

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

FIRST APPEAL NO.626 OF 2019

Mohd. Azeemoddin s/o Mohd. Hamidoddin,
Age 52 yrs., Occ. Business,
R/o House No.4-11-43, Azam Colony,
Roshan Gate, Aurangabad.

... **Appellant.**

... **Versus** ...

- 1 The State of Maharashtra
- 2 Mumtaz Khatib w/o Mazid Khatib,
Age 63 yrs., Occ. Household,
R/o Sharif Colony (near Urdu School),
Roshan Masjid, Aurangabad.

... **Respondents.**

...

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for the appellant

Mr. S.P. Deshmukh, AGP for the respondent No.1

Mr. Syed Javed Kazi, Advocate for the respondent No.2

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 27th JULY, 2019

PRONOUNCED ON : 02nd AUGUST, 2019

JUDGMENT :

- 1 Present appeal has been filed by the aggrieved party challenging

the Judgment and order dated 02.09.2016 passed by learned Adhoc District Judge-3, Aurangabad in M.A.R.J.I. No.160/2016, thereby appointing the present respondent No.2 as guardian of the children of present appellant.

2 The factual matrix leading to the appeal are, that the present respondent No.2 had filed the said proceedings under Section 7 of the Guardian and Wards Act, 1890 for appointment of guardian of person and property of two children, who are admittedly of the present appellant and the sister of present respondent No.2. Deceased Qazi Shameem Begum was the real sister of present respondent No.2 (hereinafter referred as “applicant”). At the time of petition, which was filed on 18.04.2016, minor son and daughter who appeared to be the twins, were aged 13. Present appellant is facing charge of murder of his wife Shameem. Shameem had purchased house by registered sale deed on 20.01.2005 in Azam Colony, Roshan Gate, Aurangabad. She had also invested certain amounts in fixed deposits in ADCC, Bombay Mercantile City Bank and Post Office, as she was a teacher. Her heirs were to get benefits of her service. It was stated in the application that since the father i.e. present appellant had murdered his wife, the wards are being maintained by the applicant, who is their aunt. It was stated that the present appellant had evil eye over the property of the deceased and he had extramarital relation. It is stated that since he is a murderer, he is

disqualified from inheritance from the estate of the deceased under Section 8 (Para 8 Chapter 22) Of Mohammedan Law and under those circumstances she prayed that she be appointed as guardian.

3 It appears from the record that public notice was issued in daily newspaper Punya-Nagari and nobody objected to the same and thereafter taking into consideration the evidence, that was produced, the learned Adhoc District Judge-3, Aurangabad allowed the application. The applicant was appointed as guardian of the wards as well as of movable and immovable properties of the wards.

4 The above said order is challenged by the present appellant, on the ground, that he was not made a party to the proceeding intentionally. Further, the learned Adhoc District Judge-3 had no jurisdiction to entertain the said application, since the Family Court is established at Aurangabad. In view of the establishment of the Family Court in Aurangabad under Family Courts Act, 1984, the petition under Section 11 of the Guardians and Wards Act, 1890 ought not to have been entertained. Since he was not made a party to the proceedings, there was no question of service of summons or notice to him. It is also submitted that the learned Adhoc District Judge-3 misconstrued that the appellant is disqualified from inheritance. He is not

yet convicted for the offence. Only upon the conviction that could have been a ground for disqualification. Till the offence is proved against him, he is presumed to be innocent. He being the natural guardian of his son and daughter, he could not be removed from his guardianship behind his back. He ought to have been given an opportunity to explain the circumstances alleged to be against him.

5 Heard learned Advocate Mr. Shaikh Mazhar A. Jahagirdar for appellant, learned AGP for respondent No.1 and learned Advocate Mr. S.J. Kazi for respondent No.2.

6 It has been vehemently submitted on behalf of the appellant that the learned Adhoc District Judge-3 has no jurisdiction to entertain the said application, in view of the fact that the Family Court has been established in Aurangabad, in view of Family Courts Act, 1984. He relied on the decision in **Girish J. Bobade vs. Ajay Thakur and others, 2006 (2) Mh.L.J., 702,** wherein this Court at Principal Seat after taking into consideration the Full Bench decision of this Court in **Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff, AIR 2000 BOM 356**, held that -

“The judgment of the Full Bench leaves no room for doubt that the High Court must be considered as a District Court for the

purposes of the Family Courts Act and since the Family Courts have been established in the city of Mumbai, a Guardianship Petition for the custody or access to any minor would lie in the Family Court. The Guardians and Wards Act was enacted in 1890 and the High Court exercising its Ordinary Original Civil Jurisdiction is considered a District Court under that Act. The High Court's jurisdiction has been ousted in the light of the provisions of the Family Court Act in case of guardianship proceedings instituted by a relative of a minor for guardianship of the minor's person. Such a proceeding clearly falls within the purview of Section 7 of the Family Courts Act. Therefore, only the Family Court would have jurisdiction in view of the provisions of Section 20, By virtue of Section 20, the Family Courts Act has an overriding effect over any other law. However, the High Court will continue to exercise its Ordinary Original Civil Jurisdiction in respect of petitions relating to the guardianship of the property of a minor.”

