

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FAMILY COURT APPEAL NO. 20 OF 2015
WITH
CIVIL APPLICATION NO. 16056 OF 2015
WITH
CIVIL APPLICATION NO. 3520 OF 2016**

Imran Khan S/o Ali Shah Khan,
Age: 32 years, Occ: Service,
R/o: Iqbal Nagar, Parbhani,
Tq. & Dist. Parbhani

...APPELLANT
(Original Petitioner)

versus

Sobiya Tabassum W/o Imran Khan,
Age: 27 years, Occu; Household,
R/o : C/o Mohd Ibrahim, Near Peer
Burhan Chowk, Galli No. 16, Peer Burhan
Nagar, Nanded, Tq. & Dist. Nanded

...RESPONDENT
(Original Respondent)

.....
Mr. G.R. Syed, Advocate for appellant
Mr. R.B. Narwade Patil, Advocate for respondent
.....

**CORAM : S. V. GANGAPURWALA AND
K.K. SONAWANE, JJ.**

DATED : 20th APRIL, 2016.

ORAL JUDGMENT : (Per : K.K. Sonawane, J.)

1. This appeal is directed against judgment and order dated 31st October, 2015, passed by learned Judge, Family Court, Nanded, in Petition No. D-03 of 2014, rebuffing the relief of custody of minor son, namely, "Umarkhan" claimed under section 25 of the Guardians and Wards Act, 1890 (for the sake of brevity hereinafter referred to as "Act of 1890").

2. It is not in dispute that parties to the proceeding are governed by Mohammedan Law. The appellant - original petitioner was married with respondent on 28-03-2010 as per the Muslim rites. Appellant was in service as Headmaster in the school at Manwat. He used to travel daily from the place of his residence at Parbhani to place of avocation at Manwat. After the marriage, respondent - wife joined company of husband for cohabitation. During wedlock, she begotten one male child on 14-03-2011 from the appellant - husband. It has been alleged on behalf of respondent - wife that since marriage she was being harassed and maltreated by her husband and in-laws on one or other pretext. There was marital discord in between the spouses and since delivery respondent - mother was residing separately with her minor son "Umarkhan" from appellant-husband. There were efforts for reconciliation in between the spouses. But, all efforts did not evoke result. At last appellant husband pronounced "Talaq" in presence of Quazi and witnesses. The copy of "Talaqnama" as well as cheque of Meher amount were sent to the respondent - wife, which she received it on 20-01-2012 through RPAD. Eventually, after "Talaq" marital relations in between appellant and respondent came to an end.

3. After divorce, in between spouses, appellant performed second marriage with one Nazia. She has also given birth to two children from appellant - husband. Respondent - estranged mother and her minor son started residing with her parents at Nanded. In the meanwhile, taking recourse of section 25 of the Act of 1890, the appellant-petitioner moved application for custody of minor son "Umarkhan."

Pending application, appellant carried out amendment and blamed the respondent that she has performed second marriage with one stranger Shaikh Javed. Therefore, she is disqualified for custody of minor son "Umarkhan".

4. In response to notice of the petition, respondent – wife appeared in the proceeding before Family Court, Nanded and vociferously opposed the contentions putforth on behalf of appellant. She denied all allegations and contended that since marriage while cohabiting at her matrimonial home, she was being maltreated and harassed by appellant – husband and her in-laws. She had also initiated proceedings under the provisions of Protection of Women from Domestic Violence Act, 2005 etc. The subsistence allowance was also granted for herself and minor son 'Umarkhan'. But, the appellant did not deposit any maintenance amount nor he had taken care of minor child "Umarkhan" since his birth. According to respondent, in view of provisions of Mohammedan Law, mother is entitled for custody of male child till he attained age of seven years. Respondent – wife admitted the circumstances that she had performed second marriage with Shaikh Javed. But, their marital relations became strained, which ultimately resulted into dissolution of marital tie. She had obtained divorce from second husband – Shaikh Javed and once again she started residing with her parents at Nanded. Therefore, no question arises for disqualification of the respondent on account of her second marriage. Hence, she requested to dismiss the petition.

5. In order to prove the claim, appellant – father examined himself vide (Exhibit-30). He has also adduced evidence of his mother Nasim Akhtar (Exhibit-39). He relied upon the various documents produced on record comprising divorce deed (Exhibit-33), marriage certificate (Exhibit-31), marriage certificate of respondent with Shaikh Javed (Exhibit-34) etc. In refutation, respondent examined herself vide (Exhibit-51). Respondent stated that she had performed second marriage with Shaikh Javed, but there were marital discord between the spouses. Therefore, she had taken divorce from him. According to respondent-mother, she is residing with her minor son "Umarkhan" at her parents' home. She is taking every care of son "Umarkhan" who is studying in the school. She has produced relevant documents of School Progress Card of her minor son as well as his medical prescription etc. on record.

6. Learned trial court appreciated the entire oral and documentary evidence adduced on record and arrived at the conclusion that in view of paramount consideration of welfare of child, it would be unjust and improper to deliver minor son 'Umarkhan' in the custody of the appellant - father. The learned trial court rendered findings that the appellant is not entitled for relief of custody claimed under section 25 of the Act of 1890 and rejected the petition by impugned judgment and order, which is agitated in this appeal.

7. We have heard learned Counsel Mr. Syed for appellant and Mr. Narwade, Patil appearing for respondent. We have also delved into oral and circumstantial evidence adduced on record. Admittedly

appellant filed application under section 25 of the Act of 1890, which would read as under:

“25. Title of guardian to custody of ward -

(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2)

(3)”

8. The words “may make an order” incorporated in aforesaid provision of section 25, itself demonstrate that enquiry should be held by the Court before passing any order for custody of the child. In the instant case, undisputedly the parties are governed by the provisions of Mohammedan Law. The appellant claimed custody of minor son “Umarkhan” being his natural guardian as father. But, the law contemplates that while determining issue of custody of minor child under section 25 of the Act mere status of father as natural guardian would not itself be significant for favourable order in the proceedings. But, welfare of the child would be the prime consideration to determine issue of his/her custody. It is settled rule of law that issue of custody of the child is not just like claim to property but it is a matter of trust for well-being of the child.

9. Now, turning to the factual aspects of the matter in hand, it is evident that minor child "Umarkhan" is born on 14-03-2011. Obviously, he is below age of seven years. The provisions of section 352 of the Mohammedan Law does not permit father for custody of male child until he attained age of seven years and in case of of female child until she attained puberty. The Section 352 from Mulla's Principles on Mohammedan Law, 19th edition would be reproduced as below:

***"352: Right of mother to custody of infant children-** The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues through she is divorced by the father of the child(e), unless she marries a second husband in which case the custody belongs to the father (f).*

10. Undisputedly, minor child "Umarkhan" is born on 14-03-2011 and he is below age of seven years. His mother i.e. respondent Sobiya Tabassum is entitled for custody being his guardian until he has completed age of seven years. Provisions of Section 354 of Mohammedan Law provides disqualification of mother to custody of the child on the ground of her remarriage with stranger. Section 354 of the Mohammedan Law contemplates as under :

"354: Females when disqualified for custody – A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -

- (1) *if she marries a person not related to the child within the prohibited degrees (Ss 260-261 e.g. a stranger(n), but the right revives on the dissolution of marriage by death or divorce (o);*
- (2)
- (3)
- (4) ”

11. It is worth to mention that principle propounded in sections 352 and 354 of the Mohammedan Law could not be read in isolation, but it should be conjointly considered with provisions of the Guardians and Wards Act, 1890, which vests discretion in the Court to issue requisite directions about custody for well beings of the ward.

12. Learned counsel Mr. Syed for appellant vehemently submitted that respondent - mother has performed second marriage with stranger Mr. Shaikh Javed, therefore, she is disqualified under section 354 of the Mohammedan Law for custody of minor son "Umarkhan". Moreover, he submitted that the appellant is employed as Headmaster in the school. He is also office bearers of the educational Institution. His other family members are in Government service. The appellant has higher social and economic status than the respondent. He is well capable to maintain the child in good and proper manner. It is essential to deliver the child in the custody of father to safeguard his welfare.

