

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

FIRST APPEAL NO. 322 OF 2017

Dr. Kshitij Yadavrao Dhumal,
age 41 years, occ. Asstt.Professor,
R/o Shahu Housing Society,
Vidyanagar, Karad, Tq. Karad,
District Satara ... Appellant

VERSUS

1] Rekha Kshitij Dhumal,
age 33 years, occ. Nil,

2] Utkarsh Kshitij Dhumal,
age 10 years, occ. Nil,
Under guardianship of motor
Respondent no.1
Both R/o C/o Smt. Shantabai
Namdeo Pawar, 51, Jiwhala Banglow,
Rajendra Nagar,
Behind Toyato Showroom,
Kedgaon, Tq. and
Dist.Ahmednagar ... Respondents

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Mr. G.V.Wani, advocate for the appellant
Mr. V.P.Latange, A.G.P for respondent no.1
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CORAM : K.L.WADANE, J.

**Reserved on : 22.8.2017
Pronouncement on : 31.8.2017**

J U D G M E N T :

The appellant presented this appeal
against the judgment and order, passed by the Ad

hoc District Judge-2, Ahmednagar in Miscellaneous Civil Application No. 62 of 2015.

2. The brief facts may be stated as follows.

The appellant was married to respondent no.1 on 21.5.2003. A son namely Utkarsh Respondent no.2 was born out of the wedlock on 2.10.2007. There arose certain differences in matrimonial relation between the appellant and respondent no.1, due to which respondent no.1 left company of appellant on 13.9.2012 along with respondent no.2.

3. The appellant had preferred petition for divorce bearing Hindu Marriage Petition No. 244 of 2013, which is decreed in favour of present appellant holding that respondent no.1 was responsible for the dispute in the matrimonial relation.

4. The relations between appellant and respondent no.1 were strained, however,

considering future of respondent no.2, appellant moved an application under Section 7 of the Guardians and Wards Act, 1980 bearing Miscellaneous Civil Application No. 62 of 2015 for the custody of minor respondent no.2 on the ground that the appellant and his family members are highly educated. The appellant himself has completed his Ph.D. and presently is working as Assistant Professor and is Vice Principal of the College at Waduj, Taluka Khatav, District Satara. So also, the father of appellant had also completed Ph.D. and was Professor at Venutai Chavan College, Karad. The mother of appellant was working as a School Teacher. Respondent no.1 also passed her B.Sc. B.Ed. after marriage at Karad and was working as Assistant Teacher at Karad.

5. In the Trial Court, both the parties have led their oral evidence and the learned District Judge was pleased to reject the application, however, has permitted the appellant to meet

respondent no.2 on 2nd Saturday and Sunday of every month in between 3.00 p.m. to 6.00 p.m. within one kilometer area of the house of respondent and has also permitted stay for four days during Diwali holidays and for 8 days during summer vacation at Ahmednagar city only.

6. I have heard the arguments of Mr. G.V.Wani, learned counsel for the appellant and Mr. V.P.Latange, learned counsel for the respondent. Mr. Wani, learned counsel referring to the evidence on record mentioned by the Trial Court in its judgment has argued that the appellant and his family members are highly educated and having sound financial condition appellant is intending to admit his son respondent no.2 in english medium school and in fact he was admitted in the english medium school, however, respondent no.1 along with respondent no.2 left the company of the appellant on 13.9.2012. Mr. Wani, learned counsel further argued that the educational facilities at Ahmednagar are not

better than the educational facilities available at Karad.

7. As against this, Mr. Latange, learned counsel for the respondent has argued that since 2012 respondent nos. 1 and 2 are residing at Ahmednagar and respondent no.2 is admitted in the semi english medium school at Ahmednagar. Now the education is free and from the amount of maintenance granted to respondent no.1 she can very well maintain and educate respondent no.2. Since respondent no.2 is residing with respondent no.1, respondent no.1 is taking all care for betterment and prospects of respondent no.2.

8. From the facts and reasons recorded in the petition, it appears that the appellant in his evidence has stated that he remains busy in his service and work and he has workload due to his Ph.D. He leaves his house early in the morning and returns at 4.00 p.m. Then the appellant has shown ignorance in respect of school of Utkarsh at Ahmednagar. He is not aware about the difficulties

to get admission in the said school. He has not gone to the said school. He is not aware about the quality provided in the said school. He is not aware about educational progress of his son in that school. The above said facts have come on record from the cross-examination of the appellant. From the same, it appears that the appellant, in fact, has no knowledge about the educational facilities available at the school at Ahmednagar. In absence of such details, it cannot be said that educational facilities available at Ahmednagar are not better than the educational facilities available at Karad. Further it has come on record that respondent no.1 is getting amount of Rs.10,000/- per month by way of maintenance.

9. I am of the opinion that since the total education is free of costs, respondent no.1 can very well maintain respondent no.2 from the amount of maintenance. Since respondent no.1 is not doing any job, she can concentrate on the

educational career of respondent no.2 and his future prospects. On the other hand, appellant appears to be busy in his job. Further, it has come on record that after the divorce the appellant is intending to perform his marriage. Therefore, if he has done so and if the custody of respondent no.2 is given to the appellant, then respondent no.2 has to stay with the step mother. On the other hand, respondent no.2 is residing with respondent no.1 since his birth and exclusively with respondent no.1 from the year 2012.

10. From the record, it appears that on 3.6.2017 matter was referred for mediation, however, mediation failed. On 8.8.2017 the minor was brought in this Court and I had occasion to have a dialogue with respondent no.2. I have taken him in confidence initially by asking some general questions and assessed his intelligence. Further by asking other questions initially I assessed the capability of respondent no.2 to

understand the questions and observed whether he is properly answering the questions or not. After such assessment, by taking him into confidence I inquired with respondent no.2 as to why he is not ready to go with father. Also I inquired as to why he is intending to reside with respondent no.1. After asking these questions respondent no.2 has answered all the questions properly and from that it is my assessment that respondent no.2 is not at all willing to reside with the petitioner.

11. Learned counsel Mr. Wani relied upon the observations in the case of **Mohan Kumar Rayana vs Komal Mohan Rayana**, reported in **2009 (2) Mh.L.J. 868** and has argued that the matter of custody of child cannot be looked on the basis of emotion. Mr. Wani, learned counsel further argued that since respondent no.2 is residing with respondent no.1, possibility of tutoring respondent no.2 cannot be ruled out. As already referred, I have also assessed from respondent no.2 whether the

answers given by respondent no.2 are based upon the prompting by respondent no.1, but I find that the answers given by respondent no.2 are but natural.

12. Considering the age of respondent no.2, the father is natural guardian, but his right to custody of minor is neither absolute nor is indefeasible one. Therefore, though father being natural guardian, has preferential right to custody of minor, but keeping in view the facts and circumstances and wishes of the child custody cannot be handed over to the father.

13. Looking to the liabilities of respondent no.1 and the amount of maintenance to the tune of Rs.10,000/-, I am of the opinion that respondent no.1 mother can take every care for the upliftment of respondent no.2 and she can very well provide the education to Respondent no.2.

14. In view of above and fact that presently respondent no.2 is taking education in the semi english school, it is not necessary to disturb the custody of minor respondent no.2.

15. From the reasons recorded by learned Trial Court, it appears that it has taken into consideration the evidence on record properly and has passed well reasoned order.

16. In view of above, I am of the opinion that there is no substance in the appeal, therefore, it is liable to be dismissed and accordingly it is dismissed with no order as to costs.

(K.L.WADANE, J.)

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