

Kirtikumar Maheshankar Joshi

Vs

Pradipkumar Karunashanker Joshi

Civil Appeals Nos. 1952-53 of 1992

(Kuldip Singh, K. Ramaswamy JJ)

04.05.1992

JUDGMENT

1. Special leave granted.
2. Pradipkumar Karunashanker Joshi was married to Kumudlata. A son named Vishal was born on July 20, 1979 and a daughter Rachna alias Rikta on August 12, 1981. Unfortunately, Kumudlata died on January 12, 1991 and the cause of death mentioned in the postmortem report was "cardiorespiratory arrest due to some chemical poisoning....." The husband Pradipkumar is facing criminal charge under S. 498A Indian Penal Code. On February 17, 1991 the police recorded statements of the children.
3. Pradipkumar and family were residing at Rajkot. After the death of Kumudlata, Vishal and Rikta left their father's house and went to Jamnagar to live with the family of their mother's brothers/sisters. Since then both the children are living with their maternal uncle Kirtikumar Maheshankar Joshi.
4. Kirtikumar, brother of Kumudlata deceased, filed an application before the District Judge, Jamnagar under the Guardians and Wards Act (Act) on February, 13, 1991 seeking a declaration that Pradipkumar, the father of the children, was unfit to be the guardian of Vishal and Rikta and a further prayer that he be appointed as guardian of the minor children. An interim injunction was granted by the District Judge, Jamnagar.
5. Pradipkumar also filed an application on February 17, 1991 before the District Judge at Rajkot for the custody of his minor children. The Judge passed an ex parte order deputing a Commissioner to produce the minor children in his Court on February 18, 1991. According to the Commissioner, Kirtikumar gave an undertaking that he would produce the children in the Court of District Judge at Rajkot on February 19, 1991 at 11.00 a.m. The children were, however, not produced in the Court and instead an appeal against the ex parte order of the District Judge, Rajkot was filed before the Gujarat High Court at Ahmedabad. A learned single Judge of the High Court passed a consent order, according to which, the District Judge at Rajkot was required to pass fresh order after hearing both the parties. The consent order, however, could not be complied with as Kirtikumar filed an application, under S. 10 of the Civil Procedure Code, before District Judge Rajkot for the stay of the proceedings in that Court on the ground that similar proceedings were pending, from an earlier date, before the District Judge at Jamnagar. The District Judge Rajkot stayed further proceedings by its order dated April 22, 1991 and reported the matter to the High Court under S. 14 of the Act.

6. Aggrieved by the order of the District Judge Rajkot dated April 22, 1991 Pradipkumar filed a Civil Revision Application before the High Court..A single Judge of the High Court by its order dated July 24, 1991 decided the said Civil Revision and transferred the case pending before the District Judge, Jamnagar to the Court of District Judge, Rajkot. Kritikumar filed a Letters Patent Appeal against the judgment of the learned single Judge but the same was dismissed by a Division Bench of the High Court on January 9, 1992 on the ground that the Letters Patent Appeal was not maintainable against the judgment of the learned single Judge. This appeal via Special Leave Petition is by Kirtikumar.

7. Pursuant to our order dated March 27, 1992 the children namely, Vishal and Rikta are present before us in these chamber proceedings. Their maternal uncle Kirtikumar and their father Pradipkumar are also present. Vishal and Rikta both are intelligent children. They are more matured than their age. We talked to the children exclusively for about 20/ 25 minutes in the chamber. Both of them are bitter about their father and narrated various episodes showing illtreatment of their mother at the hands of their father. They categorically stated that they are not willing to live with their father. They further stated that they are very happy with their maternal uncle Kirtikumar who is looking after them very well. We tried to persuade the children to go and live with their father for some time but they refused to do so as at present. After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage. We, therefore, dispose of the appeal by issuing the following directions:-

(I) We hand over the custody of Vishal and Rikta, the minor children, of Pradipkumar and Kumudlata deceased, to the appellant Kirtikumar who is the maternal uncle of the children.

(II) Pradipkumar, father of the children, shall be permitted by the appellant to meet the children on holidays or on any other day with prior notice to the appellant. Pradipkumar can take the children out of the appellant's house for recreation, entertainment or for shopping with the concurrence of the children.

(III) If in due course Pradipkumar wins over the love and affection of the children he would be at liberty to move this Court for the modification of the order regarding custody of the children.

(IV) We set aside the judgment and order dated July 24, 1991 of the learned single Judge of the High Court in Civil Revision Application 613/91.

(V) We further direct that the proceedings under the ct regarding the custody of the children before District Judge Jamnagar and the Joint District Judge Rajkot be treated as closed.

(VI) We give the parties liberty to move this Court for modification of this order or for seeking any directions regarding the custody and the well-being of Vishal and Rikta, if there is change in the circumstances or for the welfare of the children.

8. We, therefore, dispose of the appeal with the above directions. No order as to costs. Order accordingly.

</html