

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

**991 FIRST APPEAL NO.463 OF 2018
WITH CA/15313/2017 IN FA/463/2018**

Sadashiv s/o Gopal Kajle
Age: 61 years, Occ.: Fishing,
R/o. Bhuie Galli, Beed,
Tq. & Dist.Beed.

..Appellant
(Orig. Respondent)

Versus

Shivkanya w/o Raju Kajle
Age: 31, Occu.: Household,
R/o. Bhuie Galli, At present -
Kumbharwada, Beed,
Tq. & Dist.Beed.

..Respondent
(Orig. Applicant)

...
Advocate for Appellant : Shri S.P. Katneshwarkar
Advocate for Respondent : Shri N.P.Bangar

...
CORAM : P.R.BORA, J.
DATE: 25th January, 2019

ORAL JUDGMENT:-

1 The appellant has filed the present appeal against the order passed by the District Judge-5, Beed in Miscellaneous Civil Application No.185 of 2016 on 24.08.2017.

2 The aforesaid Miscellaneous Civil Application was preferred by the present respondent under the provisions of Guardians and Wards Act, 1890, seeking custody of minor Ganesh. Present appellant is the grandfather of minor Ganesh, whereas

respondent is the mother of minor Ganesh. Father of minor Ganesh suffered natural death on 05.05.2015. After his death, the present respondent alongwith her children went to reside at her parental house and at present also she is residing with her parents. It was the contention of the present respondent before the Trial Court that minor Ganesh was taken in custody by the present appellant against the will of the said minor. It was her further contention that the present appellant was incapable of taking appropriate care of minor Ganesh. It was also her contention that minor Ganesh is being engaged by the present appellant in the business of fishing and is not allowed to pursue his education as it could have been pursued by him had he been with the respondent. It was also alleged that since the present appellant is requiring Ganesh to accompany him in the business of fishing, his academic career is spoiled and he is not likely to complete his further education if he remains with his grandfather. The contentions so raised were disputed and denied by the present appellant by filing his say to the application filed by the present respondent in the Trial Court. In support of her contentions, the respondent testified before the Trial Court, but was not cross-examined by the present appellant. The present appellant also did not adduce any evidence to substantiate his contentions.

3 The learned District Judge, after having assessed the evidence brought before it, allowed the application filed by the respondent and directed the present appellant to handover the custody of minor Ganesh to his mother i.e. present respondent. Aggrieved by the order so passed, the appellant has preferred the present appeal.

4 Shri S.P.Katneshwarkar, learned Counsel appearing for the present appellant submitted that since the appellant failed in cross-examining the respondent and also failed in adducing evidence from his side, the real facts have not come on record and the allegations as were made by the present respondent remain un-rebutted. The learned Counsel submitted that, that is the reason that the Trial Court has passed the impugned order directing the present appellant to handover the custody of minor Ganesh to present respondent. The learned Counsel submitted that having regard to the age of minor Ganesh, the Trial Court was expected to interact the child so as to ascertain the real wishes of minor Ganesh and thereafter, the order must have been passed by the said Court. The learned Counsel submitted that since such course has not been followed and the present order has been passed, it has caused prejudice not only to the present appellant but to minor Ganesh also. The learned

Counsel submitted that all the allegations were denied by the present appellant in his written say, however, he could not adduce evidence on his behalf and the contentions so raised have thus remain unestablished.

5 The learned Counsel further submitted that at present also minor Ganesh is happily residing with the present appellant and is pursuing his education in the same manner as his brothers and sisters are pursuing by residing with their mother. The learned Counsel in the circumstances, prayed for remitting the matter to the Trial Court to decide it afresh by giving opportunity to the present appellant to adduce necessary evidence in order to substantiate the contentions raised by him in the written say filed by him before the said Court.

