



**Order below Exh.24 in G.W.Case No.02/2020**

Nikunj Harlalka Vs. Prachi Harlalka & Ors.

CNR MHBU04000066-2020

This is an application under Section 12 of the Guardians and Wards Act, 1890 filed by the applicant seeking temporary custody of opponents No.2 and 3 i.e. his sons till final disposal of main application. According to him, he has filed main application under Section 25 of the said Act seeking permanent custody of opponents No.2 and 3. Since 3.11.2019, he could not meet his sons i.e. opponents No.2 and 3 who are at present in the custody of his wife i.e. opponent No.1. He being the natural guardian and father, he has every right to meet his sons. Contents of main petition may be treated as part and parcel of this application.

2] He further averred that opponent No.1 is suffering from mental illness and she is regularly undergoing medical treatment. Therefore, she is not fit person to take care of opponents No.2 and 3. If minor sons are remained to be allowed in her custody then opponents No.2 and 3 could not be in a position to upbring in better manner. The main application would consume lot of time. The education at Mumbai as compared to Shegaon is certainly good. Therefore, for their better education also, opponents No.2 and 3 are required to be given into his temporary custody. In the parental house of opponent No.1, there is nobody to look after and take care of

minor children. Therefore, he prayed that pending final decision of main application, opponent No.1 may be directed to hand over temporary custody of opponents No.2 and 3 to him.

3] Opponent No.1 resisted the application by filing her say at Exh.26. She has come out with the case that she is not at all suffering from any mental illness. She is highly educated. Application filed by the applicant for temporary custody is bereft of any merits. In order to achieve his goal, applicant has levelled baseless allegations of mental illness against her. She is fit and healthy and is working as honorary Teacher with Chinmaya Vidyalaya at Shegaon. Applicant is mischievously mis-leading the Court. In fact, ill-treatment on his part has coerced her to reside at her parental house. Applicant and his family members have subjected her and the sons to ill-treatment. They have committed serious offences of abduction etc. against them for which FIR is registered. The life and welfare of opponents No.2 and 3 was under serious threat in the company of applicant. Anyhow, she managed to escape from his ill-treatment. Therefore, applicant has bad influence on the minor sons and poses threat to their welfare.

4] She further has contended that present application under Section 12 of the Act filed by the applicant is not tenable in the eyes of law. It also suffers from delay and latches. Both the sons are happy and healthy along with her in her parental home. Her parents are financially sound to take care of both the sons. Both opponents No.2 and 3 are extremely fond of their mother i.e. her and they are attached to her. She is the best person to take their care in their formative years. They have naturally assimilated and settled in her parental house. Her

parental family consists of so many family members and company of other kids for opponents No.2 and 3 which is helping them in blossoming. The premises are large in size having all the facilities. Therefore, it would not be in the interest of opponents No.2 and 3 to remove them from her custody and to give them temporarily in the custody of applicant. The welfare of opponents No.2 and 3 is of paramount consideration. Therefore, she prayed for rejection of application on both the counts.

5] Following points arise for my determination and I record my findings against each of them for the reasons given below.

Sr. No.	Points	Findings
1]	Whether present application is maintainable ?	Yes.
2]	Whether applicant is entitled for temporary custody of opponents No.2 and 3 till disposal of the main application ?	No.
3]	What order ?	Application is partly allowed.

### **Reasons**

#### **Point No.1:**

6] Advocate Mr.C.S.Bhate for opponent No.1 vehemently argued that Section 12 of the Guardians and Wards Act, 1890 which is found under Chapter II deals with appointment and

declaration of guardians. When the main application filed by the applicant is under Section 25 of the said Act then present application under Section 12 is not at all maintainable in the eyes of law. Even the Court is not having inherent powers either to grant temporary custody or to consider this application. He relied upon the case of **Achratlal Jekisondas Vs. Chimanlal Parbhudas, reported in AIR 1916 Bombay 129**, in which it is held by Hon'ble Bombay High Court that, "It may be taken on the authority of the Privy Council in *Annie Besant Vs. Narayaniah*, that the jurisdiction of the District Court is defined by the Guardians and Wards Act, and that it has no inherent powers to make orders with reference to minors which are not expressly conferred upon it by that Act. The Chapter of the Act relating to the appointment and declaration of Guardians is Chapter II. Section 12 provides for the summoning before the Court of the minor for whom an application has been made for the appointment of a guardian, and for the interim custody of the minor pending the hearing of the application u/s.13. Then Section 17 lays down matters to be considered by the Court in appointing a guardian, and Clause 4 of that section lays down the respective rights of parents claiming guardianship."

