

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

FIRST APPEAL NO. 1562 OF 2017

APURVA VIVEK MALVE
VERSUS
VIVEK BHAGIRATH MALVE

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Advocate for Appellant : Mr. Hrishikesh V. Tungar.

Advocate for Respondent : Mr. Niteen V. Gaware.

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CORAM : **V. K. JADHAV, J.**
RESERVED ON : 02nd August, 2017
PRONOUNCED ON: 29th August, 2017.

ORDER :

. Heard finally with consent at admission stage.

2 Being aggrieved by the common order dated 14th March, 2017 passed by the Adhoc District Judge-2, Beed below Exhibits 1 and 15 in Miscellaneous Civil Application No.216 of 2016, the original Petitioner / wife has preferred this appeal.

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

- i) Applicant is the legally wedded wife of Respondent and their marriage was solemnized on 5th September, 2010 at village Loni, Taluka Shirur Kasar, District

Beed and their relationships as husband and wife is still subsisting. The Applicant also gave birth to one daughter namely Mahima aged 5 years and a son namely Mandar aged 4 years as on the date of filing of the application. After marriage, the Applicant was treated well for some time, but thereafter, subjected to ill-treatment on account of non-fulfillment of the unlawful demands. As per the case of the Applicant, on 2nd November, 2016, she was driven out from her matrimonial home by the Respondent and his family members. The Applicant then came to the house of her mother at Beed with her two small children. On 14th November, 2016, the Respondent and his relatives came to the house of Applicant's mother at Beed, abused the Applicant and her mother and subjected the Applicant to beating. The Respondent and his family members forcibly took away both the small children with them and went to village Chakan, Taluka Khed, District Pune. The Applicant had filed the complaint to City Police Station and on the basis of her complaint, N.C. also came to be registered.

On 17th November, 2016, the Applicant and her mother went to the house of Respondent / husband at village Chakan for bringing the small children. However, the Respondent and his family members beaten the Applicant and also given threats to her. The Applicant has also filed another complaint at Police Station Chakan and N.C. came to be registered on the basis of her complaint at Police Station Chakan. The Applicant has thereafter, filed an application before the Chief Judicial Magistrate, Beed under Section 97 of the Code of Criminal Procedure for search warrant. In response to the order passed by the 5th J.M.F.C. Court, Beed, the police of City Police Station, Beed produced the children Mahima and Mandar before the Court on 21st November, 2016. However, the learned Magistrate has given the custody of those children to the Respondent and directed the Respondent to produce the children before the Court on 23rd November, 2016. Though on 23rd November, 2016 the learned Magistrate has given the custody of the said children

to the Applicant till 25th November, 2016, however, on 25th November, 2016, the learned Magistrate has given the custody of those minor children to the Respondent. The Applicant has therefore, filed Miscellaneous Civil Application No.216 of 2016 under the provisions of Section 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as “the Act of 1890”) seeking the custody of the minor children.

- ii) The Respondent / husband has raised preliminary objection on the point of jurisdiction by filing the application Exhibit 15. It has been contended that since birth, the said children are residing in his house at Mednakarwadi, Chakan, Taluka Khed, District Pune and he is taking care of them and also of their education. It has also been contended that the relations between the Applicant and Respondent became strained on account of disorderly behaviour of the Applicant. The Applicant has developed some illicit sexual relations and the Applicant had quarreled with the Respondent and his family members and on 10th April, 2014 went to her parent's house at Beed

on her own. On 24th October, 2016, however, she came to the house of Respondent and after giving threats, returned to Beed. It has also been contended that the Respondent has issued a legal notice to the Applicant and also filed a petition bearing M.P. No.322 of 2016 before the Civil Judge Senior Division, Khed, Taluka Khed, District Pune for the decree of divorce. The said petition is still pending. It has also been contended that on 15th November, 2016, the Applicant had filed a false complaint against the Respondent at City Police Station, Beed and also filed another false complaint at Police Station Chakan. In both the complaints, the Applicant has admitted that her children are not in her custody since April 2016. She has also filed a false application under the provisions of Section 97 of the Code of Criminal Procedure before the Judicial Magistrate First Class, Beed. The learned Magistrate has rejected the said application on the ground that the children are not residing with her since six months. It has been further contended that since the

Applicant went to her parent's house at Beed, the children are in the custody of the Respondent. The Applicant has raised a false contention in the application about forcible removal of children from her custody at Beed with the sole purpose that her application should not be rejected for want of territorial jurisdiction. It has been contended that the application is not filed in tune with the provisions of Section 9 of the Act of 1890 and as such, the application is either liable to be rejected or that the application may be returned to the Applicant to be presented to the Court having jurisdiction to entertain the same.

