



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FAMILY COURT APPEAL NO.40 OF 2021
WITH
CA/11705/2022 IN FCA/40/2021
WITH
CA/11037/2021 IN FCA/40/2021

Sujit s/o Vasantrya Karad ... APPELLANT
VERSUS
Rekha w/o Sujit Karad ... RESPONDENT

...
Advocate for Appellant : Mr. B.R. Kedar
Advocate for respondent : Mr. A.N. Nagargoje
...

CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.

Reserved On : 09.10.2024
Pronounced On : 18.10.2024

ORDER (MANGESH S. PATIL, J.) :

This is an appeal under Section 19 of the Family Courts Act, 1984 by the father of child who by now is aged 8 years, under the provisions of Section 10 read with Section 25 of Guardians and Wards Act, 1890 (G&W Act) read with Section 6 of the Hindu Minority and Guardianship Act, 1956 (herein after M&G Act) for his custody, who is currently in the custody of the respondent - biological mother, being aggrieved and dissatisfied by the judgment and order of the Family Court, Latur, dated 18.02.2021, whereby his petition was dismissed.

2. Learned advocate for the appellant vehemently submits that pursuant to the definition of guardian under Section 6, the petitioner

being the biological father of the child which is more than 5 years of age, he would have the priority and the right to have the custody of the child. He would submit that the child was born on 19.02.2016 and on the date of impugned judgment and order passed on 18.02.2021, the observation of the learned Judge that the child was 4 years and 11 months was factually incorrect. He would have been of 5 years of age and the appellant was entitled to have its custody.

3. The learned advocate Mr. Kedar would further submit that welfare of the child is of paramount consideration. The child was in the custody of respondent - mother being less than 5 years of age. Now that he has crossed that age the appellant has the preferential rights to claim his custody. Irrespective of the dispute as to the age as on the date of the judgment and order under challenge, by this time the child has already crossed the age of 5 years and the appellant is entitled to maintain the child while being in his custody.

4. Learned advocate Mr. Kedar would further submit that appellant's father was in police service and has been getting pension of more than Rs.25,000/- per month. The family possesses fertile agricultural land. The family gets around Rs.8 to 10 lakh income from agriculture. As against this, the respondent's father is a retired driver having unirrigated land. He does not have any house in Latur and has a meager income. The learned advocate would submit that the very fact that the respondent – wife has been unable to maintain herself and has

filed petition for maintenance, would not be able to look after the welfare of the child. Admittedly, the appellant has been bearing the school expenses for his education and would be able to look after the child with the financial support he has.

5. The learned advocate would submit that being a biological father and a natural guardian appellant has no adverse interest. More the delay it would be difficult even for the child to get adjusted with the father. Considering his tender age, the child may not be able to anticipate the hardship and his emotional decision, whatever it may be, while expressing it before this Court needs to be understood pragmatically since the child has been in the custody of respondent - mother and has not much of an association with the appellant father.

6. Mr. Kedar would submit that much weight has been attached by the learned Judge by laying emphasis on the stand being taken by the appellant while defending the proceedings initiated by the respondent – wife for maintenance under Section 125 of the Code of Criminal Procedure and for alleged domestic violence under the Protection of Women from Domestic Violence Act, 2005. It would be appropriate that the stand in those proceedings are appreciated in the proper perspective.

7. Per contra, the learned advocate for the respondent submitted that though father is a natural guardian as defined under Section 6 of the MNG Act, welfare of child is of paramount consideration. Mere financial capacity should not weigh with the father. Emotional

attachment of the child with the biological mother for having been in her custody since birth cannot be overlooked. No fault can be found with the observation of the learned Judge in the light of the stand being taken by appellant about his financial condition. He has been conveniently changing the stance. In order to defend the maintenance proceedings he would demonstrate vagrancy and now claims to be having sufficient income to maintain the child. The learned Judge has correctly appreciated the evidence and has rightly dismissed the petitioner's claim.

8. We have considered the rival submissions and perused the papers. We have also carefully gone through the decision cited at the bar.

9. At the outset, it is necessary to bear in mind the fact that irrespective of the initial dispute about the age of the child on the date of passing of the impugned judgment and order, by now, admittedly, the child is more than 8 years of age. By virtue of Section 6 of the M&G Act, the appellant being biological father of the child is his natural guardian. Bearing in mind the trite position that welfare of the child is of utmost and paramount consideration in such matters it will have to be understood in juxtaposition to the right of the biological father being a natural guardian to have its custody. The initial burden would be on a party seeking to take exception to such trite legal position. In other words, appellant being the natural guardian of the child, the burden would lie upon the respondent to demonstrate the circumstances which would disentitle the appellant from claiming the custody.

10. Bearing in mind these facts and circumstances, the circumstances which have been brought on record by the respondent – wife to defend the custody and which have weighed with the learned Judge while dismissing the petitioner’s claim for custody are :

- a. Inconsistent stand of the appellant as regards his income in the present proceeding and the proceedings filed by the respondent for maintenance and for domestic violence.
- b. The respondent has been residing at Latur which is a better place for educating the child than a village where the petitioner has been residing.
- c. After succeeding in getting divorce in a proceeding filed by him, taking advantage of the legal position, he has solemnized second marriage, however, the decree of divorce has been set aside and the matter has been remanded for decision afresh which suit is still pending and the child would be cohabiting with the stepmother.

