

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 792 OF 2022

Salim Yousuf Jamadar

Age : 36 years, occ : business

R/o Survey No.90, Adarsh

Indira Nagar, Alandi Road, Near

Datta Temple, Yerwada, Pune.

Appellant
(original respondent)

Versus

Reshma Salim Jamadar

Age : 30 years, occ : household

Presently R/o Aloor, Tal.Omerga,

District Osmanabad

Respondent
(original applicant)

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Mr. Dhiraj R. Jethliya, Advocate for the appellant.

Mr. Parag.V. Barde, Advocate for the respondent.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 28.02.2023

Judgment pronounced on : 21.03.2023

Judgment :

1. The appellant husband who is the original respondent in Civil Misc. Appln. No. 45/2020 filed by respondent – wife under Section 8 of the Guardians and Wards Act, has challenged the order dated 03.03.2022 passed therein by the learned District Judge-1, Omerga, District

Osmanabad (hereinafter referred to as “the trial Court”), in the present appeal.

2. The background facts can be summarised as under :

The appellant and respondent got married at Pune in accordance with the rites and tenets of Mohammedan Law on 19.05.2010. Out of the said wedlock, the respondent – wife gave birth to a boy named Arsalan on 21.09.2011 and a girl named Akira on 16.05.2014. At present Arsalan is aged about 11 years and Akira is aged about 8 years. Thereafter on 28.08.2019 on account of matrimonial dispute, the respondent alongwith children was forcibly driven out from her matrimonial house. It is alleged that the relatives of the appellant taken away the children from the custody of respondent – wife from her parental home at Aloor, on the pretext of giving chocolates to them. On 11.10.2021 respondent – wife filed proceeding under the provisions of Protection of Women from Domestic Violence Act in the Court of Judicial Magistrate (First Class) at Omerga, wherein the said Court granted only visitation right to the respondent to meet her children once in a month at Pune in the office of Protection Officer without disturbing the custody of minor

children with their father. The said order of refusing the custody and only giving visitation right is not challenged by the respondent – wife. On 17.11.2020 Crime No.228/2020 was registered against in-laws including the distant relatives under Sections 498-A, 323, 504 and 506 read with Section 34 of the Indian Penal Code at Murum Police Station, Taluka Omerga at the instance of respondent – wife. Such matrimonial discord between the parties ultimately resulted into filing a proceeding under Section 8 of the Guardians and Wards Act by the wife in the trial Court as regards the custody of minor children. Thereafter also on 06.09.2021 respondent – wife filed application in the said proceeding for getting interim custody of the children. As against this, the appellant – husband had also filed application under Order VII Rule 11 and Section 151 of the Code of Civil Procedure for rejection of application on the aspect of jurisdiction. Both these applications were not decided prior to the impugned order dated 03.03.2022. Ultimately the present appellant has been directed to hand over the custody of both the children to respondent – wife. Hence, this appeal.

3. The learned Counsel for the appellant submitted written notes of argument by giving chronology of the facts

which led to filing of this application under Section 8 of the Guardians and Wards Act by the respondent – wife. In addition to that, he also raised issue of jurisdiction and submitted that the learned trial Court, only on assumption and presumption, wrongly held that the children ordinarily resided at Aloor. On the aspect of welfare of the child and best interest of the child he submitted that the learned trial Court failed to appreciate specific provisions of Sections 17 and 25 of the Guardians and Wards Act. According to him, the appellant – father is residing in Pune which is admittedly a better place than Aloor where the respondent – mother resides. He claims that the appellant – father is financially much more sound than the respondent – mother, and therefore, can give better future to the children. He further submits that the parents of the respondent wife are labourer and it has also come on record that the respondent wife is not doing anything and she has not even claimed maintenance till today. As such, it can easily be inferred that the appellant – husband is in better position to take care of financial needs of the children who have already crossed 5 years of their age. As such, he prayed for setting aside the impugned order. He placed reliance on the following judgments.