13. Per contra, learned counsel for respondent Mr. Narwade Patil, assailed that allegations of second marriage of respondent for custody of minor child is unsustainable and baseless. It is true that respondent

performed second marriage with one Shaikh Javed, but there was divorce between them following strained marital relations. The Second husband Shaikh Javed has given "Talaq" to respondent, and after divorce she accompanied with her minor son "Umarkhan" started residing with her parents at Nanded. Therefore, she would not be disqualified under section 354 of the Mohammedan Law. Learned counsel further explained the circumstances at the house of appellant. He asserted that there were two children of the appellant begotten from his second wife. Appellant used to attend the place of his service at Manwat daily by traveling from his residence at Parbhani. It would be difficult for the appellant to spare sufficient time to look after the child. The second wife Nazia Sultan of the appellant did not step into witness box for cross-examination to ascertain her conduct and demeanor to safeguard the welfare of child. According to learned counsel Mr. Narwade, Patil, respondent-mother would be the best guardian of minor son "Umarkhan". she was looking after the child since his birth. The School Progress Report of 'excellent' remark fortify the circumstances of welfare of child in the custody of mother. The minor son "Umarkhan" is habituated to the environment prevailing at the house of parents of respondent. The parents indulged in hotel business. They have good source of income. Therefore, learned counsel requested not to nod in favour of appellant.

14. It is not denied that respondent-mother performed second marriage with stranger Shaikh Javed. But, it has categorically stated that the second husband had given "Talaq" to respondent following

strain relations and after divorce she took shelter at the house of parents. Respondent-mother was cross-examined on behalf of appellant on the vital issue of second marriage. But, there was no arduous cross-examination on this issue sufficient to bring on record circumstances favourable to the appellant. In short, factum of second marriage would not render respondent - mother disqualified for custody of the child. It would be reiterated that welfare of the child is paramount consideration while dealing with the application for custody of minor child. It is explicit that Mohammedan Law has not taken any pedantic view to disqualify for the custody of child, at the very moment, she gets remarried. The principles of Mohammedan Law like other Personal Law would never be expected so harsh to ignore the welfare of minor child. It seems that principles of Mohammedan Law rests on practical experience based on consideration which are conducive to the proper growth of the child.

15. We have already mentioned that respondent-mother has been divorced by her second husband and she is residing with her parents. Therefore, provisions of section 354 of the Mohammedan Law has no application to hold respondent mother disqualified for custody of minor son 'Umarkhan". The question of treatment to child by step father would not arise in this case, as respondent mother has already obtained divorce from second husband. These facts were not put into controversy seriously on behalf of appellant. Moreover, School Progress Card and other relevant circumstances on record reflects that minor "Umarkhan" is safe and sound in the custody of mother being his

guardian. No doubt, that since birth in the year 2011, minor child "Umarkhan" is in the custody of mother. Now, he is near about four to five years old. The minor child of such four/five years old would feel psychologically more secure and safe in the company of mother rather than father. It cannot be ignored that no one can compete with mother in that respect. Therefore, we do not find it justifiable to cause disturbance to minor child "Umarkhan" for his custody.

16. It is an admitted fact that appellant performed another marriage and he has two children from his second wife Nazia. The appellant is residing with sister and old aged parents. Appellant used to travel daily from Parbhani to Manwat for attending employment. In such circumstances, it would be hard and difficult for the appellant to find out sufficient time to look after minor son 'Umarkhan". He also has obligation to take care of his other two children of second wife. Learned trial court has correctly appreciated the circumstances about old aged parents of appellant and paucity of time to give proper attention to son "Umarkhan". The absence of second wife of the appellant for cross-examination in the proceeding to ascertain her inclination to take care of the child also create serious flaw in the contention of the appellant. The rule of law prescribed that the Court must have regard to the welfare of the child which is paramount consideration while dealing with application for his/her custody.

17. Having regard to the facts of present case, there is no doubt that welfare of the minor child "Umarkhan" is safer with respondent-mother. The appellant - father used to travel from Parbhani to Manwat

for his employment and remained out of the house for most of the time of the day. It would be inappropriate leaving minor child "Umarkhan" to the care of second wife of the appellant instead of natural mother. Considering the four/five years age of minor "Umarkhan" certainly he is in need of love and affection of his natural mother.

18. In such circumstances, we do not prefer to cause interference in the impugned decree passed by the learned trial court. There is no substance in the appeal filed on behalf of the appellant for custody of minor son. Learned trial Court has correctly appreciated factual score in its proper perspective for paramount consideration of the welfare of child. Hence, the appeal being devoid of merit deserves to be dismissed. Accordingly, the appeal stands dismissed. No order as to costs.

19. In view of disposal of appeal, pending civil applications do not survive and stand disposed of accordingly.

Sd/-

[K. K. SONAWANE, J.]

Sd/-

[S. V. GANGAPURWALA, J.]

MTK
