedure that was contemplated was not merely on the basis of the affidavits and this ought to have been considered by the learned Trial Judge. This fact is also observed in **Nil Ratan Kundu**'s case (supra). At the costs of repetition that the Hon'ble Supreme Court has stated that, "In deciding a difficult and complex question, a Court of law should keep in mind relevant statutes and the rights flowing

there from, but such cases cannot be decided solely by interpreting legal provisions." Thereafter, how the guardian is to be selected has been laid down, and therefore, for proving comfort of the child, contentment, health, education, intellectual development and favourable surroundings etc., an opportunity should be given to the parties to lead evidence. This Court feels that since the proper opportunity appears to have not been given to the parties to lead evidence, it is necessary to relegate the matter back to the Trial Court and in the meantime, till the decision of the said application on its merits, the custody of both the children deserves to be given to the mother. Hence, following order.

ORDER

1 The First Appeal stands partly allowed. So also, the Civil Application stands allowed accordingly.

2 The Judgment and order passed in Civil Miscellaneous Application No.8/2020, by learned District Judge-1, Basmathnagar, Dist. Hingoli on 04.02.2021 is hereby set aside. The said application is restored on the File of the concerned Court.

3 The learned District Judge-1, Basmathnagar should give an opportunity to both the parties to lead evidence in support of their respective

contentions.

4 Both the parties to appear before the concerned Court on 05.07.2021. On that day the respondent-husband should hand over both the children to the mother, in presence of that Court.

5 Custody of the children is given to the mother till the final hearing and disposal of Civil Miscellaneous Application No.8/2020.

6 As aforesaid, after giving proper opportunity to both the parties to lead evidence, the learned Trial Judge to decide the case on its merits.

7 At the same time, the respondent-husband is at liberty to meet children on every Saturday, between 10.00 a.m. to 03.00 p.m.

8 The mother should give proper access for the said meeting and the place would be the house of the parents of appellant-mother.

9 Parties to ensure that there should be no untoward incident at that time and the respondent-father shall not take any of his relatives along with him at the time of such meetings.

(Smt. Vibha Kankanwadi, J.)

agd

Date : 03.07.2021.

Later on :

1 After the pronouncement of the Judgment, the learned Advocate for the respondent-husband submits that the order and Judgment of this Court be stayed for six weeks, as his client wants to prefer appeal or challenge it in appropriate proceedings before Hon'ble Apex Court.

2 Learned Advocate Mr. Y.B. Bolkar for the appellant-wife objects for grant of the stay. He submits that due to the forcible taking away of the children and since even the learned District Judge-1 while dealing with the Civil Miscellaneous Application had not make any kind of arrangement for the meeting between the mother and the children. If stay is granted, then the custody will not be given to the mother, so also, she will not be allowed to meet children.

3 Taking into consideration the fact that the learned District Judge-1 had arrived at the conclusion that there is forcible taking away of the children by the father and he has not challenged that finding. Further, the fact that the learned District Judge-1 while deciding the Civil Miscellaneous Application had not made any arrangement for the meeting of the mother. Now, since the Judgment has been pronounced and the First Appeal is partly

allowed and the respondent-husband intends to approach Hon'ble Apex Court, a balance has to be struck. The Judgment and order passed by this Court is hereby stayed till 06.08.2021. However, now, the respondent-husband should leave children to the house of the appellant-mother, on every Sunday, between 10.00 a.m. to 03.00 p.m. and take them back, thereby an arrangement will have to be made for the meeting between the children and the mother till 06.08.2021 and accordingly this condition is imposed by granting stay.

(Smt. Vibha Kankanwadi, J.)

agd