

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1437 OF 2017
WITH CA/6242/2017 IN FA/1437/2017

GAURI MILIND AHER
VERSUS
MILIND BALASAHEB AHER

...
Advocate for Appellant : Mr. R.V. Gore
Advocate for Respondent : Mr. Sandeep Gorde Patil
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CORAM : V. K. JADHAV, J.
DATED : 25th JULY, 2017

PER COURT:-

1. Being aggrieved by the judgment and order dated 16.03.2017 passed by the District Judge-2, Kopargaon in Misc. civil application No. 25 of 2016 the original applicant has preferred this appeal.

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

a) The appellant is the wife of respondent. Their marriage was solemnized on 18.3.2012 as per Hindu rites and rituals, at Shrirampur, District Ahmednagar. After the marriage, the appellant was treated well by the respondent and his family members for two months and thereafter she was subjected to ill-treatment on various counts. The respondent is in habit of consuming liquor and he used to abuse and assault the appellant under the influence of liquor. It

has also been alleged that the respondent husband used to suspect her character. The appellant became pregnant but the respondent started making allegations that he is not the father of the child. On 14.4.2014 the appellant had delivered a baby girl. Thereafter, also respondent and his family members continued with the said ill-treatment. On 12.3.2015, respondent assaulted the appellant and drove her out of matrimonial home. Because of ill-treatment, from the month of September, 2015 the appellant came to Aurangabad and started residing in rented house. It has been further alleged that on 24.03.2015 the respondent and his family members came at the appellant's parental home at Tapargaon, Tq Kannad, District Aurangabad and forcibly taken custody of daughter Mayuri. Thereupon, the appellant lodged a complaint with Kannad police station vide NC No. 1545 of 2015 and also filed a Criminal Misc. application No. 131 of 2015 against the respondent under the provisions of Section 97 of Cr.P.C. before J.M.F.C. Kannad. However, the appellant has withdrawn the said application by filing pursis on 2.6.2015, since the respondent had assured her to hand over the custody of daughter Mayuri. However, after withdrawal of the said application, the respondent has not fulfilled his promise.

b) The respondent has resisted the application filed by the appellant, by filing his say and denied all the allegations of ill-

treatment and cruelty made in the application. It has been contended that the appellant has developed illicit relations with Ankush Tupe and Balu Tupe. It has been denied that respondent has forcibly taken the custody of Mayuri and on the other hand, Mayuri is in his custody since she was 10 months old. The appellant is in habit of filing frivolous applications against the respondent. It has also been contended that the appellant herself delivered the custody of Mayuri to him.

c) Both the parties led their oral and documentary evidence in support of their contentions. Learned District Judge-2, Kopergaon by its impugned judgment and order dated 16.03.2017 rejected the application. Hence, this appeal.

3. Learned counsel for the appellant-original applicant submits that daughter Mayuri is 3 years old. Learned District Judge in para 7 of the impugned judgment and order has observed that Mayuri was called in his chamber and she found to be very familiar with her paternal aunt. Even she called her paternal aunt as "Mummy". Mayuri is also calling her real mother i.e. appellant-original applicant to be "Aai". Learned District Judge has specifically observed that Mayuri was feeling herself comfortable with her real mother. Even she played with her in the chamber. Learned District Judge has put

specific question to Mayuri as to whether she would like to go along with her real mother and she answered in affirmative and when the learned Judge asked her as to whether she wanted to go along with her real father and she answered in negative. Thus, choice of Mayuri is her real mother and learned District Judge has repeatedly observed that Mayuri was feeling comfortable with her real mother. However, learned District Judge, under the pretext of welfare of minor, rejected the application. The learned District Judge has observed that the applicant is residing alone at Aurangabad in rental premises and as such there is nobody in the family to look after the minor when the appellant would be attending her job.

