

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1853 OF 2021
WITH CIVIL APPLICATION NO. 8556 OF 2021
AND CIVIL APPLICATION NO. 7859 OF 2022

Niyazmunbi w/o Karim Patel
Age : 30 years, occ : tailoring
R/o Dhayguda Pimpala, Taluka
Ambejogai, District Beed
At present r/o C/o Mahmud Patel,
Gulkheda, Taluka Ausa,
District Latur

Appellant

Versus

Karim s/o Chand Patel (Shaikh)
Age : 37 years, occ : business
R/o Dhyguda Pimpla, Taluka
Ambejogai, District Beed

Respondent

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Mr. R.R. Deshmukh, Advocate for the appellant.
Mr. M.P. Kale, Advocate for the respondent.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 05.06.2023
Judgment pronounced on : 08.06.2023

Judgment:

1. The appellant – wife has challenged the judgment dated 20.07.2021 passed by the learned District Judge-1, Ambejogai, District Beed (hereinafter referred to as the “learned trial Court”), whereby her application bearing Civil M.A. No. 29/2021 filed against her husband i.e. the present

respondent for getting custody of her three minor children begotten from the respondent – husband, has been rejected.

2. The background facts are as under :

The appellant filed the aforesaid application for getting custody of her three minor children under Section 25 read with Section 7 of the Guardian and Wards Act (for short, “the Act”) contending that she married with respondent on 28.10.2010 at Gulkheda, Taluka AUSA, District Latur as per the Muslim rites and rituals and thereafter gave birth to three children namely Rahim (date of birth 15.06.2012), Raheman (date of birth 28.08.2014) and Arman (date of birth 30.01.2017). However, the respondent and his relatives ill-treated the appellant on account of demand of dowry of Rs. 5,00,000/-, and therefore, she had filed complaint against them on 04.10.2018 on the basis of which Crime No.149/2018 was registered in Bhada Police Station. According to the said complaint, she alongwith her three minor children was driven out of her matrimonial house, and therefore, she had no option but to come to her father’s place at Gulkheda. Further, while residing at her father’s place, the respondent came there and forcibly took away all three minor children. Though she took aid of Section 97 of the Code of Criminal

Procedure by filing M.A. No. 150/2018 before the Court of learned Judicial Magistrate, First Class, Ausa, but it was rejected under order dated 20.02.2021 with liberty to her to pursue appropriate legal remedy for getting custody of minor children before the appropriate Court.

3. The appellant, had therefore, filed the custody application as aforesaid and alleged that she could maintain her three minor children with the aid and support of her father who is an agriculturist and possesses sufficient means with well constructed house.

4. However, the respondent resisted the said application by denying all the adverse allegations made against him. According to him, the appellant had quoted false story as regards her alleged ill-treatment on account of demand of dowry. On the contrary, the respondent contended that on 17.04.2018 the applicant and her brother Alim beat him and his mother Abedabee with fists and kicks, and therefore, he filed complaint of the said incident to Ambejogai Rural Police Station on the basis of which offence bearing Crime No.130/2018 was registered against the appellant and her brother. Further, according to him, on the same day she quarreled with him and went to her

matrimonial house by leaving three minor children with the respondent. It is also contended by the respondent in his say at Exh.13 before the learned trial Court that the earlier complaint filed by the appellant before the Women's Redressal Cell, Latur dated 19.07.2018 speaks entirely different story about the status of children and it clearly indicated that her complaint dated 04.10.2018 was a false complaint. According to him, all the minor children were residing with him happily and he was taking all the necessary care of them. He contended that as per the provisions of Mohammedan Law, specially as per Section 353, he being a natural guardian of minor children, cannot be deprived of their custody.

5. Considering the entire material on record and the oral as well as documentary evidence, the learned trial Court dismissed the application of appellant directing her to give custody of younger child Arman to the respondent – husband and retained other two children with the respondent. Hence, this appeal.

