

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

**FAMILY COURT APPEAL NO.2 OF 2020
WITH CA/88/2020 IN FCA/2/2020**

Dattatraya s/o Venkat Madane,
Age : 36 years, Occ: Business
R/o. Khadak Hanuman Chowk
Latur.

... **APPELLANT**

VERSUS

Sau. Komal w/o Dattatraya Madane,
Age : 28 years, Occu: Household,
R/o. Dhanora (B) Mandal Indravelli,
Dist. Adilabad (Telangana),

... **RESPONDENT**

...

Mr. Satish S. Manale, advocate for appellant
Mr. Sunil S. Bhagore advocate for respondent

...

**CORAM : MANGESH S. PATIL AND
S.G. CHAPALGAONKAR, JJ.**

Reserved on : 27.01.2023

Pronounced on : 27.02.2023

JUDGMENT :

Admit.

2. At the request of both the sides the appeal is heard finally at the stage of admission.

3. This is an appeal under Section 19 of the Family Courts Act by the father of Sakshi, a girl aged about 11 years being aggrieved by the rejection of his petition filed under Section 25 of the Guardians and Wards Act read with Section 6 of the Hind Minority and Guardianship Act, seeking permanent custody.

4. The learned advocate for the appellant would submit that the respondent is quarrelsome and adamant and at time she becomes violent. Even she was required to be treated by a psychiatrist. The appellant being the father and natural guardian has preferential right to have her custody. The appellant has been residing at Latur which is a district place and is known for having good facilities of education. As against which, the respondent has been residing at her parental house in a village from Adilabad District of Telangana State. Welfare of the child being of paramount importance, Sakshi can be brought up very well while being in the custody of the appellant in his house at Latur rather than with her mother in a remote village.

5. Mr. Manale for the appellant would further submit that ignoring the betterment of the child the respondent has been unnecessarily refusing custody. When the couple was together she was admitted to a well known school at Latur. No evidence was led before the Family Court by the respondent as to what kind of education Sakshi has been taking at Village Dhanora, District Adilabad. The learned Judge of the family court has taken emotional decision rather than an intelligent one. There was nothing before the family court to demonstrate as to how the petitioner will not be able to provide better life and education to Sakshi so that some exception could have been thought of to the normal rule of a right of the father to claim custody of a child which is no longer an infant.

6. The learned advocate for the respondent submitted that both

the sides had led evidence before the family court which has appreciated all facts and circumstances and evidence while reaching a plausible conclusion. Considering the then age of Sakshi of around 9 to 10 years the respondent mother was rightly found to be a person with whom Sakshi would be brought up well. She has all the love and affection being a natural mother. As against this, the petitioner in spite of having fathered the child had barely cared for her betterment. He never bothered to go to Dhanora to meet Sakshi and if this is his behavior and attitude, the inference drawn by the family court that he would not be in a better position to look after Sakshi cannot be questioned.

7. Learned advocate for the respondent would further submit that the petitioner is a businessman. He has been residing with his aged parents who are infirm. Even his father during testimony stated that Sakshi can be brought up with the help of his another daughter-in-law cohabiting with him. But she has her own child to look after. Since the petitioner would be out of home for several hours in connection with his business, it was doubtful if there would be somebody to look after Sakshi's welfare. The family court has borne in mind all the aforementioned aspects and has reached a reasonable conclusion.

8. We have carefully considered the rival submissions and perused the impugned judgment as well as the record. There cannot be any doubt about the fact that the petitioner being the father of Sakshi, in view of the provision of Section 6 of the Hindu Minority and Guardianship Act, he will

have a preferential right. However, simultaneously, in view of Section 13 of that Act, welfare of the minor has to be of paramount consideration. It is therefore conspicuous that the provision of Section 6(a) is regulated by Section 13(2). It is therefore trite that welfare of the child essentially is important and to be looked into and it would override any statutory provision. The learned Judge of the family court has expressly referring to the aforementioned provisions has kept this principle in mind.

9. As can be appreciated, except the allegations and counter allegations in respect of the behavior of the appellant and the respondent, there is not much of a dispute on facts. The appellant is a permanent resident of Latur and is a businessman residing with his parents, his brother, sister-in-law and their issue and that he is a graduate. There is also no dispute about the fact that he has been staying in Latur which is well known for its educational facilities. There is also no quarrel that he is financially sound as compared to the respondent and her parents. Similarly, there is no dispute that the respondent is matriculate and has been residing at village Dhanorae in Adilabad District, Telangana and in all probability the place may not be having all the education facilities that are available at Latur.