(1) Lahari Sakhamuri vs Sobhan Kodali

(2019 7 SCC 311

(ii) Ruchi Majoo vs Sanjeev Majoo, (2011) 6 SCC 479

*(iii) Salim Ibrahim Mhate vs Nazaneen Saleem
2016 SCC Online Bom. 12007*

(iv) K. Vidyasagar vs Sau. Shobha, 2012 (5) Mh.L.J. 805

(v) Sashanka vs Prakash, MANU/MH/2188/2020

(vi) Sheoshankar vs Khupchand, AIR 1925 Nag 233

(vii) Gaytri Bajaj vs Jiten Bajaj, (2012) 12 SCC 471

*(viii) Nil Ratan Kundu and another vs Abhijit Kundu
AIR 2009 SC (Supp) 732*

4. On the contrary, learned Counsel for the respondent – wife strongly resisted the submissions made by the learned Counsel for the appellant – husband. He supported the impugned order and contended that the learned trial Court rightly rejected the objection of the husband in respect of jurisdiction. He pointed out that the children were taking education in English Medium School at Aloor, but the appellant – husband asked them to take education in Urdu Mediam School which is definitely hazardous to the future of children. However, he fairly admitted that the respondent wife has not claimed any maintenance from her husband till today. According to him, the appellant cannot give proper attention to the children

since he remains out of the house for his work and on the contrary respondent who is not going out of the house for livelihood, can give better attention to the children. As such, he prayed for dismissal of the appeal.

5. Heard rival submissions. Perused entire documents on record alongwith the impugned order. Also perused various citations upon which the learned Counsel for the appellant husband placed reliance.

6. It is significant to note that the appellant has challenged the impugned order on two grounds; first, the learned trial Court failed to consider that it had no jurisdiction to entertain the application for custody and second, the learned trial Court did not consider the aspects namely “best interest of children” and “welfare of children” in proper perspective. So far as the jurisdictional aspect is concerned, the appellant had challenged filing of application by the respondent – wife for custody at Omerga, District Osmanabad on the ground that it was not an ordinary place of residence of children. According to the appellant, the children ordinarily reside at Pune only. However, by going through the impugned order, it is evident that the learned

trial Court has discussed various citations of High Courts as well as the Hon'ble Supreme Court on the aspect of jurisdiction and finally came to the conclusion that it had jurisdiction to entertain the application of respondent – wife for custody of children.

7. It is significant to note that the learned trial Court has held Aloor as a place of ordinary residence of the minor children which is also residential village of the parents of respondent – wife. It is not a temporary residence of respondent – wife and her children. Therefore, obviously after being driven out from the house alongwith children as alleged by her, she had gone to Aloor in the house of her parents. Further, there was no alternative for her to chose any other place of residence, and therefore, the contention of the appellant – husband that Aloor was not ordinarily place of residence of minor children, is not at all proper. Though the learned Counsel for the appellant relied on the judgments of the Honble Apex Court in the cases of *Ruchi Majoo vs Sanjeev Majoo*, *Salim Ibrahim Mhate vs Nazaneen Saleem and K. Vidyasagar vs Sau. Shobha* (supra), on the aspect of jurisdiction, but considering the peculiar facts of this case, I do not find those judgments helpful to the appellant.

8. So far as the next ground of challenge is concerned, it is already settled that while deciding the custody matter in respect of a child under the provisions of Guardians and Wards Act, 1890 as well as other similar Acts, the interest and welfare of minor should be treated as paramount consideration. In the case of ***Lahari Sakhamuri vs Sobhan Kodali*** (supra), the Hon'ble Apex Court in para-43 has observed as follows :

“43. The expression “best interest of child” which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of “best interest of the child” is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean “the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development”.

9. Further, the Hon'ble Apex Court in the case of ***Nil Ratan Kundu and another vs Abhijit Kundu reported in AIR 2009 SC (Supp) 732***, has observed as follows :

“In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is

neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor”.