11. At the out set, it is necessary to bear in mind the fact that the impugned judgment and order was passed on a petition filed by the appellant in 2018 when the child was around 3 years of age and bearing in mind the fact that on the date of judgment he was completing 5 years and was having the fifth birthday on the very next day of the pronouncement, one will have to appreciate the aforementioned facts and circumstances while judging sustainability of the judgment and order under challenge. Though the learned judge was in error in observing that the child was 4 years and 11 months on the date of judgment, that would not make any change in the legal parameters which enable a

biological mother to have custody of minor children in preference to biological father and natural guardian.

12. Admittedly, the child by now is more than 8 years of age and has been going to a school for which the expenses are being borne by the appellant as is reflected from even the joint pursis filed by both the sides in this Court on 29.10.2021. The child was stated to be studying in MIT Vishwashanti Gurukul, Ambajogai Road, Latur and the appellant was paying its expenses. It is in the backdrop of such state of affairs that independent of the reasoning assigned by the learned Judge, the matter will have to be decided in the light of the changed circumstances. The burden would be on the respondent wife to demonstrate as to how the welfare of the child would be at peril if he is sent in custody of the appellant father.

13. In this regard it is necessary to note that as far as financial condition is concerned, there can be no dispute that the appellant would be better off as compared to the respondent. Not much weight needs to be attached to the incompatible stands being taken by him during the course of evidence and in different proceedings, as regards his financial condition. It is but natural that while defending the maintenance and domestic violence proceedings, he tried to demonstrate lack of resources but while claiming the custody he makes his income as a capital. However, the very same argument can be advanced with equal vehemence against the respondent - mother. If she has been facing

vagrancy and has been unable to maintain herself and has been claiming maintenance from the appellant she would not be in a position to now say that with the maintenance to be paid by the appellant she can maintain the child. We, therefore, are of the considered view that not much weight can be attached to the inconsistent stands being taken by the appellant.

14. True it is that the appellant had obtained a decree of divorce and had solemnized second marriage and thereafter the respondent succeeded in appeal and the matter was remitted back to the trial court and his second wife must have been cohabiting with him and would be a stepmother of the child. However, in the absence of any fact, circumstance and evidence, it would be clearly an hypothesis to consider this as a decisive circumstance. Though the learned Judge has not said it in so many words, his reliance on this aspect insinuates that he had some reservation, in all probability, anticipating that the child would face a stepmotherly treatment. Merely because the appellant has solemnized a second marriage that cannot *ipso facto* disentitle him to claim custody, more so, in the absence of iota of evidence to demonstrate as to how the child would be treated by his stepmother.

15. It is in this context it needs to be borne in mind that the legislature in its wisdom has not put any rider while declaring the biological father as a natural guardian. Therefore, solemnization of second marriage by the appellant cannot be looked upon as a

circumstance which would *per se* be disregarding welfare of the child.

16. This takes us to the only remaining ground that the respondent has been residing in Latur, whereas, the appellant's place of residence is in a village from the nearby Taluka. However, again, this circumstance should not weigh with the Court more so when the evidence is deficient to demonstrate that removing the child from the custody of respondent - mother and placing it in the custody of appellant - father would affect latter's right to claim custody. Though over all welfare of the child should be the paramount consideration, the right of a natural guardian cannot be denied unless there is some drastic circumstance to deviate from the rule. If the appellant is the biological father and natural guardian even he would be interested in the welfare of the child. At least there are no circumstances to indicate that he has been claiming the custody with some ulterior motive.

17. One cannot lose sight of the fact that such custody matters, in a sense, are not close ended. If at all at some later point of time the facts and circumstances would be demonstrative of the fact that appellant has not been maintaining the child properly or there would be some such circumstance demonstrative of his welfare being overlooked by the appellant, it would always be open for the respondent to claim back the custody.

18. Even the emotions at this stage would take a backseat. If the emotions alone were to be decisive, a mother's claim would easily get a

priority but that being not the law, as the father is the natural guardian as declared under Section 6 of the M&G Act, leaning of the child with the mother cannot always be a consideration without there being attending circumstances which deprive the father of custody.

19. In our interaction with the child we found him joyful and happily staying with his mother and would even indicate that he would want to continue to stay with the mother. However, the volition of the child of the age of 8 years, particularly when he has been in the custody of the respondent - mother since his birth and considering the fact that since the date of filing of the petition the appellant has been exercising his visitation right, in our considered view, a pragmatic, logical and legal approach is needed. Though it is heart wrenching, in the absence of strong, cogent and convincing circumstances to make exception to the law declaring biological father as a natural guardian, in our considered view, the appeal deserves to be allowed and the appellant deserves to be given custody of the child, of course, making necessary provision so that it could meet respondent - mother frequently.

20. The appeal is allowed. The impugned judgment and order is quashed, set aside and reversed. Appellant's petition is allowed. The respondent shall hand over custody of the child Shivraj Sujit Karad to the appellant immediately after his midterm examination is over in Oct/Nov 2024.

21. The appellant shall drop and take away the child at the

respondent's place of residence on every Sunday between 11.00 am and 3.00 pm and also for half of the days during every vacation i.e. Diwali, Winter and Summer.

22. Pending civil applications are disposed of.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

23. After pronouncement of the order, learned advocate for the respondent – mother of the child seeks stay to the operation of the order, so as to enable her to approach the Supreme Court.

24. Since it is a matter of child's custody and when admittedly, the child is in custody of the mother, operation of the order shall stand stayed for a period of four weeks. However, it is clarified that the interim arrangement agreed between the two sides, shall continue even during the period of four weeks.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE