

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 90 OF 2015
WITH CA/306/2015 IN FA/90/2015

BHALCHANDRA DASHRATH SARWADE
VERSUS
BHIMA LAHU SHITOLE

...
Advocate for Appellants : Mr. S.J. Salunke
Advocate for Respondent : Mr. N.K. Chaudhari
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CORAM : V. K. JADHAV, J.
DATED : 5th APRIL, 2017

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. Being aggrieved by the judgment and order dated 30.10.2014 passed by the learned District Judge-2, Beed, in Mic. Civil Application No. 374 of 2011, original respondent has preferred this appeal.
3. Brief facts giving rise to the present appeal are as follows:-
 - a) The present respondent/original applicant is the natural father of minor child Deepali. He had filed an application bearing Misc. civil application No. 374 of 2011 seeking custody of his minor daughter from the appellant-grand father. The mother of minor Deepali had

committed suicide at her matrimonial home and on the basis of the complaint filed by the appellant herein, crime No. 60 of 2011 came to be registered against the respondent herein for the offences punishable under Sections 498-A, 306, 323 r.w. 34 of I.P.C. However, the respondent herein came to be acquitted by the court in the said crime. However, during the period, when the respondent/father was behind the bars, minor Deepali remained with the appellant. It has been alleged that the present appellant has taken forcible custody of minor Deepali from respondent-father.

b) The appellant has strongly resisted the said application by filing written statement at Exh.13. It has been contended that the marriage of his daughter with the respondent/original applicant had taken place in the year 2009. His daughter was treated well for few days and thereafter subjected to cruelty on account of non fulfillment of demand of Rs.1,00,000/- for construction of house. The appellant could not fulfill the said demand. Even his daughter deceased Savita was subjected to cruelty on account of non fulfillment of said demand and on 11.9.2011, deceased Savita consumed poison in her matrimonial home and died on the same day. Since then the female child remained in the custody of appellant. The appellant is looking after minor Deepali with love and affection and he is also giving good treatment as well as education to her.

c) The respondent/father has adduced his oral and documentary evidence in support of his contentions and the appellant/original respondent has also examined himself. The respondent/father has also produced copy of the judgment of acquittal passed by the criminal court.

d) The learned District Judge-2, Beed, by its impugned judgment and order dated 30.10.2014 allowed the application and thereby directed the appellant to hand over the custody of minor Deepali to the respondent. Hence, this appeal.

4. Learned counsel for the appellant submits that the minor Deepali is in custody of the appellant since September, 2011 when she was 13 months old. At present, minor Deepali is six and half years old and is taking education in 1st standard. Learned counsel submits that the appellant has got three sons and out of them, two sons are residing at Surat to earn their livelihood. However, one son alongwith his wife and children are staying with him. Learned counsel submits that his son has three children. Minor Deepali grown up in the company of those children and now is fully accustomed to the atmosphere in the house of appellant. Dislocation of the child at this stage would affect the child mentally as well as physically. At the

time of deciding application by the learned District Judge, the respondent/father was not re-married. Thus, the learned District Judge has given weightage to the same. However, at present, admittedly, the respondent/father got re-married and he has wife with two children. The step mother would not take care of minor Deepali. The respondent/father would not be able to look after the child continuously and the child would be remained in the custody and under supervision of her step mother.

5. Learned counsel for the appellant submits that the respondent/father is natural guardian and ordinarily, under the provisions of Guardian and Wards Act, the natural guardian of the child has the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child.

6. Learned counsel for the appellant, in order to substantiate his contentions, placed reliance on the following two cases:-

- i. Smt. Anjali Kapoor vs. Rajiv Baijal, reported in AIR 2009 SC 2821
- ii. Muthuswami Chettiar and Anr vs. K.M. Chinna Muthuswami Moopnar, reported in A.I.R. 1935 Madras 195.

7. On the other hand, learned counsel for the respondent/father submits that the respondent/father is the natural guardian of minor Deepali and he is entitled for the custody of his minor daughter. The respondent/father came to be acquitted for the offences levelled against him in crime No. 60 of 2011. However, during the course of registration of crime and thereafter for some time, the respondent/father remained in the custody and as such, the appellant had taken minor Deepali with him from his house. Though the respondent/father got re-married, the respondent/father has filed affidavit of his wife before this Court and his wife has affirmed in her affidavit that she would take care of minor Deepali as if her own child. The appellant is at present more than 60 years old, his only one son is residing with him and other two sons are staying at Surat. The daughter in law of the appellant may take care of minor Deepali during the life time of appellant. She has got her own children and in future, she would not be able to look after minor Deepali. Minor Deepali is staying with the appellant since long and thus, when she was brought before the court, she had given her consent to stay with the appellant. The financial condition of the appellant is not sound. The appellant has only 3 acres of land and there is no other source of income for the family. On the other hand, the financial position of the respondent/father is sound and he has got near about 4 hectares of land. The appellant is not behind the welfare of the minor child

Deepali. The appellant had instituted civil suit claiming share in the property of the respondent/father in the name of minor Deepali. The respondent/father would take care of his child in future and the learned District Judge has rightly considered the same and accordingly allowed the application. No interference is required.

