

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO. 1178 OF 2018

1. Sow. Tejashri Ashok Awachar
age 38 years, occ. Service
r/o Shivaji nagar, Hingoli
Tq. & Dist. Hingoli
2. Ku. Pranjali Ashok Awachar
age 16 years, occ. Education
r/o as above
(Minor, under guardianship of Applicant No. 1)
3. Parth Ashok Awachar
age 12 years, occ. Education
r/o as above
(Minor, under guardianship of Applicant No. 1) Appellants

Versus

Ashok s/o Jairam Awachar
age 43 years, occ. Service
r/o village Kinkheda
Post Masla Pen
Tq. Risod, Dist. Washim

Respondent

Mr. Shrimant Mundhe, Advocate for the appellants.
Mr. S.R. Bagal, Advocate for the respondent.

WITH
FIRST APPEAL NO. 1774 OF 2018

Ashok s/o Jairam Awachar
age 43 years, occ. Service
r/o village Kinkheda
Post Masla Pen
Tq. Risod, Dist. Washim

Appellants

Versus

1. Sow. Tejashri Ashok Awachar
age 38 years, occ. Service
r/o Shivaji nagar, Hingoli
Tq. & Dist. Hingoli
2. Ku. Pranjali Ashok Awachar
age 16 years, occ. Education
r/o as above
(Minor, under guardianship of Applicant No. 1)
3. Parth Ashok Awachar
age 12 years, occ. Education
r/o as above
(Minor, under guardianship of Applicant No. 1) Respondents

Mr. S.R. Bagal, Advocate for the appellant.

Mr. Shrimant Mundhe, Advocate for all respondents.

CORAM : M.G. Sewlikar, J.

DATE : 15th February, 2021.

JUDGMENT :

1. Heard.
2. Admit. Both these appeals are being disposed of by common order as they arise out of the same judgment.
3. Facts leading to these appeals can be stated succinctly as under :-

Appellant No. 1 in First Appeal no. 1178/2018 and the appellant in First Appeal No. 1774/2018 were wife and husband respectively. Their marriage was solemnised on 18.05.2001. For

convenience, the appellant No. 1 in First Appeal No. 1178/2018 is hereinafter referred to as “appellant-wife” and appellant in First Appeal No. 1774/2018 is hereinafter referred to as “appellant-husband”.

4. Appellants No. 2 and 3 in First Appeal No. 1178/2018 (respondents No. 2 and 3 in First Appeal No. 1774/2018) are the children born out of the wedlock. At the time of filing of the petition for custody under Section 25 of the Guardians and Wards Act, respondent No. 2 – daughter was 9 years of age and respondent No. 3- son was 5 years of age. It is an admitted position that the marriage of the appellants was dissolved by a decree of divorce by the competent Court. The appellant-wife and the children had filed Regular Civil Suit no. 32/2008 for partition. Against the decision in Regular Civil Suit No. 32/2018, the appellant-husband had preferred Regular Civil Appeal no. 55/2011 in which, the parties arrived at compromise and it was agreed that the appellant-husband would have the custody of the daughter and the son. It seems that this compromise was not acted upon and the custody of the children remained with the mother i.e. appellant-wife. The appellant-husband filed Civil Application no. 76/2011 for custody of children in Washim

Court. The same was returned for presentation in proper Court. Accordingly, it came to be instituted in District Court, Hingoli and it came to be renumbered as Civil Application No. 18/2013.