6 Shri N.P.Bangar, learned Counsel appearing for the respondent resisted the submissions made on behalf of the appellant. The learned Counsel supported the impugned order. The learned Counsel submitted that in her testimony before the Trial Court, respondent had specifically deposed that minor Ganesh is engaged in the business of fishing by the present appellant and is not allowed to pursue his education. The learned Counsel submitted that considering the progress made by three children staying with the respondent and comparing

the same with the progress being shown by minor Ganesh, who is residing with his grandfather, it is revealed that the educational career of minor Ganesh has been adversely affected as he had remained with his grandfather. The learned Counsel submitted that the contentions raised by the respondent in her application before the Trial Court and the oral evidence adduced by her in support of her contentions before the Trial Court have remained unchallenged. The learned Counsel submitted that even after having availed ample opportunities, the present appellant could not adduce any evidence, which leads to the only inference that whatever was alleged by the respondent was true and there was no material with the present appellant to rebut the said allegations. The learned Counsel, in the circumstances, prayed for dismissal of the appeal.

7 I have given due consideration to the submissions made by learned Counsel appearing for the parties. I have perused the impugned order and the other material placed on record. The material on record reveals that the present appellant though filed his written say denying the contentions raised in the application, did not adduce any evidence in support of his said contentions and the plea or defence so raised by him remained unestablished. Material on record further reveals that the

present appellant did not cross-examine the respondent i.e. original applicant. Perusal of the order reveals that only because the testimony of respondent had gone unchallenged, whatever was stated by respondent in her evidence before the Trial Court has been accepted by the Trial Court, which has resulted in passing the impugned order. From perusal of the impugned order, it is revealed that except the oral testimony of respondent, no independent evidence has been adduced by the present respondent to substantiate her contentions raised by her in the application filed by her seeking custody of minor Ganesh. It is evident that since the facts as were stated by the respondent on oath before the Trial Court have gone unchallenged, the Trial Court has held the allegations to have been proved and has accordingly allowed the application filed by the respondent directing the present appellant thereby to handover custody of minor Ganesh to present respondent.

8 After having considered the entire material on record, it appears to me that the Trial Court has failed in appreciating the important aspect of the matter that in such matters the paramount consideration is welfare of the child. In such cases, ordinarily the Courts are supposed to independently know from the child about his wishes as to with whom he would be more

comfortable and happy. In the present matter, admittedly such exercise has not been undertaken. From the material on record, it is quite clear that though it was the allegation of the respondent that the academic career of minor Ganesh has been spoiled, there is absolutely no evidence on record showing that infact the educational career of minor Ganesh has been spoiled. As I noted earlier, merely because oral testimony of the respondent had gone unchallenged, the Trial Court has held those allegations to have been proved. It is not in dispute that though three children are now residing with their mother i.e. present respondent, minor Ganesh continued to be with the present appellant. No such material has been brought on record even in the present appeal so as to draw even *prima-facie* conclusion that the educational career of minor Ganesh is in peril as because he is staying with his grandfather and not with his mother.

9 For the reasons stated above, it appears to me that unless it is specifically established that living of minor Ganesh with his grandfather would really spoil his educational career and unless the wishes of the child are understood by the Court independently by interacting with him, there cannot be effective decision. In the circumstances, I deem it appropriate to remit the matter to the Trial Court by setting aside the order impugned in

the present appeal with a direction to decide the matter afresh by giving due opportunity to the parties to substantiate their claim. Needless to state that the Court below would certainly undertake an exercise of interacting with the child to know as to with whom he will be more comfortable and happy and whether he is properly pursuing his education or is prevented from pursuing the same. In the circumstances, the following order is passed:-

ORDER

- I) The impugned order dated 24.08.2017 is set aside.
- II) The matter is remitted to the Trial Court with a direction to decide it afresh by giving opportunity to the present appellant to adduce evidence from his side. Needless to state that it would be open for the original applicant i.e. present respondent also to adduce evidence in support of her contentions and place on record necessary documents and the evidence as is required in the matter.
- III) The Trial Court shall also prefer to interact with the child independently to know the desire of the child with whom he wants to reside and with whom he would be more comfortable and happy.

IV) The appeal thus stands partly allowed in the aforesaid terms.

V) The parties shall appear before the Trial Court on 13.03.2019 so that no separate notices may be required to be issued by the said Court.

VI) Pending Civil Application stands disposed of.

(P.R.BORA)
JUDGE

SPT