10. It is in view of such a state of affairs coupled with the fact that Sakshi is about to reach 13 years we had called the petitioner and the respondent to the chamber and tried to convince them that at least looking to the future of Sakshi they should come out with some mutual arrangement regarding her custody. Since we feel that rather than the Court foisting

some decision it was always better that they would take a conscious decision intelligently rather than emotionally. However, the attempt has failed as they could not reach any agreement.

11. Having been left with no alternative we have heard the arguments finally and even had free discussion with Sakshi in our chamber. We found that though she was found to be of the age of enough understanding she was also in a dilemma. She could not express it in so many words but from her demeanor we could gather that she was not able to comprehend the situation when we asked her if she would want to stay with her mother or would like to be with her father albeit she repeatedly said in a low tone that she would be happy to be with the mother. In our considered view, our interaction with the girl has made us to believe and reach a conclusion that it would be emotionally challenging to her to now part ways with her mother at this age. Therefore, according to us she was inclined to stay with her mother albeit at the back of mind she could have even a second thought of going to Latur and to stay with the father.

12. It is necessary to note that the couple has separated since prior to 2015. Sakshi was born in 2010. Meaning thereby that she has been residing with the respondent mother at Dhanora since she was barely 5 years old that is for last 8 years. She will be completing 13 years of age this May. During this long tenure of last 8 years she had hardly come down to Latur or the appellant had hardly met her by going to Dhanora. Obviously, over a period of time at this age, she would be emotionally attached to the

respondent mother and there will not be such a bond between her and the appellant father. Needless to state that Sakshi being a girl child reaching puberty in a near future, it would be in her best interest that she continues to be in the custody of her mother with whom she has been leaving for last almost 13 years most part of which is even in the absence of appellant father. Shifting her place at this age when company of the mother would be most essential to convince and reassure the girl, we are of the firm view that changing the custody at this age to the appellant would certainly be traumatic and contrary to the welfare of Sakshi.

13. True it is that the appellant is financially sound as compared to the respondent's parents. It is also true that Sakshi has to lead her life with her mother in a small village like Dhanora and would be deprived of the education facilities available at Latur and the comfort of appellant - father's wealth and the comfort of his house. But then in our considered view these materialistic things cannot over take the requirement of the company of a natural mother at the age of puberty.

14. If at all, all these materialistic things are to be taken into consideration, and if really the appellant is interested in the well being of Sakshi, he can make necessary arrangement so that she leads a comfortable life and gets better education even while staying with the respondent mother at Dhanora. He cannot be permitted to lure Sakshi to claim custody on the basis of his being affluent. He can provide sufficient money for her upbringing even while she is residing with the respondent rather than

showing his assets and expecting those to weigh with the courts in allowing him to have her custody. To repeat, precisely for this reason, we had expressly told the appellant and the respondent that they could think for the betterment of Sakshi and had extended an opportunity to them to reach to some amicable arrangement keeping in mind her welfare and well being.

15. The learned Judge has scanned the evidence carefully and has reached a plausible conclusion while refusing to hand over the custody of Sakshi to the appellant. He has also pointed out as to how, the respondent would be available to Sakshi round the clock which may not happen if she is in appellant's custody. His parents are old. Even his father in his testimony was of the view that they would look after Sakshi with the help of his another daughter-in-law who herself has a son. The learned Judge has rightly reached a conclusion that in all probability Sakshi may not be looked after well at appellant's home.

16. True it is that there are certain allegations about mental illness of respondent but no evidence was led before the family court about it much less to prove that because of it she would be unable to carefully look after Sakshi. In our view, no error is committed by the learned Judge in appreciating the evidence and reaching the conclusion. The decision is sound and cannot be reversed.

17. However, even if custody is being refused to the appellant, some kind of arrangement for visitation rights should have been prescribed by the family court which it has failed to do. There is no dispute about the fact

that the appellant is a businessman stationed at Latur and the respondent is residing in Village Dhanora of Adilabad District and the two places are more than 300 km apart. Even both the learned advocates are unanimous that there is no direct connectivity between these two places. Keeping in mind these state of affairs, we feel that the following arrangement would meet the ends of justice in the peculiar facts and circumstances:

- i. The Appeal is dismissed. However, the appellant is permitted to meet Sakshi at any time at the parental home of the respondent in Village Dhanora Tq. Adilabad, Telangana State.
- ii. He is entitled to interact with Sakshi through video and audio call on ever Saturday and Sunday as per Sakshi's convenience.
- iii. Sakshi shall remain in appellants custody for one week during Diwali Vacations and two weeks in Summer Vacations as per the convenience of all the three individuals i.e. the appellant, the respondent and Sakshi. It would be the responsibility of the appellant to fetch her from Dhanora and drop her back.

18. The appeal is dismissed with above arrangements. Pending civil application is disposed of.

(S.G. CHAPALGAONKAR, J.)

(MANGESH S. PATIL, J.)