5. Appellant-husband alleged that appellant-wife is a teacher. In the year 2006, she was transferred to Kolgaon, District Hingoli. She started living at Kolgaon along with the children. The appellant-wife admitted the daughter in Dadasheb Ghadge Patil Vidyalaya, Trimurti Nagar, Newasa Phata, Tq. Newasa, Dist. Ahmednagar in 3rd standard. It is a Boarding School. The son was taking education in Nursery. The son had a snake bite in the month of September 2011 because of the negligence of the appellant-wife. Therefore, the appellant-wife is not capable of taking care of the children. She is neglecting them. The appellant-wife leaves house at 9.00 am and comes back at 6.00 pm. There is no one to look after the children. Therefore, the minor children are being neglected. The children often remain ill. The appellant-wife had admitted in a letter written by her to the appellant-husband that she was operated for Fibroid prior to marriage and she had a love affair before marrying the appellant-husband. He alleged that having regard to this aspect of the matter, the appellant-wife is unable to give proper upbringing

to the children. He, therefore, sought custody of the children.

6. Appellant-wife filed written statement at Exhibit 10. She admitted marriage between her and the appellant-husband and that the children were born out of the wedlock. She denied all the other allegations in toto. It is alleged by the appellant-wife that the appellant-husband doubted her chastity and subjected her to beating. He neglected the children. She had filed application for maintenance for herself and for the children in which maintenance at the rate of Rs. 2,500/- per month for each of the child was awarded. She and children had filed Regular Civil Suit no. 32/2008 which was decreed on 28.03.2011, against which the appellant-husband preferred appeal. After divorce, the appellant-husband married a second wife. The appellant-husband is seeking custody of the children just to avoid the payment of maintenance.

7. It appears that the learned District Judge – 2, Hingoli awarded the custody of both the children to the appellant-husband which was challenged by the appellant-wife vide First Appeal no. 1705/2016. This Court (V.K. Jadhav, J.) held that the learned District Judge -2, Hingoli, did not consider the welfare of the minor

and simply allowed the application on the basis of the compromise and remanded the matter to the District Judge -2, Hingoli for decision on merits. The learned District Judge -1, Hingoli decided the said Civil Application no. 18/2013 vide order dated 20.01.2018. It appears that the learned District Judge -1, Hingoli completely ignored the order passed by this Court and again awarded custody of minor son to appellant-husband on the basis of the compromise without considering the pivotal aspect of welfare of the minor in the matters of custody of children. This Court, initially thought of again remanding the matter to the District Judge -1, Hingoli for re-consideration. However, both the learned counsel submitted that this aspect can be considered by this Court as during the pendency of the appeal, the daughter attained the age of majority. The son is 14 years of age and by the time the decision comes, it is most likely that the son will also have attained the age of majority. Therefore, this Court did not think of remanding the matter to the trial Court.

8. Heard Shri Mundhe, learned counsel for the appellant-wife and Shri Bagal, learned counsel for the appellant-husband.

9. Learned counsel Shri Mundhe submitted that both the

appellant-wife and appellant-husband are the teachers. Their divorce took place on 20.03.2006. Compromise was effected on 22.08.2014 in Regular Civil Appeal No. 55/2011 in which, it was agreed that the custody of the minor children shall be given to the appellant-husband. Temporary custody was given to the father i.e. appellant-husband. However, the daughter filed First Information Report against the appellant-husband (father) under Protection of Children From Sexual Offences Act (POCSO Act). Therefore, the custody was given to the mother i.e. appellant-wife. He submitted that the appellant-husband has married a second wife. According to learned counsel Shri Mundhe, on the background of filing of First Information Report and consequent filing of charge-sheet against the appellant-husband, custody ought not to have been given to the appellant-husband. He submitted that the learned District Judge -1, Hingoli did not at all consider the welfare of the minor and relied on a clause in the compromise that custody of the minors shall be with the husband (father of the children). He submitted that welfare of a son can never lie with a father who is accused of sexually abusing the daughter of his own flesh and blood. He submitted that for these reasons, interference by this Court in the order of the learned District Judge has become absolutely necessary.

