



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

CIVIL REVISION APPLICATION NO. 126 OF 2023

Neha Fatema @ Neha Farzeen w/o
Mohammad Mohsin Saudgar,
Age : 25 Years, Occ. Household,
R/o. Noble Colony, Noble Heights,
Wadi (Bk.) Nanded.

..Applicant.

VERSUS

Mohsin s/o Abdul Salim Saudagar,
Age : 30 Years, Occ. Business,
R/o. Mohsin Colony, Delgoor Naka,
Nanded

.. Respondent

....

Mr. S. S. Kazi, Advocate for the Applicant.

Ms. A. N. Ansari Advocate for the Respondent

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 15th March 2024

ORDER:-

1. The present petitioner, who is the respondent in petition No.D-12/2022, has challenged the order, dated 19.04.2023, passed below Exhibit-23, in the aforesaid proceeding by the learned Principal Judge, Family Court at Nanded. Under the impugned order, the learned Principal Judge, Family Court, Nanded i.e. the learned trial Court has rejected the application filed by the petitioner for rejection of the aforesaid petition under Order VII, Rule 11 of the Code of Civil procedure (for short, "C.P.C.").

2. Heard rival submissions and also perused the impugned order along with the other documents on record. The learned counsel for the petitioner also placed reliance on the judgment of the Hon'ble Apex Court, *in the case of Vithalbhai (P) Ltd Vs. Union of Bank of India reported in (2005) 4 Supreme Court Cases 315*

3. It is significant to note that the present petitioner had claimed rejection of the petition on two grounds; that the petition filed by her husband i.e. present respondent is premature in view of provisions of Mohammedan Law specially Section 357 whereby father cannot claim custody of his minor male child till it attains age of seven years and that as per Section 17 of the Guardian and Wards Act 1890, the Court has to take consistent view with the Personal Law to which minor is subjected.

4. Admittedly, the minor child in the instant case i.e. son of the rival parties is now two years old. Further, there is no dispute in respect of the provisions of Mohammedan Law whereby it is observed that the child must remain with the mother till it attains age of seven years. Further, the provision as mentioned above of the Guardian and Wards Act 1890 is

also not in dispute. The learned counsel for the petitioner relied upon the observations in the case of Vitthalbhai (supra). The said observations of Hon'ble Apex Court is quoted herein below :-

“22 We may now briefly sum up the correct position of law which is as follows :

A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the Court; the Court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The Court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff

or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases :

(i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See Samar Singh V. Kedar Nath). One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained”.

5. Thus, the learned counsel for the petitioner submits that the minor child has not attained the age of seven years, and therefore, the present suit is premature one and it can be held that no cause of action has yet taken place. However, as per the observations of Hon'ble Apex Court as mentioned above, a civil suit, even if it is filed at premature stage, the same is not to be necessarily dismissed for such reason. Moreover, even though the Muslim Personal Law to which the parties belong, says that a male child needs to be in custody of mother till he attains age of seven years, but while considering the application for custody of minor under the provisions of Guardian and Wards Act 1890, welfare of the minor child is the paramount consideration and the Muslim Personal Law (Shariat Application) Act, 1937 of parties can be taken only as a guideline. The Hon'ble Apex Court in so many cases has observed that the welfare of minor child must prevail over the provisions of Personal Law to which parties belong. There is no such bar for filing custody application for person belonging to Muslim community under the provisions of Guardian and Wards Act. Therefore, the petition filed by the respondent-husband for getting custody of his son, who is aged about two years, cannot be rejected by resorting to the Order VII Rule 11

of the Code of Civil Procedure. Hence, no substance is found in the present application and accordingly it stands dismissed.

(SANDIPKUMAR C. MORE, J.)

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