

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

**APEAL FROM ORDER NO. 16 OF 2014
WITH CA/14995/2013 IN AO/16/2014**

**DYANESHWAR LOTAN BHOI AND ANOTHER
VERSUS
KAVITA DYANESHWAR BHOI**

...
Advocate for Petitioners : Mr. Patil Shrikant S.
Advocate for Respondent : Mr. R. M.Deshmukh

...
CORAM : S. V. GANGAPURWALA, J.

DATE : 19th August, 2015

PER COURT :

1. The respondent has filed application under section 6 of the Hindu Minority and Guardianship Act claiming custody of present appellant No.2 minor as natural guardian from the appellant No.1. The same is allowed.

2. Mr. Patil, learned counsel for the appellants submits that the application has been allowed ex-parte. At the relevant time, the appellant was residing at Surat, as such, notice was not served on the appellant. It is only at the time of execution, the appellant got the knowledge when the notice of execution was served upon the appellant. The learned counsel submits that the child i.e. appellant no.2 is suffering from cancer and appellant No.1 is taking care of the treatment of appellant no.2.

3. According to the learned counsel, as the order passed is ex-parte

one, the appellant deserves to be given opportunity to adduce evidence and to put forth its stand.

4. Mr. Deshmukch, the learned counsel for the respondents submits that even as per the consent terms for divorce, the custody of appellant No.2 was to remain with the present respondents but as the appellant No.1 was not giving custody of the appellant No.2 to the present respondents, the application was required to be filed.

5. Welfare of the child is of paramount consideration.

6. It is not disputed that the present appellant No.1 did not appear in the proceedings before the District Court. Even the learned Judge, in para 3 of the order, observed that even notice by RPAD was not served upon the present appellant No.1 and then a public notice was served in the newspaper.

7. Considering the fact that appellant no.1 could not present himself before the Court as no notice was served upon him and as the matter pertains to custody of a child, it would be expedient to give one more opportunity to the appellant no.1 to defend the said application, however, the appellant no.1 also deserves to be mulct with cost.

8. In the result, I pass following order:

- i. The impugned order dated 08.08.2013, passed in Misc. Civil Application No. 06/2013 is quashed and set aside.
- ii. The appellant No.1 is given opportunity to defend the said application. The appellant no.1 shall appear before the District Judge, Amalner in Misc. Civil Application No. 06/2013 on 14.09.2015.
- iii. Within one month from the date of appearance, the appellant shall file his written statement and thereafter the District Judge shall decide the Misc. Application No.06/2013, afresh, on its own merits, in accordance with law by giving opportunity to the parties to adduce evidence, expeditiously, preferably within nine months from the date of appearance.
- iv. The appellant No.1 shall pay cost of Rs.5000/- to respondent No.1 on or before 14th of September, 2015.
- v. Appeal from Order accordingly stand disposed of.
- vi. Record and proceeding be sent back to the court below, immediately.

(S. V. GANGAPURWALA, J.)

JPC