10. Learned counsel Shri Bagal submitted that the appellant-wife is a woman of loose character. After divorce with appellant-husband, she married one Sangewar. The appellant-wife had lodged First Information Report against said Sangewar. Thereafter, she obtained divorce from said Sangewar. Then she married one Baban Umaji Jagtap against whom she had filed an application in the police station. She obtained divorce from said Baban Jagtap and thereafter started living with one Vinayak Shirke in live-in-relationship. He argued that this clearly shows that the appellant-wife is a lady of loose moral and if the children are allowed to be kept with such a woman, she will not be in a position to give proper upbringing to the children. He further submitted that she has a son from the said Vinayak Shirke. She had filed an application for maintenance against the appellant-husband in which maintenance was awarded to the children. He submitted that this clearly shows that the appellant-wife is financially incapable to maintain the children. He submitted that the appellant-wife filed First Information Report against various persons making allegations of rape against them. She was in live-in-relationship with Vinayak Shirke. Therefore, a woman of such a character will not be able to

offer proper environment conducive to the development of the child. He submitted that false First Information Report under POCSO Act came to be lodged at the instance of the appellant-wife by the daughter. He submitted that for all these reasons, the custody of the minor son has been rightly given to the appellant-husband. The appellant-husband is in a better position to give proper upbringing to the minor son. His second wife, who has been examined as a witness in the trial Court, has deposed on oath that she is ready to maintain the son. He submitted that the welfare of the minor will be best protected in the able hands of the father than the mother who married thrice and sought divorce and was in live-in-relationship with a married man. He, therefore, prayed for the dismissal of First Appeal No. 1178/2018 preferred by the appellant-wife and allow First Appeal no. 1774/2018 preferred by the appellant-husband.

11. Following points arise for determination of the case :-

- i) With whom the welfare of the minor lies, with the father or with the mother ?
- ii) Whether interference in the order of the learned trial Court is called for ?
- iii) What order ?

12. My findings on the above points with the reasons in support of them are as under :-

- i) With the mother.
- ii) In the affirmative.
- lii) As per the final order.

13. Almost all the facts are admitted by the parties. It is not in dispute that the marriage between the appellant-wife and the appellant-husband was dissolved by a decree of divorce. It is also not in dispute that it was agreed in the compromise effected in Regular Civil Appeal No. 55/2011 that custody of the children will be given to the appellant-husband. It is also an admitted position that both the appellant-husband and appellant-wife are the teachers. The appellant-wife had filed an application for maintenance for minor children in which maintenance at the rate of Rs. 2,500/- per month for each of the child was awarded. It is also an admitted position that the custody of the children was given to the appellant-husband. The appellant-wife got the custody of the children back on account of the First Information Report under POCSO Act lodged by the daughter. It is also not in dispute that the appellant-wife after obtaining divorce from the appellant-husband married one Narendra

Sangewar, obtained divorce from him, again married one Baban Jagtap, obtained divorce from him and started living in live-in-relationship with one Vinayak Shirke from whom she has a son by name Vignesh. All the three i.e. Narendra Sangewar, Baban Jagtap and Vinayak Shirke have been examined by the appellant-husband as his witnesses in the trial Court. The appellant-wife has also admitted filing of the First Information Report accusing her husbands of rape.

14. The position that emerges is that the appellant-wife married two persons, made allegations of rape against them and obtained divorce from them. One of the husbands had filed application before the police station accusing the appellant-wife for black-mailing him and demanding Rs. 10,00,000/- from him. After obtaining divorce from these two persons, she started living with one Vinayak Shirke who was a married man. Here is a husband, a father, against whom a daughter of his own flesh and blood has lodged First Information Report under POCSO Act on the basis of which charge-sheet came to be filed. Both the learned counsel agree that the said criminal case is still pending. Thus, the record shows that both of them have made allegations against each other. But allegations

against the appellant-husband are more serious. He is facing trial under POCSO Act on the report of his own daughter. Therefore, custody of the son cannot be given to a father who is accused of molesting his own daughter. It is true that the appellant-husband is not convicted in the said case. But having regard to the seriousness of the allegations and pendency of a criminal case, custody of the son cannot be given to the appellant-husband who is facing prosecution under POSCO Act.

15. Moreover, record shows that appellant-wife is taking appropriate care of the minor son as against the appellant-husband. On perusal of the record of the trial Court, it is seen that the son has performed better so far as education is concerned. The Report Card of Class II of the son shows that he has scored B2 grade in English, Hindi, Mathematics and General Science in first term and in Marathi he got D grade. In second term his grade in English was A2, Hindi B1, Marathi B2, Mathematics A2 and General Science A2. In Class III, his performance shows improvement. In first term, he got A2 in English, Hindi, Marathi, Mathematics and A1 in General Science. His performance in second term improved and he got A1 in all the subjects. The remarks of the school show that he is good in sports.

In Class IV, in first term, he got B1 in English and Social Studies, A2 in Hindi and Marathi, B2 in Mathematics and A2 in General Science. In second term, he got A2 in English, Marathi, General Science and Social Science, B1 in Hindi and B2 in Mathematics. This shows that the appellant-wife is taking proper care of the son. As against this, the record produced before the trial Court shows that the school authorities had written a letter to the appellant-husband that his daughter was consistently absent from the school. This shows that the appellant-husband did not pay any attention to the education of his daughter. Therefore, having regard to this, it cannot be said that welfare of the son lies with the father. It is the settled principle of law that in custody matters welfare of the minor is of paramount consideration. This Court, (Smt. Vibha Kankanwadi, J.) had an interaction with the children and it is recorded vide order dated 21.06.2019 that the children do not want to live with the father. Learned counsel Shri Bagal submitted that the children were brain-washed and, therefore, they made this statement. However, considering the discussion made above, it clearly goes to show that the welfare of the minor son lies with the mother.

16. The learned District Judge -1, Hingoli did not consider

any of these aspects and has granted custody of son to the appellant-husband on completely irrelevant considerations. The reasons given in paragraph No. 23 of the judgment are reproduced for the facility of reference as under :-

23. It is true that respondent No. 3 is real son of applicant. Her advocate has argued that there can not be a better person than the mother to look after her child. It does not mean that father could not look after his child like mother. Respondent No. 1 is in service. She has already having son Vighnesh from Vinayak. She has agreed to give custody of respondent No. 3 Partha to the applicant but no reason were assigned as to why she took 'U' turn about her that settlement, hence for the reasons the respondent No. 1 have a son and respondent No. 2 Pranjali is also reside with her, I am of the view that custody of respondent No. 3 Partha may be given to the applicant. Accordingly, I answer points, partly allowed the application and pass the following order."

17. This reasoning clearly shows that the learned District Judge -1, Hingoli has nowhere considered the basic principle of custody of minor children that welfare of the minor is of paramount consideration. He has completely ignored the order dated 09.02.2017 passed by this Court in First Appeal No. 1705/2016. He has committed the same mistake which his predecessor had committed. Therefore, interference by this Court in the order of the learned District Judge -1, Hingoli has become absolutely necessary. In this

view of the matter, Point No. 1 is answered accordingly and Point No. 2 is answered in the affirmative.

18. It is an admitted position that the daughter has attained the age of majority during the pendency of the appeal. Therefore, both the appeals have become infructuous to that extent. In this view of the matter, following order is passed :-

ORDER

- i) First Appeal no. 1178/2018 is allowed.
- ii) Order dated 20.01.2018 passed by the learned District Judge-1, Hingoli in CMA No. 18/2013 is set aside.
- iii) CMA No. 18/2013 is dismissed.
- iv) First Appeal No. 1774/2018 is allowed to be withdrawn so far as daughter Respondent No. 2-Pranjali Ashok Awachar is concerned as she has attained the age of majority during the pendency of appeal.
- v) Considering the relations between the parties, they are left to bear own cost.
- vi) Pending civil application, if any, does not survive and stands disposed of.

(M. G. SEWLIKAR)
Judge