



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

FAMILY COURT APPEAL NO. 105 OF 2023

Suvarna Babasaheb Gaikwad,
Age : 27 Years, Occu. : Nurse,
R/o Khandgaon, Tq. Pathardi,
Dist. Ahmednagar. .. Appellant

Versus

1. Vandana Pravin Thokal,
Age : 35 Years, Occu. : Nurse,
R/o Ambedkar Nagar, Bolhegaon,
Cobhe Colony, Tal and Dist.
Ahmednagar.
2. Maxcare Hospital Clinic,
Behind Zopadi Canteen,
TV Center Road, Ahmednagar,
Through its Administrative Officer,
3. Pravanya Abhijeet Sase @
Pravnya Pravin Thokal,
(Under the Guardianship of
Respondent No. 1),
Age : 4.5 Years, Occu. : Nil,
R/o Ambedkar Nagar, Bolhegaon,
Cobhe Colony, Tal and Dist.
Ahmednagar. .. Respondents

Mrs. Sumedha C. Thombre, Advocate for the Appellant.
Shri D. R. Markad, Advocate for the Respondent Nos. 1 and 2.

**CORAM : MANGESH S. PATIL AND
SHAILESH P. BRAHME, JJ.**

**CLOSED FOR JUDGMENT ON : 08.07.2024
JUDGMENT PRONOUNCED ON : 18.07.2024**

JUDGMENT (*Per Shailesh P. Brahme, J.*) :-

. Heard both the sides finally at the admission stage considering the urgency that matter pertains to custody of a minor girl. Appellant has placed on record paper book comprising of relevant documents of the trial court for the adjudication of this appeal.

2. Being aggrieved by the judgment and decree dated 18.04.2023 passed by the learned Judge, Family Court, Ahmednagar in Petition No. D-10 of 2022, the appellant has approached this Court. The appellant is the original petitioner who sought custody of respondent No. 3 minor daughter U/Sec. 25 of the Guardians and Wards Act, 1890. The respondent No. 1 contested the proceedings. Both the parties adduced oral evidence of two witnesses each in support of their case and produced documents on record.

3. It is case of the appellant that, she gave birth to the respondent No. 3 minor girl on 08.11.2016 out of her illicit relationship with her partner Abhijeet. Abhijeet lured her with the false promises of marriage and had physical relationship and later on refused to keep his words. Appellant was married with another person and marriage could not be continued. It was dissolved by the orders of the Court.

4. It is further contended that appellant was required to stay at her cousin uncle's place from maternal side, Santosh.

Respondent No. 1 is the real sister of Santosh. It was agreed between appellant and the respondent No. 1 that the new born baby would be kept in custody of the respondent No. 1 and no sooner than the marriage of the appellant could be fixed with her estranged partner the custody would be restored. The appellant was having access to the baby for some period. Thereafter, respondent No. 1 and her husband refused to hand over custody of the minor daughter, which led her to prefer present proceeding for custody.

5. It is further contended that appellant is working as a nurse with Dharma Hospital, Ahmednagar and earns Rs. 8,000/- per month. Besides that she does the tailoring work. She has savings account and few ornaments have also been purchased by her. It is tried to be contended that she is in a position to maintain and look after the minor.

6. The claim of the appellant is opposed by the respondent No. 1. It is contended that at the time of delivery, registration of the minor with hospital was done in the name of the respondent No. 1. A consent deed was executed on 08.11.2016 for handing over custody of minor to the respondent No. 1 as she was born out of illicit relationship. The appellant was paid Rs. 3,00,000/- towards her diet, medication and future expenses. In view of the written agreement between the parties, minor has been looked after by the respondent No. 1 and she is in her custody. It is vehemently contended that the respondent No. 1 has better resources to maintain the minor, including her salary to the tune

of Rs. 18,000/-, agricultural land of her husband and house property. It is further contended that the minor has been admitted in the school and every care is being taken by the respondent No. 1 to develop her personality.

7. It is the case of the respondent No. 1 that the daughter would be in safe custody with her. The appellant is claiming custody for the oblique motive to teach lesson to the estranged partner. There is every possibility of appellant getting married for the second time.

8. During the course of the proceedings, attempts were made for reconciliation but could not materialize. The learned Judge interacted with the minor and it is recorded that the respondent No. 1 was recognized by the minor as a mother and minor has been brought up with great love and affection. Minor is not ready to stay with the appellant.

