



Judgment

24 fa1031.22

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, NAGPUR**

**FIRST APPEAL NO.1031 OF 2022**



..... **Appellant.**

**:: VERSUS ::**



..... **Respondent.**

=====  
Shri R.L.Kadu, Counsel for the Appellant/Wife.  
Shri A.J.Thakkar, Counsel for the Respondent/Respondent.  
=====

**CORAM : URMILA JOSHI-PHALKE, J.**  
**CLOSED ON : 21/02/2023**  
**PRONOUNCED ON : 13/04/2023**

**JUDGMENT**

1. By this appeal, the appellant (opponent/wife) challenges judgment and order dated 15.6.2019 passed by learned Principal District Judge, Buldana in Guardian and Wards Case No.9/2019. The parties are hereinafter referred as per their original nomenclature.

2. Brief facts necessary for disposal of the appeal are as under:

.....2/-

**2**

The marriage of the respondent (applicant/husband) was solemnized on 17.6.2012 with the opponent/wife. They had a son [REDACTED] from the said wedlock who was born on 7.5.2013. The matrimonial dispute arose between the applicant/husband and the opponent/wife. As per the allegations of the applicant/husband, the opponent/wife was not ready to cohabit with him and was insisting to stay separately. As he had not listen to her, she left the company of the applicant/husband. He had taken efforts to fetch her back. However, she did not turn up and, therefore, he filed an application before the Woman Cell in the office of the Superintendent of Police at Buldana. He had also filed an application under Section 9 of the Hindu Marriage Act, 1956 for restitution of conjugal rights. The opponent/wife had also filed an application for grant of maintenance under Section 125 of the Code of Criminal Procedure.

3. As per the contentions of the applicant/husband, due to their matrimonial dispute, their ward is suffering from serious ailments. For better care and protection of the child, the applicant has settled the dispute and withdrawn the proceedings filed by him under Section 9 of the Hindu

.....3/-

**3**

Marriage Act. The opponent/wife is not having sound economical condition to maintain the child. As the opponent/wife had filed an application for grant of maintenance, it is sufficient to show that she is unable to maintain herself. In such circumstances, she is unable to take care of the child. Now, their child has attained the age of six years and the applicant/husband is a natural guardian. The child requires special care and treatment which opponent/wife cannot give. The applicant/husband had admitted his son in Joseph English School. However, the opponent/wife left the matrimonial home and now his minor son is unable to attend the school. Due to the said conduct of the opponent/wife, the academic career of the minor child is affecting. He further alleged that the opponent/wife is not allowing the applicant/husband to meet the child and depriving him from love and affection of his son. As the opponent/wife is residing at the mercy of her parents, she cannot take care of the child. On the other hand, the applicant/husband is the father who is a natural guardian and can provide due facilities and take care of his education and, therefore, he claimed custody of the child by filing the application.

.....4/-

**4**

4. Though the Notice of the said application is served on the opponent/wife, she failed to appear before the trial court and, therefore, the application proceeded *ex parte*. The applicant/husband has not entered into the witness box. On his behalf, his father Sudhakar Udaybhan Bawaskar adduced the evidence vide Exhibit-13. On the basis of his evidence, the trial court allowed the application and directed the opponent/wife to hand over the custody of the child to the applicant/husband.

5. The opponent/wife has challenged the judgment and order dated 15.6.2019 passed by learned Principal District Judge, Buldana in Guardian and Wards Case No.9/2019, by this appeal.

6. As per the grounds raised by the opponent/wife, the Notice was not served upon her properly and the trial court proceeded by passing *ex parte* order. Thus, an opportunity was not granted to challenge the application. She prayed for remand of the application by affording her an opportunity to challenge the grounds raised by the applicant/husband.

.....5/-

**5**

7. Heard learned counsel Shri R.L.Kadu for the opponent/wife and learned counsel Shri A.J.Thakkar for the applicant/husband.

8. Learned counsel Shri R.L.Kadu for the opponent/wife submitted that the trial court did not make requisite enquiry before passing the order of handing over the custody of the child born out of the wedlock. He further submitted that the Notice was not served properly and relying upon the report of the Bailiff, erroneously the application was decided *ex parte*. He submitted that the enquiry regarding the desire of the child is also not carried out.