10. Further, the Hon'ble Apex Court in the case of ***Gaytri Bajaj vs Jiten Bajaj*** (supra), has made the following observations :

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate

consideration that must guide the determination required to be made by the Court”.

11. Thus, after going through all the aforesaid observations it has been consistently held that the welfare of minor or best interest of the child should be the paramount consideration in deciding the custody matters.

12. On perusal of the impugned order, it is evident that this aspect of paramount consideration has not been discussed by the learned trial Court elaborately, considering the capacity of the appellant. It is evident that in the entire order there is discussion on the aspect of jurisdiction and only in the last para the trial Court has given finding in respect of this aspect of welfare of minor children and that too in a cryptic manner. Nothing is discussed by the learned trial Court as to who, out of the parents of minors, is in better position to act in the best interest of the children by providing them good future education and necessary facilities. Admittedly, under the Hindu Minority and Guardianship Act, 1956, the custody of minor remains with mother upto the age of 5 years of minor. However, in the instant matter, both the minor children have crossed their age of 5 years. It is significant to note that the son Arsalan is of 11 years whereas daughter Akira is of 8 years. As such, by considering their

best interest they must get good education, safety and other amenities. From the perusal of the impugned order it is evident that the learned trial Court has decided to give the children in the custody of respondent-wife by holding that the appellant-husband remains out of the house for his work and as against this the wife is not going out of the house to earn livelihood, and therefore, she is placed on higher footing for giving time for development of the children and taking their care. However, only giving time for development of the child shall not be the only criterion, but the other aspects, such as financial assistance, good atmosphere and security are also important in the nourishment of minor children.

13. Though it has come on record that the children were admitted in Saraswati English Medium School at Aloor for certain period, but it has also come on record that the appellant got them admitted in Wali Mohammad Urdu Primary Semi English School at Bandgardan Road, Pune. The learned trial Court itself has stated in the order that medium of school is not important, but the quality of education imparted to the children is important. Further, it appears that even though the children are admitted to Semi English Medium Urdu Primary School, but it is extremely

importance to note that they are taking education in a city like Pune which always has the best exposure to the children comparatively than the school at Aloor, District Osmanabad. There cannot be any comparison in respect of standard of living between Pune and Aloor. Aloor being a small village, is not having better facilities for higher education of the children. On the contrary, Pune appears to be a better place for the minors.

14. The next aspect is financial assistant. It is to be noted that the respondent-wife is not having any independent source of income, and therefore, she cannot provide best education to the minor children at this stage. As against this, it appears that the appellant-husband is financially in sound position since as per his advocate he is in transport business and owner of so many trucks. Therefore, the appellant is definitely in better position to provide the minor children, all the facilities for their proper upbringing and securing their future. The learned trial Court has not discussed all these aspects and without assigning proper reason, decided to give the custody of minor children to the respondent-wife. It is only mentioned in the order that it will be in the best interest of children and the wife is in a position to take better care of

children, but nothing is mentioned as to how she would provide better future to them. Therefore, considering all these aspects and in the light of the observations of the Hon'ble Apex Court, as aforesaid, I find it proper that the minor children must remain in the custody of appellant – father who can provide better future to them than the respondent-mother.

15. So far as the emotional aspect is concerned, the learned Judicial Magistrate (First Class), Omerga has already granted visitation right to the respondent-wife vide order dated 02.03.2020 in D.V. Application No. 58/2019 filed by her. As such, there is no need to pass separate order of visitation right since the said order was continued by this Court till final decision of this appeal vide order 20.04.2022 while granting stay to the execution of the impugned order.

16. In the result, the appeal stands allowed and the impugned order dated 03.03.2022 passed by the learned District Judge-1, Omerga, District Osmanabad in Civil Misc. Appln. No. 45/2020 is quashed and set aside. No order as to cost.

(SANDIPKUMAR C. MORE, J.)