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fa1707.24

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

**FIRST APPEAL NO. 1707 OF 2024
WITH
CA/7329/2024 IN FA/1707/2024**

1. Imran S/o. Yunus Sayyad, ...Appellant
Age-35 years, Occu-Business, [Ori. Resp. No.1]
R/o. Krushi College Road,
In front of Bhojane Hospital, Pachod,
Dist. Aurangabad

VERSUS

1. Ashiya W/o. Imran Sayyad, ...Respondents
Age-33 years, Occu- Household, [Resp No.1 Ori Petitioner]
R/o. Krushi College Road, [Resp Nos. 2 to 7 Ori. Rspdts.]
In front of Bhojane Hospital, Pachod,
Tq. Paithan, Dist. Aurangabad
2. Yunus Bandeali Sayyed,
Age-56 years, Occu-Business,
3. Karimunnisa W/o. Yunus Sayyad,
Age-54 years, Occu-Household
4. Mukhtar S/o. Yunus Sayyad,
Age-33 years, Occu-Business,
5. Nisar S/o. Yunus Sayyad,
Age-42 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. Nos. 2 to 7
All R/o. Krushi College Road, in front of
Bhojane Hospital, Pachod, Tq. Paithan, Dist. Aurangabad

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. 363/2022 directing the present appellant-original respondent No.1 to hand over the custody of children to respondent No.1. Present appellant is the husband-original respondent No.1 in Civil Misc. Application No. 363/2022. 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.

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 16-05-2008 as per Muslim rites. There are total six children born out of said marriage. Presently custody of one child is with the wife. Custody of five children is with the husband. Custody of five children is sought by the wife. It is the case of the wife that after the marriage she was staying in a joint family. After two days of the marriage, she was ill-treated at the hands of in-laws for demand of Rs.2 lakhs for opening imitation jewelry shop. Because of poor financial condition, father of the wife expressed inability to pay such amount. On that count there started quarrels in the family. The father of the wife therefore raised hand loan of Rs.2 lakhs and paid to husband's family.

Expenses while delivering the children were also born by the father of the wife. The wife after having these many children, performed the family planning operation, on that the husband got annoyed and again started ill-treatment to the wife.

5. Because of constant harassment, relatives of the wife had been to her matrimonial house, whereupon, the husband and his relatives drove the wife out of the house by keeping children with them. Wife thereafter filed an application under Section 97 of the Cr. P. C seeking custody of the children. However, said application came to be rejected. The wife has therefore, approached the District Court seeking custody of the children in the capacity of natural guardian.

6. It is the case that being a real mother she has natural love and affection for the minor children. There is no one to look at the children in the husband's family as all the male members are busy in their respective shops. For taking proper care of children, it is necessary to give custody to the mother.

7. It is the case of the husband that position of the wife is not financially sound to take care of the children. Children are looked after by their grand-mother. Financial position of the husband is sound. He even pays income tax. Other allegations of ill-treatment and demand of Rs.2 lakhs are denied. Husband initially did not adduce evidence and matter was decided by judgment and order dated 29-04-2023. The custody was directed to be given to the wife. This order came to be challenged before this court. This court, thereafter, remanded the application directing to provide an opportunity to the husband to lead evidence.

8. Thereafter, matter came to be decided afresh. 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.

9. 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 6th std. whereas husband is educated up to 12th std. 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 Furkhan is 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 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. 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.

10. 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 a 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 children are found vulnerable to tutoring and developing general negativity.

Children are only of 9 years, 7 years and daughters Bursha and Mubashir are twins are of 6 years and therefore, required company of the mother. He relied upon the judgment reported in 2022 LiveLaw (SC) 643 RohithThammana Gowda Vs State of Karnataka and Ors.

11. 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 distabilize. Thus, from the interaction with

the child the Hon'ble Apex Court had decided not to disturb the custody of the child.

12. So far as judgment in the case of Rohith Thammana Gowda (supra) is concerned, the Hon'ble Apex Court has given 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 age of the children was 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, the mother of the mother was in the house for entire day, dismissed the petition of the husband.

13. 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 tender age is not 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 parents 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 as usual stated that they are happy with the father. However, it must be considered that presently children are in custody of the father and natural tendency, the answer has come in favour of the

father.

14. So far as better company and care is concerned, it is seen that almost every members 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 parents would not be much difficul. 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 twin girls are hardly of 6 years of age. Being female children they require care and attention of the mother. Other children are also 9 years and 7 years of age. Under Muslim Law, custody of the children below 7 years is required to be with the wife.

15. 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 the children. [In the order it, however wrongly appears that wife is directed to pay]

16. 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 to each by correcting the order of the learned trial court as discussed in para No.15 of this judgment.

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

18. 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.]