9. Both the parties have led oral evidence of themselves as well as appellant examined her mother and respondent No. 1 examined Archana Santosh Thombe. It is not disputed that appellant is the biological mother of the minor who is born on 08.11.2016. She was born out of the illicit relationship of the appellant with her partner Abhijeet. Since discharge from the hospital after delivery, the minor is in the custody of the respondent No. 1. There is written agreement between the parties dated 08.11.2016. The respondent No. 1 is distant relative of the appellant, (मावस आत्या).

10. Learned Judge has referred to Section 6 of the Hindu Minority and Guardianship Act, 1956 (for the sake of brevity and convenience hereinafter referred as to the 'Act') but halfheartedly. It is appropriate to reproduce Section 6 of the Act :

6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

11. Considering the date of birth of the respondent No. 3, presently she is of seven years and 08 months. Appellant being

biological mother is her natural guardian. As per clause (b) of Section 6 of the Act minor being illegitimate unmarried girl, appellant is entitled to have custody of the minor. This aspect of the matter is overlooked by the learned Judge while dealing with the matter on merits. Learned Judge should have reproduced entire section and applied mind to all the clauses.

12. In the present case, the rival claims for custody are not between biological mother and father or estranged partner. The respondent No. 1 is a distant relative of the appellant. The custody of the respondent No. 1 has no sanctity of law, albeit, since beginning she is having custody of the minor. Neither agreement between the parties executed on 08.11.2016 would confer right of either guardianship or custody of the minor with the respondent No. 1, when clauses (a) and (b) of Section 6 of the Act confer the custody of the illegitimate minor to the appellant. Her claim for custody of the respondent No. 3 is within four corners of law and deserves to be allowed.

13. In the present matter, father of the respondent No. 3 is not claiming custody of the minor, therefore by implication of clause (a) of Section 6 of the Act it can be inferred that the appellant is entitled to the custody.

14. The appellant is in service with a private hospital and has been earning Rs. 8,000/-. Besides that she is able to earn from her tailoring skills. There is no reason to doubt that she has opened a bank account and collected funds. Therefore, it is not a

case where custody is being claimed by mother, without there being any source of income.

15. The learned counsel for the respondent No. 1 strenuously argued the comparative financial status and welfare of the minor in allowing her custody with the respondent No. 1. Though the material on record shows that the respondent No. 1 is better placed than the appellant, she cannot retain the custody of the minor vis-a-vis the claim of the biological mother. The findings recorded by the learned Judge in respect of financial status of the respondent No. 1 are inconsequential and cannot confer the custody.

16. Learned Judge has also devoted couple of paragraphs for the conduct of the appellant in claiming the custody belatedly. We find that there were compelling circumstances for the appellant in not claiming the custody immediately. She was required to execute agreement on 08.11.2016. She appears to have made attempts to restore her relationship with her estranged partner, but could not fructify.

17. Learned counsel for the respondent No. 1 has vehemently referred to the admissions in the cross examination of the appellant and her mother to demonstrate that custody being claimed with oblique motive. Even if the submissions of the respondent No. 1 are accepted, for want of legal sanctity, it is not possible to retain custody of minor with the respondent No. 1. As the respondent No. 1 failed to show any statutory provision for

maintaining the custody of the minor, we cannot approve the submissions of the learned counsel.

18. The learned counsel for the respondent No. 1 has drawn our attention to observation recorded by the learned Judge after interaction with minor. Those observations are inconsequential because the appellant's claim is based upon the legal provision and the respondent No. 1 is opposing the claim on equity. It is trite law that when legal right is pitted against the equitable considerations, legal right would prevail. For this proposition, we find support from the judgment of the Supreme Court in the matter of Kamla Vs. S.L.A.O. reported in **(2023) 3 SSC 528**.

19. Though as per Section 13 of the Act, welfare of the minor is of paramount consideration, those considerations cannot supersede the legal right of the appellant. We have recorded that the appellant has source of income, albeit lessor as compared to the respondent No. 1, but it cannot be said on the basis of the material on record that she would be unable to look after and maintain the minor. For the reasons stated above the appeal succeeds. We, therefore, pass following order.

O R D E R

I. Family Court Appeal is allowed.

II. The judgment and order dated 18.04.2023 passed by the Judge, Family Court, Ahmednagar in Petition No. D- 10 of 2022 is quashed and set aside.

III. The respondent No. 1 shall hand over custody of the respondent No. 3 minor girl to the appellant forthwith.

IV. There shall be no order as to costs.

V. Decree be drawn up accordingly.

[SHAILESH P. BRAHME, J.] [MANGESH S. PATIL, J.]

bsb/July 24