

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

FIRST APPEAL NO. 749 OF 2021

Suhas Uttam Gangawane
Age : 43 yrs. Occu. : Service,
R/o. Waruda,
Tq. and Dist. Osmanabad. Appellants

Versus

1. Dnyanoba Shrawan Sarwade,
Age : 65 yrs. Occu.: Nil,
R/o Opposite Dr. Babasaheb
Ambedkar Girls Hostel Vikram
Nagar, Latur, Tq. & Dist. Latur.
2. Nanda Dnyanoba Sarwade,
Age : 60 yrs. Occu.: Agri.,
R/o. As above. Respondents

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Mr. Abhijit S. More, Advocate for the Appellant
Mr. Sachin S. Panale, Advocate for Respondent Nos. 1 and 2.

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CORAM : SHRIKANT D. KULKARNI, J.

DATE : 04th JANUARY, 2022

ORAL JUDGMENT :-

1. Feeling aggrieved by the impugned judgment and order passed in Misc. Civil Application No. 186/2016 by the District Judge-6, Latur, the appellant has preferred this appeal.

2. The appellant happens to be the father of Asit Gangawane who is stated to be approximately 16 years old. The wife of the appellant namely Pradnya met with unfortunate death on 06.10.2012. The criminal case came to be registered against the appellant under Section 302 of the Indian Penal Code. The appellant came to be acquitted from the charge of murder after conclusion of trial. The appellant had applied for custody of his minor son Asit by taking aid of Section 25 of The Guardians and Wards Act, 1890 (hereinafter referred to as “the Act”) before the District Judge at Latur. The learned District Judge after taking into consideration the rival pleadings of the parties, evidence on record and considering the arguments advanced on behalf of both the sides was pleased to reject the application seeking custody of the minor son Asit. In the above background, the appellant / father has knocked the doors of this Court by way of appeal.

3. Heard Mr. Abhijit More, learned counsel for the appellant and Mr. Sachin Panale, learned counsel for respondent nos. 1 and 2 at length.

4. Mr. Abhijit More, learned counsel for the appellant vehemently submitted that the impugned order passed by the learned District Judge, Latur is bad in law and liable to be quashed and set aside. The appellant being natural father is entitled to get custody of his minor son. The learned District Judge has given undue importance to the wish of the minor son and rejected the application for custody of a son. He submitted the learned District Judge has also not considered the provisions of Section 25 of the Guardians and Wards Act, 1890 in a proper perspective and arrived at incorrect conclusion. He submitted that the appellant is taking proper care of his minor daughter. As such, there was no impediment before the learned District Judge to handover the custody of his minor son for his interest and development.

5. Mr. Abhijit More, learned counsel for the appellant has also relied upon the decision of this Court in case of ***Raju Uttam Trimbake and another Vs. Bhausahab Bhimaji Shinde*** [First Appeal No.815/2019 with Civil Application No. 2625 of 2018 in First Appeal (Stamp) No. 3197 of 2018 decided on 24.04.2019 – Aurangabad Bench].

6. Per contra, Mr. Sachin Panale, learned counsel for respondent nos. 1 and 2 supported the impugned judgment and order passed by the learned District Judge-6, Latur. He submitted that the learned District Judge has personally interviewed the minor son in his Chamber. The learned District Judge has considered the conduct and behaviour of the appellant. The learned District Judge has also considered the evidence on record, which focused light as to how the appellant / father is careless in looking after his son. He submitted that the learned District Judge has rightly rejected the application by considering the welfare of the minor son, which is the paramount consideration. He submitted that there is no merit in the appeal.

7. I have considered the submissions of learned counsel appearing for respective sides. Perused the impugned judgment passed in Civil M.A. No. 186/2016 by the learned District Judge-6, Latur, so also, relevant part of the evidence.

8. At the out set, it is necessary to mention that at present the minor son Aist is residing with respondent nos. 1 and 2, who are the maternal grandparents of Asit. It is also revealed during the course of argument that Asit is about to reach age of majority and

just away from seven to eight months in attending the majority. It is also not in dispute that Aditi happens to be the daughter of the appellant and she is now residing with her father. Respondent no.2 Nanda (Grandmother) had applied for the custody of Aditi by moving an application [Misc. Application (Guardians and Wards Act) No. 88/2011] and said application came to be rejected vide order dated 24.08.2012.