6. Learned Counsel for the appellant – wife strongly submits that the learned trial Court has definitely erred in giving custody of the minor children to the respondent – husband by observing that the respondent can maintain

them better than the appellant. He pointed out that under the provisions of Mohammedan Law, the mother is entitled for custody of male child upto 7 years and since the younger son Arman is still below the age of 7 years, the impugned judgment itself is contrary to law. He also pointed out that the appellant has already taken out one application for production of additional evidence in form of documents wherein it has been declared by the Medical Officer that Arman is medically fit person, and therefore, the observation of the learned trial Court that the respondent can take care of the disability of Arman better than the appellant, is not proper. Further, under the same application, the appellant has also produced on record the document showing that she is earning through tailoring job. Thus, he submits that on the aspect of capacity of maintaining the children, trustworthy evidence has been brought by the appellant which requires due consideration. The learned Counsel for the appellant also relied on the following judgments :

- (i) Family Court Appeal No. 20 of 2015 (Imran Khan s/o Ali Shah Khan vs Sobiya Tabassum W/o Imran Khan)***
- (ii) Abdulsattar Husen Kudachikar vs Mrs. Shahina Abdulsattar, AIR 1996 Bom 134***

7. On the contrary, learned Counsel for the respondent supported the impugned judgment and pointed

out that the learned trial Court has taken care of every aspect as regards the welfare of minor children which is definitely a paramount consideration for deciding their proper custody. According to him, the judgments relied upon by the learned Counsel for the appellant differ from the facts of this case, and therefore not helpful. He contended that interim custody of Arman given to the appellant was only temporary arrangement and after dismissal of the application of the appellant, she must give custody of Arman to the respondent. As such, even if this Court had given temporary custody of Arman to the appellant under order dated 30.01.2020, it could not be construed that this Court had opined in her favour.

8. Heard rival submissions. Also perused the entire oral and documentary evidence alongwith the impugned judgment and record and proceedings.

9. The relationship between the parties is not in dispute. Moreover, it was also not in dispute that the younger son Arman of the rival parties is physically disabled to some extent. Further, it can also be seen that during the pendency of application for getting the custody, the then District Judge, vide order dated 30.04.2019, had given interim custody of all

the minor children to the appellant, but the said order was challenged by the respondent before this court and this Court stayed the said order. However, thereafter this Court gave custody of only younger son Arman to the appellant, and therefore, the elder sons Rahim and Raheman remained with respondent i.e. their father. Thus, it appears that the appellant is asking custody of her sons on the following grounds :

- (i) That, under the provisions of Mohammedan Law, custody of male child needs to be given to mother till he attains the age of 7 years.
- (ii) That, she can maintain all three children better than the respondent with the help of her father since he is possessing agricultural land and has sufficient income source.
- (iii) That, the respondent has married again with a lady by name Fatema and due to existence of step-mother, the future of Rahim and Raheman has been endangered.

10. So far as legal aspect is concerned, admittedly this Court in the case of *Sayyad Sabdarali Sy. Nyajali vs Shahistabegum Sayyad and others* reported in **2007 (6) Mh.L.J. 532**, has observed that personal law of the parties cannot be totally ignored and under the principles of Mohammedan Law, mother is entitled to the custody of male child upto completion of his age of 7 years and of a female child until she attains puberty. It is also observed that the

said entitlement of mother continues though she is divorced by the father of child, unless she remarries. However, this Court, in the case of *Lachhmananna Irranna Shetpalliwar and others vs Anil Shriram Marsetwar* reported in **2017 (6) Mh.L.J. 551**, as observed in the impugned judgment itself, has given finding that while determining the question of granting custody of minor children to one of it's parents, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. As such, the Court shall endeavour to strike balance between requirements and the welfare of minor children. Further, it is also observed by this Court in the case of *Mohankumar Rayana vs Kimal Mohan Rayana* reported in **2009 (2) Mh.L.J. 868** that the 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. Thus, it is now settled by this Court that even though there are legal provisions under personal law that a male child is to be retained with mother till he attains age of 7 years, but considering the welfare of child, the aforesaid provision shall not be come in a way to give custody of minor child to the father in view of his welfare

and well being. As such, the submission of learned Counsel for the appellant in the light of the aforesaid legal provision under the principles of Mohammedan Law, cannot be considered in deciding the custody of younger son Arman, who is still below the age of 7 years. Needless to say that, there cannot be such impediment in respect of other two minor sons Rahim and Raheman who have attained their respective ages of 11 and 9 years at present.