8. On going through the pleadings made in the application, written statement, evidence and the impugned judgment and order passed by learned District Judge, it appears that the learned District Judge was not influenced by the fact alone that the respondent/father was not remarried. It appears from the impugned judgment and order that the learned District Judge has given importance to the welfare of the child and accordingly passed the impugned order.

9. From the averments made in the application and the evidence recorded before the learned District Judge, it appears that, two sons of the appellant are staying at Surat and only one son is staying with him. It also appears that the appellant has only 3 acres of land and there is no other source of income to the family. It also appears that son of the appellant, who is staying with him, is married and he has got 3 children. Instead of considering the welfare of minor Deepali, the appellant has instituted a suit in the name of minor Deepali, claiming share in the property of respondent. In the backdrop of

financial condition of the appellant, the action of institution of suit in the name of minor Deepali indicates some different intention. Learned District Judge has rightly given weightage to the said aspect.

10. In case of ***Smt. Anjali Kapoor vs. Rajiv Bajjal (supra)*** relied upon by learned counsel for the appellant, the Supreme Court by referring the decision in the case of ***Muthuswami Moopanar reported in AIR 1935 Madras 195***, has observed that if a minor has for many years from a tender age lived with grand parents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fide of the petition by the father for their custody. Bearing these facts in mind, the Supreme Court in para 20 of the judgment has further observed the conduct of the respondent father. The Supreme Court has observed that the respondent/father has borrowed money from several persons and since he has meager income he may not be in a position to give conformable living for the child. In spite of notice issued to him, he has not appeared before the court personally or through his counsel, which shows his lack of concern in the matter. The Supreme Court has further observed that the respondent/father

got married for the second time and has a child too, and the minor child might have to be in the care of step mother, specially the father being a businessman, he has to be out of the house frequently on account of his business. In the facts of the said case, the Supreme Court thought it fit that the custody of the minor child be given to grand parents.

11. In the instant case, the respondent/father himself has filed an application before the learned District Judge seeking custody of minor child and he has shown his concern to look after the welfare of the child earnestly. On the other hand, the conduct of institution of suit in the name of minor child Deepali, claiming share in the property of the respondent/father is questionable. It indicates that the appellant with some ulterior motive has opposed the application of the respondent/father seeking custody of child.

12. Apart from this fact, it further appears that the appellant is at present more than 60 years of age. His wife must also be above the age of 55 years. His daughter-in-law has already three children. Under these circumstances, in my considered opinion, the respondent father would look after his daughter in future and he will take care of her education and also her marriage. In my opinion, this is the right stage if the custody of minor Deepali is given to

respondent/father. Minor Deepali, due to her tender age, is not in a position to give her consent and she is not likely to face any mental strain or depression.

13. It is true that ordinarily under the provisions of Guardian and Wards Act, natural guardian of the child has right to the custody of the child. However, as held by the Supreme Court in the case of ***Smt. Anjali Kapoor vs. Rajiv Bajjal (supra)***, the said right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. In the case in hand, the respondent/father has also filed affidavit of his wife. He has not suppressed the fact that he got remarried and having two children from his second wife.

14. In view of above, I find no fault in the judgment and order passed by the learned District Judge. Hence, I proceed to pass the following order:-

O R D E R

The first appeal is hereby dismissed. In the circumstances there shall be no order as to costs.

15. In view of disposal of first appeal, pending civil application is

disposed of.

16. At this stage, learned counsel for the appellant submits that minor child Deepali is staying with the appellant since 2011 and execution of this order may be stayed for a period of 8 weeks from today, as the appellant intends to challenge this order in the Supreme Court. Learned counsel for the respondent/father has opposed this prayer. Since the appellant intends to approach the Supreme Court and the fact that the minor child Deepali is staying with the appellant since September, 2011, the operation of this order shall be suspended for a period of 8 weeks from today.

(V. K. JADHAV, J.)

rlj/