4. Learned counsel for the respondent submits that though the appellant has made reckless allegations against the respondent, there are no allegations that the respondent is not taking care of his daughter Mayuri. Mayuri is feeling comfortable with her paternal aunt and even calling her as "Mummy". The appellant is residing alone at Aurangabad and her parents are residing at village Tapargaon, Tq. Kannad, which is at a distance of 40 kilometers from Aurangabad. Thus, there is nobody residing with the appellant at Aurangabad to take care of Mayuri during her absence. On the other hand, the parents of the respondent as well as real sister of the respondent, to whom minor Mayuri used to call as "Mummy", are residing with

Mayuri at Loni. Learned counsel submits that the welfare of the child is paramount consideration. The learned District Judge has therefore, rightly rejected the application. There is no substance in the appeal and thus the appeal is liable to be dismissed.

5. Learned counsel for the respondent, in order to substantiate his contentions, placed reliance on the following judgments:-

- i) Sheila B. Das vs. P.R. Sugasree, reported in AIR 2006 SC 1343
- ii) Nil Ratan Kundu vs. Abhijit Kundu, reported in LEX (SC) 2008 8 152
- iii) Anjali Kapoor vs. Rajiv Baijal, reported in LEX (SC) 2009 4 132
- iv) Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam, reported in 2010 (10) SCC 314
- v) Vishnu and Ors. vs. Jaya, reported in AIR 2010SC 2092
- vi) Gaytri Bajaj vs. Jiten Bhalla, reported in LEX (SC) 2012 10 20.

6. It appears that the appellant and the respondent have made reckless allegations against each other. There is no need to go into

the merits of those allegations, at this stage. The minor Mayuri is about 3 and ½ years old. She may not be in a position to make intelligent preference which may assist the Court to adopt a particular course for the welfare of the child. However, the learned District Judge in para 7 of the impugned judgment has observed that Mayuri was feeling comfortable with her real mother and though she is a girl of tender age, expressed her desire to go alongwith her mother (appellant) and not with her father (respondent). It also appears that minor Mayuri is missing her real mother and as such, she is addressing her paternal aunt as “Mummy”.

7. Upon careful perusal the judgments relied upon by learned counsel for the respondent, it appears that in all the cases, the welfare of the child is considered as paramount consideration. The better financial resources of either of the parents and their love for the child are also relevant consideration. Heavy duty is cast on the court to exercise judicial discretion in the background of the relevant facts and circumstances, bearing in mind the welfare of the child as paramount consideration. In some of the cases, the Court has undertaken exercise to balance the emotional confrontation of the parents of the minor child and the welfare of the minor. In most of the cases, desire of the minor child is also considered. It is thus clear that there cannot be a strait-jacket formula to decide the issue about

custody of minor child and the welfare of the child would be the paramount consideration and the same is depending upon the facts and circumstances of each and every case.

8. In the instant case, the welfare of Mayuri is not required to be considered on other facts, as considered by the court below, but taking into consideration the age of Mayuri, her interest will be best served if she remains with her real mother i.e. the appellant. In my considered opinion, the tender age of the child Mayuri would be the strong circumstance to grant her custody to the appellant.

9. In view of above discussion, the impugned judgment and order passed by the learned District Judge-2, Kopargaon is liable to be quashed and set aside. Hence, I proceed to pass the following order:-

O R D E R

- I. The appeal is hereby allowed.
- II. The judgment and order dated 16.03.2017 passed by the District Judge-2, Kopargaon in Misc. civil application No. 25 of 2016 is hereby quashed and set aside.

III. The Misc. civil application No. 25 of 2016 is hereby allowed and it is directed that the custody of minor child Mayuri shall be given to the appellant Gauri s/o Milind Aher.

10. At this stage, learned counsel for the respondent prays for stay to this order for a period of four weeks so as to enable him to approach the Supreme Court. However, considering the age of the child, I am not inclined to grant stay. Request stands refused.

11. Pending civil application is also disposed of.

(V. K. JADHAV, J.)

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