11. So far as the aspect of welfare and best interest of the minor children is concerned, the financial capacity of either of the parents, the atmosphere where minor children are presently residing and the quality of education which can be provided to them, are the material factors. So far as the family atmosphere is concerned, the appellant has contended that the respondent has performed second marriage with one Fatema and due to existence of step-mother, the future of Rahim and Raheman is in dark. Though the evidence is led in respect of marriage of respondent with Fatema and that she begotten one child from the respondent which consequently given to the sister of respondent, but that is not sufficient to establish ill-treatment of minor sons Rahim and Raheman. Merely because of existence of step-mother, it cannot be said

that the future of those children is in dark, especially when there is no pleading of any specific incident of ill-treatment. Further, from the impugned judgment itself, it is evident that the learned trial Court had an interaction with Rahim and Raheman and found that both of them were cheerful and healthy, and they expressed their willingness to reside with the respondent only. They also expressed their wish not to reside with the appellant. Thus, even the sons Rahim and Raheman are happy with the respondent since they are taking proper education and there was no ill-treatment to them either by the respondent or by the alleged step-mother Fatema.

12. Though the appellant, under Civil Application No.7859 of 2022 produced certain opinions of the Doctor that Arman is medically fit and does not require any attention which the respondent can provide, but the said fact is not enough to decide that she can give better maintenance to Arman than the respondent. Further, she has also produced on record the document which can be considered as source of her income under the said application which is filed under Order 41 Rule 27 of the Code of Civil Procedure which is meant for production of additional evidence at appellate stage.

However, the said document showing that she has completed her tailoring course, appears to be prepared after the date of the impugned judgment, and therefore, the criteria for permitting additional evidence under the aforesaid order, is not fulfilled. As such, the said application for production of additional evidence appears to be an afterthought and such evidence will not be helpful since there is no supporting document that the appellant is earning regularly. Thus, it can be seen that there is no sufficient evidence on record to show that she is financially sound for maintaining the children. Even in the cross-examination she refused to answer whether she is dependent upon her father for her livelihood. On the contrary, it has been brought on record that the respondent runs a grocery shop and thereby having independent source of income. Moreover, he has also owner of agricultural land. Even for the sake of argument if it is presumed that the father and brother of the appellant are having sufficient means to maintain the minor children of the appellant, but in future nothing can be said that they would maintain the children of appellant with same intensity, specially after the lifetime of father. Therefore, in respect of financial condition, the respondent is in a better position.

13. Further, the complaint filed by appellant in Bhada Police Station on the basis of which Crime No. 149/2018 is registered, indicates that the children were taken away forcibly by the respondent from her custody by visiting her matrimonial house, but the earlier application given to the Women's Redressal Cell by the appellant speaks otherwise. In that application the appellant herself had stated that since July 2018 all her minor children sons were residing with the respondent and Rahim and Raheman were taking education in Zilla Parishad School, Dhayguda Pimpala in 3rd and 1st Standard respectively. It is extremely important to note that the learned trial Court had also verified this fact by having personal dialogue with those children. Further, it appears that at Dhayguda Pimpala there are better education facilities available than village Gulkheda, where the appellant is residing. Thus, it appears that the appellant must have filed subsequent complaint with Bhada Police Station by making false allegations which are definitely contrary to her contention in the earlier application given to Women's Redressal Cell.

14. Thus, considering the entire material on record, it appears that the respondent is in better position to maintain all the three minor children, and therefore, considering the

welfare of the minor children, which should be paramount consideration in deciding custody cases, the learned trial Court has rightly handed over the custody of all the sons of appellant and respondent, to the respondent – father. Even though this Court had given custody of younger son Arman temporarily to the appellant vide order dated 30.01.2020, but it cannot come in the way for giving custody of Arman back to the respondent – father as directed by the learned Trial Court. Further, it is also important to note that the visitation right has also granted to the appellant by the learned trial Court, and thus, the learned trial Court has also tried to balance the emotional aspect between the mother and sons. The judgments cited by the learned Counsel for the appellant differ on facts, and therefore, cannot be made applicable since the welfare of children is of utmost importance. As such, I do not find any substance in the appeal and the same is dismissed. Pending Civil Application No. 8556 of 2021 for stay to the operation of the impugned judgment and Civil Application No. 7859 of 2022 for production of additional evidence in form of documents, also stand rejected.

15. At this stage, the learned Counsel for the appellant – wife submits that the appellant intends to challenge the

judgment passed by this Court today before the superior Authority and therefore, prays for continuation of ad-interim relief in terms of prayer clause (B) as granted by this Court vide order dated 24th September 2021. The learned Counsel for the respondent husband strongly opposed for the same on the ground that this Court has decided the appeal on its own merit.

16. However, considering the statutory right of the appellant wife to challenge the judgment, the interim order dated 24th September 2021 is continued for the further period of four weeks. It is made clear that no further extension will be allowed.

(SANDIPKUMAR C. MORE, J.)