- iii) The learned Adhoc District Judge-2, Beed has framed the preliminary issue to the effect that whether the Court has jurisdiction to try and decide the petition and after hearing the parties and on the basis of the documents produced before the Court, recorded the finding to the said preliminary issue in the negative and by impugned order dated 14th March, 2017 below Exhibit 15 allowed the application

and returned Miscellaneous Civil Application No.216 of 2016 to the Petitioner for presentation before the competent Court having the jurisdiction to try and decide the petition. Hence, this appeal.

4 The learned counsel for Appellant / wife submits that the proceedings under the provisions of Guardians and Wards Act, 1890 cannot be disposed of summarily and as such, the question of jurisdiction, if it is a mixed question of facts and law cannot be decided as a preliminary issue without recording the evidence. The learned counsel submits that in view of the provisions of Order XIV, Rule 2 of the Code of Civil Procedure, only the issue of law may be tried as a preliminary issue and that the issue of facts and mixed issue of law and facts cannot be decided as a preliminary issue. In the instant case, the facts are disputed and as such, the law can be applied only after the dispute of facts is resolved on consideration of evidence. The learned counsel submits that no evidence whatsoever was recorded by the Court below and without giving any opportunity to the Applicant to substantiate her contention about forcible removal of her children from her custody at Beed, the learned District Judge has recorded the finding on the preliminary issue on the basis of certain documents.

The learned District Judge has given weightage to certain admissions by referring the admissions given by the Applicant in the FIR and other proceedings. The learned counsel submits that an admission is relevant and it has to be proved before it becomes evidence. In order to attach weight to such an admission, the Court has to record the finding whether the admission is clear, unambiguous and is a relevant piece of evidence and secondly, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, it is sound that if a witness under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule. A mere proof of admission will be of no avail and cannot be utilized against a person given such an admission. The learned counsel submits that the impugned order is thus, liable to be quashed and set aside and the learned District Judge shall be directed to decide the application after holding the due inquiry in the matter.

5 The learned counsel for Appellant / wife in order to substantiate his contentions placed his reliance on the following cases:

- a) **Pradeep Vs. Mamta**, decided by the Delhi High Court on 16th March, 2004 in W.P. (C) No.8186 of 2003 (Coram: Manmohan Sarin J.)
- b) **Antu Mahton Vs. Ramraj Singh**, decided by the Patna High Court on 24th November, 1955 in Civil Revn. No.771 of 1954 (Coram: R. K. Chaudhary J.)
- c) **Maria Beatriz De Souza Vs. Agnelo John Bosco Savio Fernandes**, decided by this Court on 17th July, 2014 in Writ Petition No.383 of 2012 (Coram: U. V. Bakre J.)
- d) **Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (dead) By LRs. and another**, reported in, **AIR 1977 Supreme Court 1712.**

6 The learned counsel for Respondent / husband submits that in terms of the provisions of Section 9, Sub-Section (1) of the Act of 1890, the application with respect to the guardianship of the person of minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. The learned counsel submits that the minor children are residing with the Respondent / husband since long and the Appellant / wife left her matrimonial house on her own. She is residing at her mother's house at Beed. The minor children are residing at Chakan with the Respondent / husband. The