7] Secondly on the case of **Ruxmaniben Tribhovandas Jethabhai Vs. Minor Narmada @ Nandu & Ors, reported in AIR 1962 Gujarat 227**, in which it is held by Hon'ble Gujarat High Court that, "the juxtaposition of Section 12 leaves no doubt that it provides for the making of interlocutory orders in an application for appointment or declaration of a guardian and that it does not confer any such power on the Court in relation to a petition u/s.25. The application for interim custody of

Narmada could not, therefore, be maintained by the petitioner u/s.12.”

8] Advocate Mr.S.T.Joshi strongly replied that facts of both the cited cases on which, advocate Mr. Bhate placed his reliance are altogether different. Even otherwise, Hon'ble Gujarat High Court in the cited case **Ruxmaniben Tribhovandas Jethabhai Vs. Minor Narmada @ Nandu & Ors** has held that Court has inherent powers to make interlocutory orders for interim custody of a minor in a petition under Section 25 and therefore, such application is very much maintainable.

9] Section 12 of the Guardians and Wards Act speaks that Court may direct that the person if any, having custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints and may make such order for the temporary custody and protection of the person or property of the minor as thinks proper.

10] I have carefully gone through facts of both the cited cases on which, advocate Mr.C.S.Bhate placed his reliance. In the first cited case **Achratlal Jekisondas Vs. Chimanlal Parbhudas**, question in appeal before the Hon'ble High Court was whether the father who has never had the care or custody of his infant child can successfully call upon the Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over. It was held that District Court as defined under the Guardians and Wads Act, has no inherent powers to make orders with

reference to minors which are not expressly conferred upon it by that Act.

11] At the same time, by relying upon this particular cited case, Hon'ble Gujarat High Court in another cited case **Ruxmaniben Tribhovandas Jethabhai Vs. Minor Narmada @ Nandu & Ors** has held that Court has inherent powers to make interlocutory orders for interim custody of a minor in a petition under Section 25 and therefore, such application is very much maintainable.

12] In view of this, I have no hesitation to reach the conclusion that application for interim custody of minor opponents No.2 and 3 pending main application is maintainable. In the result, I answer Point No.1 in the affirmative.

**Point No.2:**

13] Advocate Mr.S.T.Joshi vehemently argued that relationship between the parties is not in dispute. Opponent No.1 by deserting applicant, is staying at her parental home since 3.11.2019 along with minor sons i.e. opponents No.2 and 3. she is suffering from serious mental illness. He invited my attention to the reports along with list at Exh.3 at Sr.No.6. Considering the welfare of minor sons, according to him, it would be dangerous to keep minor opponents No.2 and 3 in her custody. Moreover, she is at the mercy of her parents. As against this, applicant is financially sound. He is settled at Mumbai. Education at Mumbai is quite good than Shegaon. He being natural guardian and father, certainly deserves for the

temporary custody of opponents No.2 and 3. In the alternative, he prayed for interim order in respect of prayer clause in the main application at Exh.1 to allow applicant to take opponents No.2 and 3 to his house at the time of vacation, public holidays, festivals etc. at his cost.

14] He relied upon the case of **Gayatri Bajaj Vs. Jiten Bhalla, reported in 2012(3)B.C.J.759 Supreme Court**, in which it is held by Hon'ble Apex Court, that, "It is not the better right of the either parent that would require adjudication but it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide determination required to be made by Court while ordering custody of minor children."

15] Advocate Mr.C.S.Bhate strongly replied that opponents No.2 and 3 are happy in the custody of their mother i.e. opponent No.1 at her parental home. There are serious allegations of abduction etc. against applicant. In order to achieve his goal, applicant is levelling false allegations of mental illness against opponent No.1. She is fit and healthy. She is working as honorary teacher with N.V.Chinmaya Vidyalaya at Shegaon. In the same school, opponents No.2 and 3 are taking education. Their progress is quite good. They are settled at Shegaon since last one year. Applicant is not fit person to grant temporary custody of minor sons to him. If such temporary custody is granted to him, it would not be in the interest and benefit of the minor sons. Therefore, he submitted for rejection of the application.

16] At the outset, it is required to be noted is that applicant is claiming his wife i.e. opponent No.1 to be suffering from serious mental illness. But from the documents on record along with list at Exh.27, it is seen that she is appointed as a Guest Teacher with N.V. Chinmaya Vidyalaya, Shegaon with effect from 12.11.2019 i.e. since almost one year. She is teaching English to Class 3 and Environmental Studies to Classes 4 and 5. Therefore, this issue is required to be decided on merits by recording evidence of both the parties.