In clear words, it is stated, “in my opinion, therefore, a Guardianship Petition seeking guardianship of the person of a minor filed by either the parents or any relative of a minor would lie before the Family Court, irrespective of whether there is a matrimonial dispute pending before that Court”. Therefore, the petition which was filed before the High Court was then returned to the petitioner for presenting the same before the appropriate Court.

7 He further submitted that the appellant has been granted bail on 08.09.2016 by this Court. He has produced the said order. Thereafter by filing application No.7306 of 2019, certain more documents have tried to be produced on record, in the form of First Information Report filed against him and further order in Criminal Application No.2368 of 2018, whereby he was directed to give an undertaking that he will not enter the house, which is standing in the name of his deceased wife. He, therefore, prayed for quashing the impugned order by learned Adhoc District Judge-3, Aurangabad.

8 Per contra, the learned Advocate appearing for respondent No.2 supported the reasons given by the learned Adhoc District Judge-3 and submitted that in Rule 223 of Law of Succession and Inheritance of Chapter 18 of Mohammedan Law, an heir is dis-entitled to inherit the estate of the deceased, if he/she causes the death of the deceased intentionally or accidentally. Here, the present appellant is facing charge for the murder of his wife and therefore, he is disqualified. He also relied on the decision in **Minoti vs. Sushil Mohansingh Malik and another, AIR 1982 BOM 68**, wherein disqualification of a person for murder was considered. He also submitted that the paramount consideration of the child was considered by the concerned Court.

9 The important point to be noted herein is that the learned Adhoc District Judge-3, Aurangabad as it appears did not consider, whether he had the jurisdiction to try the application or not and secondly, whether all the parties who are needed have been made party to the proceeding are made or not. When the contents of the application itself showed that the appellant, who is the father of the wards is alive, may be in jail, without making him a party to the proceeding, the Court could not have proceeded with the matter. Further, at that time there was only a charge of murder against the appellant, the evidence is yet to be adduced and offence yet to be proved. Under such circumstance, opportunity ought to have been given to the appellant to put forth his say. In fact, when the wards were 13 years of age, the father was the guardian and when by such application, since the applicant intended to remove the appellant from the position of guardian of the wards, then definitely an opportunity to contest the matter ought to have been given by making him as a party to the proceeding. It appears that whatever has been stated in application has been taken as gospel truth, when in fact, the offence is yet to be proved against the appellant. The difference in “charge of murder” and “proof of murder” or in other words, “conviction for murder” ought to have been considered by the learned Adhoc District Judge-3. It is to be noted that the learned Adhoc District Judge-3 after perusing the copy of the First Information Report, order of rejection of bail application earlier

passed, went on to conclude that under Mohammedan Law he is disqualified. Without giving an opportunity to him, such observations ought not to have been made by the learned Adhoc District Judge-3. It shows total lack of mind on his part. There was no question of giving paramount consideration of children in this case, as the application was not for immediate custody of children. Even if, that consideration deserves to be given, it cannot be behind the back of existing guardian as per personal law.

10 It will not be appropriate to go into all the objections raised by the appellant in detail, since the matter deserves remand on the ground that he was not made a party to the proceeding and the point of jurisdiction itself is challenged. Now, the children are aged 17. Under such circumstance, directions are required to be given to decide the matter expeditiously, further, when the appointment of guardianship is for person as well as property then appropriate age of the minor requires to be considered. With these observations, following order is passed.

ORDER

1 The First Appeal is hereby partly allowed.

2 The order passed in M.A.R.J.I. No.160/2016 by learned Adhoc District Judge-3, Aurangabad dated 02.09.2016 is hereby set aside.

3 The matter is remanded to the concerned Court with direction to add the present appellant as party respondent and give him an opportunity to contest the matter on all counts.

4 Needless to say that, taking into consideration the age of the children the concerned Court should expedite the matter and decide the application as early as possible, by even taking it on day to day basis, within a period of two months.

5 Record and Proceedings be sent back to the concerned Court, immediately.

6 Both the parties are directed to appear before the Court on 07.08.2019.

(Smt. Vibha Kankanwadi, J.)

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