minor children are also taking education in the school at Chakan. The Appellant should have filed her petition for custody of minor children at the District Court where the minors ordinarily reside. The learned counsel submits that the Appellant / wife has initiated the proceedings under Section 97 of the Code of Criminal Procedure before the Magistrate at Beed and in those proceedings, the learned Magistrate has recorded that the Appellant / wife has admitted before the Court that she has not seen her minor children since last six months. On perusal of the certified copy of FIR dated 23rd October, 2016, it appears that the Appellant / wife has admitted in the FIR itself that her minor children are residing with the Respondent / husband at Chakan since April 2016. Thus, the above admission of the Appellant / wife herself negatives her story about forcible removal of minor children from her custody at Beed. The learned counsel submits that the learned District Judge, Beed has therefore, rightly allowed the application Exhibit 15 and returned Miscellaneous Civil Application No.216 of 2016 to the Appellant / wife for presentation before the competent Court having the jurisdiction to try and decide the petition. The learned counsel submits that in terms of the provisions of Section 9 Sub-Section (1) of the Act of 1890, the District Court in whose jurisdiction the minor ordinarily resides, has a jurisdiction to entertain, try and

dispose of the issue concerning the guardianship. The learned counsel submits that the Act of 1890 is a self sufficient Act.

7 The learned counsel for Respondent / husband in order to substantiate his contentions placed his reliance on the following cases:

- a) **K. Vidyasagar Balsubramanyam Pillai Vs. Shoba Vidyasagar Pillai**, reported in, **2013 (7) Bom.C.R. 928**,
- b) **Susmitha Mohan Vs. Rajesh**, decided by the Kerala High Court on 31st March, 2005 (Coram: Pius C. Kuriakose, J.) : (2005 (3) KLT 88),
- c) **Arunish Sood Vs. Kumar Sood & another**, decided by the Delhi High Court on 26th July, 2011 in CM (M) No.1530 of 2009 (Coram: Ms. Justice Indermeet Kaur.)

8 It appears from the impugned order that the learned District Judge has decided the application by framing the preliminary issue on the point of jurisdiction and accordingly, returned the application to the Appellant / wife for presentation before the

competent Court having jurisdiction to try and decide the petition. It also appears from the contents of the application bearing Miscellaneous Civil Application No.216 of 2016 that the Applicant / wife has approached the District Court with a specific pleading that on 14th November, 2016, the Respondent / husband and his relatives came to the house of Applicant's mother at Beed, subjected to Applicant and her mother abuses, beating and forcibly took away the small children from her custody. The Respondent / husband has denied the said incident. It is the contention of the Respondent / husband that the Applicant / wife has left the house on her own leaving the children in his custody and since then the minor children are in his custody and he is taking care of them and also of their education. The Respondent / husband has strongly placed his reliance on certain admissions given by the Applicant / wife before the Court in the proceedings under Section 97 of the Code of Criminal Procedure and also in the FIR date 23rd October, 2016 lodged at Police Station Chakan.

9 In the backdrop of the above controversy, the provisions of Section 9 of the Act of 1890 are necessary to be reproduced hereinbelow:

“9. Court having jurisdiction to entertain application.—

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.”

10 The provisions of Section 9(1) of the Act of 1890 unambiguously lays down pre-condition for assumption of the jurisdiction of the Court to try the matter is that the minor must be ordinarily resides within its local jurisdiction. This is a question of fact to be determined by the Court. In terms of the provisions of Order XIV, Rule 2 of the Code of Civil Procedure, when determination of issue

requires evidence, the issue cannot be decided as a preliminary issue. Only the issue of law may be tried as a preliminary issue and the issue of facts and mixed issue of law and facts cannot be decided as a preliminary issue. In the instant case, the facts have been disputed and as such, the law can be applied only after the disputes of facts are resolved on consideration of evidence.

11 In the case of *Maria Beatriz De Souza Vs. Agnelo John Bosco Savio Fernandes* (supra) relied upon by the learned counsel for Appellant, in para 15 of the judgment, this Court has made the following observations:

