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fa1708.24

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1708 OF 2024
WITH
CA/7330/2024 IN FA/1708/2024

Mukhtar S/o. Yunus Sayyad,
Age-33 years, Occu-Business,
R/o. Krushi College Road,
In front of Bhojane Hospita, Pachod,
Tq. Paithan, Dist. Aurangabad

...Appellant
[Ori. Resp. No.1]

VERSUS

1. Habiba W/o. Mukhtar Sayyad,
Age-25 years, Occu-Household,
R/o. Krushi College Road,
In front of Bhojane Hospital, Pachod,
Tq. Paithan, Dist. Aurangabad
2. Yunus Bandeali Sayyad,
Age- 56 years, Occu-Business,
3. Karimunnisa W/o. Yunus Sayyad,
Age-54 years, Occu-Household,
4. Imran S/o. Yunus Sayyad,
Age-35 years, Occu-Business,
5. Nisar S/o. Yunus Sayyad,
Age-26 years, Occu-Business,
6. Ishrat W/o. Afroz Shaikh,
Age-31 years, Occu-Household,
7. Masarrath W/o. Affan Mehfooz Chaus,
Age-29 years, Occu-Household,

Resp No. 2 to 7

All R/o. Krushi College Road,
In front of Bhojane Hospital, Pachod,
Tq. Paithan, Dist. Aurangabad

...Respondents

[Resp No.1 Ori. Petitioner]

[Resp No. 2 to 7 Ori. Respondents]

Mr. Krishna Pratap Rodge, Advocate for the appellants
Mr. Sayyed Tauseef Yaseen For respondent Nos.1

CORAM : KISHORE C. SANT, J.

RESERVED ON : 23rd JULY, 2024

PRONOUNCED ON : 28th AUGUST, 2024

JUDGMENT:

1. This appeal is preferred against the judgment and order passed by the learned District Judge, Aurangabad dated 09-05-2024 in Civil Misc. Application No. 364/2022 directing the present appellant-original respondent No.1 to hand over the custody of children to present respondent No.1. Present appellant is the husband-original respondent No.1 in Civil Misc. Application No.364/2022. Present respondent No.1 is the original petitioner in the said application. Present respondent Nos. 2 to 7 are original respondent Nos. 2 to 7, who are parents, brothers and family members of the appellant husband.

2. The appellant is referred to as 'husband' and respondent No.1 is referred to as 'wife' and respondent Nos.2 to 7 are referred to as 'relatives' for the purpose of convenience.

3. The wife filed an application under Section 25 of the Guardians and Wards Act, 1980 for custody of the minor children from the husband.

4. The case in short, is that the husband and wife got married on 24-04-2015 as per Muslim rites. There are two sons namely Sayyad Mohammad who was 5 years of age and Sayyad Sarmad who was 2 years of age at the time of filing application and one daughter namely Fatima born out of said marriage. It is the case of the wife that after the marriage she was staying in a joint family. After few days of the marriage, she was ill-treated at the hands of in-laws for demand of Rs.1.50,000/- for opening imitation jewelry shop. The wife therefore was constrained to file to lodge a First Information Report with Pachod Police

Station for the offence punishable under Section 498-A, 504, 506 read with Section 34 of the IPC. On the basis of FIR, Crime No. 297/2022 was registered. Same is pending. Since she was driven out of the house, she had filed proceeding under Section 97 of the Cr. P. C. seeking custody of the minor children. Both the proceedings are pending before the learned trial court. The wife thereafter filed Misc. Application No. 364/2022 for custody of children being natural guardian of the children. It is her case that she is in a position to take care of the children. She can look after their education up bringing of the child etc.

5. It is the case of the husband and relatives that financial condition of the family and husband is sound. Allegations about ill-treatment and harassment are denied. Specific incident dated 27-07-2022, is denied i.e. driving out of the wife from house. The children are taking good education and they are looked after by the family. The children show good progress in the school. Though there were attempts on the part of the husband to call the wife for cohabitation, it is the wife

who did not come for cohabitation. The husband is also a natural guardian.

6. However, there was no evidence laid by the husband's side. The court therefore, decided the application directing the parties to give custody of the children to the wife. The husband challenged the order before this court. This court remanded the application with direction to give opportunity to the husband to adduce evidence. It is, thereafter, main application again came to be decided after taking evidence. It is this order, which is now under challenge. In the impugned judgment and order, the learned trial court observed that wife can take best care of the children. Minor children need company of the mother. It is the mother who can take proper care of the children by paying attention. She has sufficient time for children as she is a housewife and not involved in any business. As against that husband is busy with his grocery shop and does not have time to look after the children. It has come on record that there was also a notice for 'restitution of conjugal rights'.

However, there was no reply. It is observed on the basis of evidence that husband runs grocery shop etc and directed the custody of children to be handed over to the wife.

7. This court has gone through the record and proceedings and evidence in the matter. This court also interacted with the children to assess their situation and to ask their willingness. The children presently are in the custody of the husband and thus very naturally they stated they are happy with the father and they do not want to go with the mother.

8. Learned advocate for the appellant vehemently argued the appeal. He submits that observations of the court are against facts on record. It is the father who can take decision in the interest of the children. The wife is educated only up to 8th std. whereas husband is educated up to BA. His grocery shop business is flourishing one. His brother is also having tea-stall. His another brother runs a footwear shop near bus-stand. However, this evidence is ignored by the learned court. Children

are taking education in a reputed school namely Jain English School at Pachod. Progress report of children in school is not properly appreciated. He relied upon compilation of the documents produced on record to show that son Mohammad & Sarmad are taking education in Gurukul English School. In spite of issuance of notice, wife has not come for co-habitation. Though the wife has left the house on 27-07-2022, no attempts were made for seeking custody. The custody was sought much time after leaving the house. Even the children do not want to go to reside with the mother. There are many people residing in the house of the parents of the wife because of this mother would not in position to take care of children. Now the children are settled in the husband's house. Learned advocate for the appellant relied upon the judgment reported in 2024 SCC Online SC 225 in the case of Shazia Aman Khan and Another Vs State of Orissa and others.

9. As against that Mr. Sayyed, learned advocate for the respondents submits that there is no female member in the

family of the husband to look after the children. Financial condition is not sole criteria while considering the matter of grant of custody of minor children. The learned trial court has rightly observed, on the basis of evidence, that the children are found vulnerable to tutoring and developing general negativity. Children are only of 5 years & 2 years requiring company of the mother. He relied upon the judgment reported in 2022 LiveLaw (SC) 643 RohithThammana Gowda Vs State of Karnataka and Ors.

10. In the case of Shazia Aman Khan (supra) the Hon'ble Apex Court has considered the concept of custody, guardianship and stability of child. It is held that the court has to look at stability and security of the child as essential for full development of child's talent and personality. It is reiterated that paramount consideration in the matter of custody is welfare of the children. It is further held that while deciding the matters of custody, wish of the children is also one of the factors that requires consideration. In that case, child was called to the court

for interaction. Parents were also called for interaction. In that case, court found that child was quite intelligent who could understand her welfare. In that case, child expressed that she does not want to be destabilize. Thus, from the interaction with the child the Hon'ble Apex Court had decided not to disturb the custody of the child.

11. So far as judgment in the case of Rohith Thammana Gowda (supra) is concerned, the Hon'ble Apex Court directed to give custody to the mother as it was satisfied that the child was comfortable and secure with his mother. The order directing to give custody to the mother was maintained. In the case reported in AIR 1988 Kerala 30 Suharabi Vs Muhammed the Kerla High Court directed to hand over custody to the mother by setting aside the judgment and order of the learned District Judge. It was considered that the children were of tender age and it was in the interest of children to be in the custody of the mother. In Writ Petition No. 2048/2023 Abhishek Ajit Chavan Vs Dr. Gauri Abhishek Chavan this court at Bombay, on considering various

factors, interacted with the child in the chamber. Though the child expressed her desire to be with her father, this court held that the comfort of the child is one of the factors to be taken into consideration while considering the welfare of the child. It was considered that child was of 8 years of age. Child at the age of 8 years would normally be driven by her immediate comfort. The court after considering the family position of the parties & that mother was only having part time job and thus would be in the house for most of the time in a day, dismissed the petition of the husband.

12. In view of the above, now it is settled that it is the interest of the children that needs to be considered. Mere desire of a child at a tender age is not a sole factor to be considered for taking decision in respect of the custody. The child at the tender age is not fully aware of his welfare. There is always tendency to be with parent with whom they are residing. They are mostly influenced by tutoring by the parents. Interaction with child is thus influenced by such parents. In the present case also, this

court interacted with the children. The children naturally stated that they are happy with the father. However, it must be considered that presently children are in custody of the father and as expected, answer has come in favour of the father.

13. So far as better company and care is concerned, it is seen that almost every member in the family of the husband is occupied in the business. There is only grand-mother of the children who is in the house for whole day. In the house of the wife, she is always at home. She stays with her parents. There are other relatives in the family. So far as deprivation of the company is concerned, it needs to be noted that both the parties are staying in the same town. Distance between the houses of husband and wife is not more than 2 km. Thus, visitation by parent would not be much difficult. Husband can always meet children at convenient place. Husband and wife are related to each other even prior to marriage. One more factor needs to be considered is that there is one female child who is staying with mother. If all the siblings stay together it would help children in

growing together. Being female child she requires care and attention of the mother. Under Muslim Law, custody of the children below 7 years is required to be with the wife.

14. So far as financial condition is concerned, the court has rightly taken care of that aspect directing husband to pay an amount per month to each children. [In the order it, however wrongly appears that wife is directed to pay]

15. This court finds that the learned trial court has considered all the evidence and has rightly arrived at the conclusion. No case is made out to disturb the said findings of fact. Thus in view of the discussion above, this court finds that there is no merit in the appeal and appeal deserves to be dismissed. The learned trial court had directed custody to be handed over within a period of one month from the date of judgment, however, that period is now over. Therefore, this order to take effect within one month from today. Rest of the order is maintained as it is. The husband is directed to pay an

amount per month by correcting the order of the learned trial court as discussed in para No.14 of this judgment.

16. In view of above, appeal stands dismissed off.

17. In view of disposal of the appeal, the civil applications, if any stand disposed off.

[KISHORE C. SANT, J.]

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LATER ON:

1. At this stage the learned advocate for the appellant seeks continuation of the interim order.

2. The request is vehemently opposed by the learned advocate for the respondent. He submits that during the pendency of the application, she was not allowed to see the children by the husband.

3. In view of the same, following arrangement:

(i) Stay continued for next four weeks.

(ii) The interim arrangement to continue till next four weeks, by way of interim arrangement. For next four weeks, the wife is allowed to see the children at the house of the husband by way of interim arrangement and to take the children on every Saturday After school time is over and she will send back the children on every Monday in the morning for school purpose to husband.

[KISHORE C. SANT, J.]