9. It is also not in dispute that the appellant / father has faced the trial for committing the murder of his wife and he has been acquitted from the charge of the murder, after conclusion of trial in a Sessions Case.

10. Section 25 of the Act provides remedy for seeking custody of a minor / ward. The guardian who applies under Section 25 of the Act is not *ipso facto* entitled to relief. The Court on enquiry must be satisfied that it is for the welfare of the minor to hand over the custody of the minor to the guardian. In an application under Section 25 of the Act, the sole criterion for disposing of the case is minor's welfare. It is only if the Court is of opinion that it will be for the welfare of the ward to return to the custody of the guardian that it can pass an order for such return. The rights of guardian

should not weigh at all though it may be presumed that, if the law gives the guardianship to particular person it is in the interests of the minor that person should have custody of his person. But other circumstances cannot be ignored.

11. On perusal of the findings with reasons recorded by the learned District Judge, it is evident that the learned District Judge has interviewed the child / minor son in his personal Chamber and transpired that minor Asit was not willing to go with his father. There are certain observations made by the learned District Judge in para 14 of the judgment to that effect after conducting interview with the minor son.

12. It is further observed by the learned District Judge on the basis of evidence that since last ten years, the appellant / father has not provided any kind of maintenance to his minor son. He was even not knowing in which school his son Asit was studying. The appellant has admitted that minor son Asit is being maintained by his father-in-law and mother-in-law since last 14 ½ years. By taking into consideration the material brought on record through the cross-examination of the appellant, the learned District Judge arrived at conclusion that the appellant / father is not at all

taking care of his son. How the appellant would maintain his minor son if custody is given to him. He is not taking care of education of his minor son. What would happen to his future. The learned District Judge after taken into consideration the circumstances and the evidence on record arrived at conclusion that it would not be just and proper to hand over the custody of the minor son to his father / appellant. It would not be in the interest of the minor. The view taken by the learned District Judge is found proper and based upon the evidence coupled with the circumstances. While deciding the question of custody, the welfare of the minor should be the paramount consideration. Even though the appellant is a natural guardian / father would not be *ipso facto* entitled to get custody of his son when it is found that it would not be in the interest of the minor son.

13. The evidence of the appellant on record speaks that he is not taking care of his son. He did not take care of his food, education and assisting him in his school activities. The minor son categorically stated before the learned District Judge while conducting the personal interview that his father did not bestow love and affection on him. He had stated that he would not like to stay with his father.

14. In case of *Perry Kansagra Vs. Smriti Madan Kansagra* reported in *(2019) 20 Supreme Court Cases 753*, the Hon'ble Court has held that, "the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no

statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

15. Having regard to the legal position made clear by the Hon'ble Supreme Court in case of ***Perry Kansagra Vs. Smriti Madan Kansagra*** (supra), in deciding the issue of custody, the paramount consideration should be the welfare and well being of the child.

16. Mr. Abhijit More, learned counsel for the appellant has relied upon the decision in case of ***Raju Uttam Trimbake and another Vs. Bhausaheb Bhimaji Shinde*** (supra). On going through the said decision, it is noticed that the facts of the cited case and the facts of the case in hand are quite different. In the cited case, the trial Court has personally interviewed the child and found that the child has no grievance against his father. In the facts of the case in hand, the minor son has shown his unwillingness to go with his father at the time of personal interview conducted by the learned District Judge. There is no material on record to show that the respondents/ grandparents are unable to maintain their grandson. Only because they are old aged cannot be a ground to handover the custody of a minor son to the appellant. The respondents are taking care of their grandson after demise of their

daughter for about more than 14 years. They are maintaining their grandson nicely. The minor son is being maintained properly with love and affection. They are looking after their grandson for his welfare.

17. Having regard to the above reasons and discussion, I do not find any perversity in the findings recorded by the learned District Judge while rejecting the application. The view taken by the learned District Judge is found absolutely correct on the the basis of circumstances appearing on record coupled with the evidence. No merit in the appeal and the same is liable to be dismissed.

ORDER

- (i) The appeal stands dismissed.
- (ii) The impugned judgment and order passed in Civil M.A. No. 186 of 2016 by the District Judge-6 at Latur is hereby confirmend.
- (iii) No order as to the costs.
- (iv) The first appeal is accordingly disposed of.

[SHRIKANT D. KULKARNI]
JUDGE