“15 In the case of “Ruchi Majoo” (supra), the appellant-mother had filed the petition for custody of minor child under the Guardians and Wards Act, 1890, in the Court at Delhi alleging that the minor was, on the date of the presentation of the petition for custody, ordinarily residing at New Delhi. Section 9(1) of the Guardians and Wards Act provides that if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. The Hon'ble Supreme Court has observed that the solitary test for determining the jurisdiction of the Court under section 9 of the Guardians and Wards Act is the “ordinary residence” of the minor. It is observed that whether the minor is ordinarily

residing at a given place is primarily a question of intention which in turn is a question of fact and it may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. In the circumstances above, the finding of the Trial Court that certainly a triable issue of the domicile of the petitioner as well as of the minor child Graca arises in the matter and which needs investigation by way of enquiry, and that the Court cannot throw the petition at the threshold, was, in my considered view, a correct finding. However, in spite of arriving at such a finding and instead of directing that the question of jurisdiction shall be decided on merits after due enquiry, the Trial Court dismissed the preliminary objections of the respondent at the threshold and held that it had jurisdiction to entertain and decide the matter of minor's custody. The Appellate Court has overlooked the fact that the question of jurisdiction was a mixed question of law and facts which required enquiry for determination. It may be true that the respondent is the British national and the Child had British passport, the validity of which has expired. It may also be true that there is: -NHS medical card for the petitioner, issued on 11/01/2008, at the address "14 Alexandra Crescent Bromley Kent"; Tax Credit Awards by HM Revenue & Customs for her at the same address; Child Trust Fund, etc. But all the above things may not be sufficient for determination of the domicile of the parties and more particularly of the child. It

should be kept in mind that what has been produced on record by the respondent are the mere copies of the documents and not certified copies thereof. In my view, the impugned order of the Appellate Court as well as the order of the Trial Court is required to be set aside with a direction to the Trial Court that the question of jurisdiction shall be decided on merits along with the question of custody of the minor, after recording due evidence of the parties.”

12 It is thus clear that the question of jurisdiction of the Trial Court, raised by the Respondent in the preliminary objection and consequential question of what is in the best interest and welfare of the child and who is best suited for the custody of the minor child, cannot be decided without recording the evidence.

13 In the case of *Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (dead) By LRs. and another* (supra) relied upon by the learned counsel for Appellant, in para 16 of the judgment, the Supreme Court has made the following observations:

“16. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the Indian Evidence Act that 'admission is not conclusive proof' are to be considered in

regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity if the document are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule" (see *Bal Gangadhar Tilak v. Shrinivas Pandit*, 42 Ind App 135 at p.147) :(AIR 1915 PC 7 at p.11)). The Judicial Committee in that case said, "it has to be observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed". The general principle is that before any person is to be faced with any statement he should be given an opportunity to see that statement and to answer the same. The specific statutory provision is contained in Section 145 of the Indian Evidence Act that "A witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him". Therefore, a mere proof of admission, after the person whose admission it is

alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him.”

14 In the light of the ratio laid down by the Supreme Court as above, it is for the District Judge to consider and weigh the so-called admissions given by the Appellant / wife only after recording the evidence and after giving an opportunity to the Appellant / wife to explain those admissions. The learned counsel for Respondent / husband has placed reliance on the cases as mentioned above, however, in those cases, the question of framing of preliminary point to decide the issue of jurisdiction is not involved.

15 In view of the above, the Trial Court will have to conduct a due inquiry for determination of the questions raised by both the sides and record the findings on all the issues as far as possible. After due inquiry, if the learned District Judge comes to the conclusion that it has no jurisdiction to entertain the petition seeking custody of the children then the learned District Judge shall not pass any order regarding the custody of the children and may pass the order either dismissing the proceedings or returning the application to the Applicant for representation before the competent Court to entertain the same. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is hereby partly allowed.
- II. The impugned common order dated 14th March, 2017 passed by Adhoc District Judge-2, Beed below Exhibits 1 and 15 in Miscellaneous Civil Application No.216 of 2016, is hereby quashed and set aside.
- III. Miscellaneous Civil Application No.216 of 2016 is restored to its original number.
- IV. Learned District Judge shall dispose of Miscellaneous Civil Application No.216 of 2016 in accordance with law.
- V. All the contentions of the parties are kept open.
- VI. The parties shall appear before the District Judge on 13th September, 2017 and the District Judge shall dispose of the application as expeditiously as possible preferably within a period of six months from the date of appearance of the parties.
- VII. The appeal is accordingly disposed of.

[V. K. JADHAV, J.]