

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

FIRST APPEAL NO. 1705 OF 2016
WITH
CA/4903/2016 IN FA/1705/2016
WITH
CA/13109/2016 IN FA/1705/2016

TEJASHRI ASHOK AWACHAR AND OTHERS
VERSUS
ASHOK JAIRAM AWACHAR

...
Advocate for Appellants : Mr Mundhe Shrimant
Advocate for Respondents : Mr Bagal Suraj R.

...
CORAM : V.K. JADHAV, J.
Dated: February 09, 2017
...

PER COURT :-

1. Heard finally with the consent of the parties at admission stage.

2. Being aggrieved by the judgment and order dated 9.10.2015 passed by the District Judge-2, Hingoli in CMA No.18/2013, the original respondent no.1 alongwith her children preferred this appeal.

3. Brief facts, giving rise to the present appeal are as follows :-

Respondent is husband of appellant no.1 and

appellant nos. 2 and 3 borne to them out of their marital wedlock. However, after birth of appellant nos. 2 and 3, matrimonial dispute arises between the parties. Thus, civil litigation as well as criminal litigation are pending between the parties in different courts. Present respondent had approached to the District Court, Hingoli by filing C.M.A. no.18/2013 under section 25 of the Guardians and Wards Act, praying therein custody of the appellant nos. 2 and 3. The learned District Judge-2 Hingoli, by its impugned judgment and order dated 9.10.2015 allowed the petition as prayed for. Hence, this appeal.

4. Learned counsel for the appellants submits that, the learned District Judge has given reference to the compromise effected between the parties in RCA No.55/2011 and in terms of the said compromise decided the application and thereby given custody of the children to the present respondent without looking to the welfare of the child. The learned District Judge has not observed anything about welfare of the children and only on the basis of certain clause in the said

compromise, allowed the application as prayed. Learned counsel submits that, in the said compromise, wherein subject matter of said compromise is landed property, reference has been given that, the custody of the children would be given as per the compromise effected between the parties in the pending proceeding of CMA No.18/2013. Learned counsel submits that, in CMA 18/2013, no compromise had taken place between the appellant no.1 and respondent and only on the basis of said clause, in the compromise effected between the parties in the civil litigation, the learned District Judge has allowed the application in terms of its prayer clauses. Learned counsel submits that, entire approach of the learned District Judge is incorrect, improper and illegal.

5. Learned counsel for respondent submits that, there is specific clause in the compromise effected between the parties in the said civil litigation that the respondent would take care of his minor children and that custody of the children would be given to him as per the compromise that would be effected between

them in the proceeding which is subject matter of the present appeal. Learned counsel submits that, despite several opportunities were given to the appellant no.1, she failed to appear before the District Judge in the proceedings bearing CMA No. 18/2013 and she has failed to effect the compromise as agreed between the parties in the civil litigation, as aforesaid. Learned counsel submits that, there are serious allegations made against appellant no.1 wife supported by the documents and, if those allegations and documents are considered, then, it would be unsafe to grant custody of the children to her looking to the welfare of the children. Learned counsel in the alternate submits that, if, this court is inclined to remand the matter to the learned District Judge, then, the learned District Judge may be directed to expedite the disposal of the matter at the earliest keeping in mind the welfare of the children. Learned counsel submits that, at present custody of the children is with appellant no.1 and she is deliberately killing time with an intention to protract the proceeding.

6. On perusal of the impugned judgment and award, it appears that, there is no compromise effected between the parties in CMA No.18/2013. The learned District Judge has allowed the application as prayed by referring the compromise that has taken place between the parties in the civil litigation. On perusal of the compromise effected between the parties in the said RCA, it appears that, in paragraph no.2(c) of the compromise, reference is given that the parties would effect compromise in the pending CMA no.18/2013 and custody of the children shall be with the respondent father as per the compromise effected between them in the proceeding. Learned District Judge has not at all considered welfare of the children nor discussed anything on that and simply allowed the application on the basis of said compromise. Thus, this court left with no other alternative but to remand the matter to the learned District Court, Hingoli, with certain directions. Hence, following order.

O R D E R

- I. First Appeal is hereby partly allowed with no costs.

- II. The Judgment and order dated 9.10.2015 passed by the District Judge-2, Hingoli in CMA No.18/2013 is hereby quashed and set aside.
- III. CMA No.18/2013 is remanded to District Judge, Hingoli with following directions.
- a] Re-admit CMA No.18/2013 under its original number. The learned District Court shall decide the said CMA 18/2013 after giving an opportunity to lead the evidence and after hearing both the parties afresh in accordance with the provisions of law.
- IV] The District Judge Hingoli is also directed to dispose of CMA no.18/2013 as expeditiously as possible and preferably within a period of TWO MONTHS from the date of appearance of the parties before the District Court.
- V] The parties shall appear before the Court below on 20.2.2017 and cooperate the Court below for disposing the same.
- VI] In case, if, either of the parties does not appear before the Court below on the given date, the District Judge shall dispose of the matter within two months from the said date irrespective of the appearance of the parties.

VII] Appeal is accordingly disposed of.

VIII] Pending civil applications also disposed of.

IX] All points kept open.

(V.K. JADHAV, J.)

..

aaa/-