17] It is not at all disputed that since 3.11.2019, opponent No.1 is staying at her parental home at Shegaon along with minor sons i.e. opponents No.2 and 3. From the documents along with list at Exh.27, it is seen that their admission with Chhatrabhuj Narsee School, Mumbai is cancelled. Opponent No.2 minor son Advit is admitted in Class 1 in N.V.Chinmaya Vidyalaya, Shegaon in November 2019 and now he is promoted to Class 2 for the academic session 2020-2021. As per the certificate on record, he is doing excellent in his academic and secured 'very good' grade in class 1<sup>st</sup> examination. Opponent No.3 minor son Sashmit is enrolled in Nursery with Chinmaya Shishu Vaatika, Shegaon for academic session 2020-2021 and as per the certificate on record, he is doing satisfactory progress.

18] It goes to show that opponents No.2 and 3 are undergoing education with N.V. Chinmaya Vidyalaya, Shegaon, in which opponent No.1 herself is Guest Teacher. It appears that they are settled in their education at Shegaon along with their mother i.e. opponent No.1.

19] There are serious allegations against applicant regarding abduction and ill-treatment to opponents No.2 and 3 so also his wife opponent No.1. It is also alleged that FIR to that effect is also registered with the police. Considering the fact that minor opponents No.2 and 3 being settled at Shegaon, physically, educationally and emotionally along with their mother opponent No.1 in her parental home, it would not be just and safe to grant their temporary custody to applicant who is staying at Mumbai. Besides their admission at Mumbai with Chhatrabhuj Narsee School is already cancelled.

20] As contended in the say, parental family of opponent No.1 consists of so many family members including other kids in the house who are helping opponents No.2 and 3 in blossoming. The premises are also large in size having all the facilities and therefore, according to opponent No.1, opponents No.2 and 3 are comfortable, safe and sound in her custody. They are naturally assimilated and settled in her parental house.

21] As observed by the Hon'ble Apex Court in the cited case **Gayatri Bajaj Vs. Jiten Bhalla**, it is not the better right of the either parent that would require adjudication but it is the desire, interest and welfare of the minor. Considering the welfare of minor opponents No.2 and 3 which is of paramount consideration, it would not be just and safe to remove temporarily them from the custody of their mother i.e. opponent No.1 and to hand over their custody to their father i.e. applicant temporarily.

22] Even prayer made by advocate Mr.S.T.Joshi alternatively, also cannot be considered because it would be just like to grant final relief to applicant at an interim stage and without deciding real controversy in between the parties on merits. On this point also, he is not at all entitled for the temporary custody of minor opponents No.2 and 3. In the result, I answer this Point in the negative.

**Point No.3:**

23] My negative finding to Point No.2 shows that applicant is not entitled for temporary custody of opponents No.2 and 3, his minor sons. At the same time, it cannot be ignored that he being their father, is natural guardian. Though his minor sons opponents No.2 and 3 did not deserve to be removed out of the custody of their mother temporarily, visitation rights can certainly be granted to applicant by invoking inherent jurisdiction by this Court.

24] Even opponent No1 has no objection for his visitation rights to opponents No.2 and 3. Because while filing say to another application at Exh.17, at Exh.19 and in para No.8, on humane consideration, she has shown her readiness and willingness to let applicant to visit minor sons opponents No.2 and 3 in person at the residence of her parents at Shegaon, but after Covid-19 pandemic subsides.

25] There cannot be any dispute that we are in the final stage of unlock. Situation is coming to its normalcy gradually. Under such circumstances, if applicant is allowed to visit his

sons i.e. opponents No.2 and 3 at the parental house of opponent No.1 twice in a month then it would be in the interest of applicant as well as minor opponents No.2 and 3. Applicant as well as minor opponents No.2 and 3 would be in a position to see and meet each other at regular intervals. In the result, application deserves to be partly allowed. Hence, the following order.

**Order**

1.	Application is partly allowed.
2.	Prayer of applicant for temporary custody of minor opponents No.2 and 3 to him or permitting him to take them at his house during vacations etc. is hereby rejected.
3.	However, opponent No.1 is directed to give access to applicant at the residence of her parents at Paldiwal compound, main road, Shegaon for visiting minor opponents No.2 and 3 twice in a month on every 2 <sup>nd</sup> and 4 <sup>th</sup> Saturday of each month in between 3.00 p.m. to 5.00 p.m. She shall make arrangement for such meeting. Applicant shall meet his minor sons opponents No.2 and 3 in the presence of their mother i.e. opponent No.1.
(Order is dictated and pronounced in open Court.)	

Khamgaon  
Date:6.11.2020

**(R.D.Deshpande)**  
District Judge-1,  
Khamgaon

Dictated on	6.11.2020
Transcribed and typed on	6.11.2020
Checked and signed on	6.11.2020
Uploaded on	6.11.2020
Transcribed, typed and uploaded by	Dhananjay V. Matre, Stenographer (Grade 1)