9. In support of his contentions, learned counsel Shri R.L.Kadu for the opponent placed reliance on the decision of the Honourable Apex Court in the case of Lekha vs. P.Anil Kumar, reported in (2006)13 SCC 555 wherein it has been held that though under the Hindu Law a father is a natural guardian of minor after age of six years and also the father ought to be the guardian of the person and and property of minor under ordinary circumstances, the paramount

.....6/-

**6**

consideration in granting custody of a minor child should be the interest and welfare of the child.

He further placed reliance on the decision of the Honourable Apex Court in the case of Gaurav Nagpal vs. Sumedha Nagpur, reported in (2009)1 SCC 42 wherein it has been held, "welfare of child as paramount consideration". The object and purpose of the Act is not merely physical custody of minor, but due protection of the rights of ward's health, maintenance, and education.

10. *Per contra*, learned counsel Shri A.J.Thakkar for the applicant submitted that after service of the Notice, opponent/wife failed to appear and, therefore, the trial court rightly considered the application as the evidence adduced by the applicant/husband remained unchallenged. He further submitted that the opponent/wife has no financial capacity to educate the child and on the contrary the applicant/husband can take care of giving proper education to him and prayed for dismissal of the appeal.

11. In support of his contentions, learned counsel Shri A.J.Thakkar for the applicant placed reliance on the decision of

.....7/-

**7**

the Honourable Apex Court in the case of Vivek Singh vs. Romani Singh, reported in AIR 2017 SC 929 wherein also it is observed that the Hindu Minority and the Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. The paramount consideration is welfare of child.

12. I have perused the impugned judgment and order passed by the trial court. Also, I have perused the record and proceedings produced before me.

13. Insofar as the ground mentioned by the opponent/wife are concerned, the Bailiff report shows that the Notice is properly served. The Bailiff report is to the extent that on 24.4.2019 he visited the residential house of the parents of the opponent/wife. She was present in the house along with her parents. He has handed over the Notice to her father in her presence. Thus, the Bailiff report is sufficient to show that the Notice was properly served on the opponent/wife and, therefore, the ground regarding the proper opportunity is not available to opponent/wife.

.....8/-

**8**

14. Insofar as merit of the appeal is concerned, only reasoning given by the trial court in paragraph No.7 is that the father is the natural guardian, son is taking education, and for betterment of the ward the custody of the child needs to be given to the father.

15. It is well settled law that paramount consideration in such matters is the welfare of the children.

16. It was the duty of the trial court to cause appearance of the minor child before the court and hold interview of the child in camera to know a view of the child supposedly with sufficient understanding. Had the trial court held interview, the trial court would have been known several things like desire of the child to come to the conclusion. There is a failure to find out whether the welfare of the child could be found out at the present place of the residence of the opponent/wife. The trial court recorded finding in paragraph No.7 only by observing that the father is a natural guardian. The evidence adduced by the applicant/husband remained unchallenged. For betterment of the child, his custody needs to be given the father.

.....9/-



17. The word welfare used under Section 13 of the Act has to be construed literally and must be taken in the widest sense. The moral and ethical welfare of the child must be looked into. Though the provisions of the special statutes govern the rights of the parents, the paramount consideration is the welfare of the child. For ascertaining the welfare of the child, the trial court was bound to make thorough enquiry keeping in mind the paramount consideration is the welfare of the child.

18. In this view of the matter, the matter deserves to be remanded back for deciding the same afresh by giving an opportunity to the opponent/wife.

19. In the above circumstances, I proceed to pass following order which would subserve the ends of justice:

**ORDER**

(1) The First Appeal is **allowed**.

(2) The judgment and order dated 15.6.2019 passed by learned Principal District Judge, Buldana in Guardian and Wards Case No.9/2019 is quashed and set aside.

.....10/-

**10**

(3) The matter is remitted back to the trial court for deciding it afresh in accordance with the law.

(4) Both the parties shall appear before the trial court on 25.4.2023 and cooperate the trial court for expeditious disposal of the matter.

(5) The trial court after having granted an opportunity to the opponent/wife and the applicant/husband, if he so desires, shall decide the matter without having been influenced by the observations in the present judgment as expeditiously as possible and preferably within three months from the date of writ of this judgment.

With this, the First Appeal stands **disposed** of.

**(URMILA JOSHI-PHALKE, J.)**

!! BrWankhede !!

...../-