SUPREME COURT OF INDIA

Lekha

Vs

P. Anil Kumar

Appeal (Civil) 5131 of 2006 (Arising Out of Slp (C) Nos. 19687/2005)

(Dr. Ar. Lakshmanan and Altamas Kabir, JJ)

21.11.2006

JUDGMENT

DR. AR. LAKSHMANAN, J.

Leave granted.

The present appeal is directed against the order of the High Court of Kerala allowing matrimonial appeal for the custody of the child of the respondent by reversing the finding of fact arrived at by the trial Court. The trial Court, after considering the evidence on record and interviewing the child, came to the conclusion that for the welfare of the child the custody should be given to the mother and dismissed the original petition of the respondent-father filed under the Guardians and Wards Act, 1890 holding that he is not entitled for the custody of the child. On appeal, the High Court reversed the finding of the trial Court and directed to give the custody of the child to the father without interviewing the child. The High Court also permitted the respondent to take the child to Gulf.

BACKGROUND FACTS:

The marriage between the appellant and the respondent was solemnized on 31.01.1994 as per Hindu religious rites and customs. Out of the said wedlock, a son, namely, Rohit Vishnu was born and he is

12 years old now. At the time of marriage, the respondent was employed abroad. After marriage the appellant and the respondent lived together for 2= months and thereafter they lived separately because of the misunderstanding between them. Since the harassment and cruelty of the respondent crossed the extreme extent, the appellant was compelled to file a petition for divorce on the ground of cruelty. The respondent filed a petition for restitution of conjugal rights against the appellant.

Thereafter, the respondent filed an original petition under the Guardians and Wards Act, 1890 for the custody of the 11 years old minor child. The main allegation of the respondent was that the appellant was having illegal intimacy with another person. The second contention was that if the child is in the company of the appellant, it would affect the education of the child. The respondent also contended that he is financially better than the appellant and hence the custody of the child be given to him. The appellant defended the matter and filed a written statement denying all the allegations.

In the meantime, the Subordinate Judge passed an ex- parte decree for divorce in favour of the appellant and the petition for restitution of conjugal rights filed by the respondent was dismissed for default.

After considering the oral evidence adduced by the parties and examining the documentary evidence and also interviewing the child, the trial Court came to the conclusion that for the welfare of the child the custody should be given to the mother and dismissed the original petition of the father filed under the Guardians and Wards Act, 1890.

Against the order of the trial Court, the respondent filed an appeal before the High Court of Kerala. The contention of the respondent was that contrary to the deposition made by the appellant before the trial Court that she would not re- marry, immediately after the judgment of the petition filed under the Guardians and Wards Act, 1890, she remarried. It is, therefore, contended that the continued custody of the child with the appellant would be detrimental to the interest, progress and welfare of the child.

The High Court, without giving an opportunity to express the willingness of the child, allowed the appeal only on the ground of remarriage of the appellant/mother of the child. The High Court also held that the respondent-father is a businessman in Saudi Arabia and the father is more apt and suitable to protect the interest of the minor child and also in imparting education to the required standard of the child. Aggrieved against the order passed by the High Court, the appellant has preferred the above civil appeal. On 21.09.2005, the status quo was ordered by this Court. We heard Mr. P.S. Narasimha, learned counsel for the appellant and Mr. C.S.Rajan, learned senior counsel for the respondent. We have also interviewed the child in our chamber for about an hour.

Mr. P.S. Narasimha, learned counsel for the appellant submitted that the order of the High Court is unjustifiable because before passing an order, the High Court ought to have enquired about the mental make-up of the child to ascertain whether he is willing to go with his father. According to him, the minor child is highly talented and the documents produced by the appellant before the

lower forum would clearly show that he is extraordinary in his studies. He further submitted that the trial Court personally interviewed the child. He categorically stated that he wants to stay with his mother. He stated that the finding of the High Court that before the trial Court, the appellant unequivocally deposed that she would not re-marry for the purpose of looking after the minor child is totally wrong. Arguing further, he submitted that it is true that the appellant deposed that she has no intention to remarry and that it does not mean that the appellant gave an undertaking that she would continue to be unmarried in her whole life. Concluding his argument Mr. Narasimha submitted that considering her age and for the welfare of her minor child the appellant got remarried and in the circumstances that mother also has land and properties in her name, the finding of the High Court is only on the basis of an oral submission and not from any documentary evidence, hence the order of the High Court is liable to be set aside. Mr. C.S. Rajan, learned senior counsel for the respondent-husband submitted that the welfare of the minor child is the only interest in the remaining life of the respondent for which he is prepared to take any pain and task in life. The respondent being a natural guardian of the child, the boy who is 12 years old will find it difficult to adjust with his step-father and mother who now has a baby with her second husband. Mr. Rajan further submitted that the appellant in her statement before the Addl. District Judge had stated that she would not remarry in life and would look after the child, which fact has been specifically stated in the judgment of the trial Court and in the High Court. But quite contrary to the statement, the appellant immediately after the judgment of the District Judge remarried on 24.06.2005. It is further submitted that the appellant is now staying in her present husband's house in Varkala which is about 150 kms. away from her parental house and, therefore, the appellant will not be in a position to take full care of the minor child in her changed circumstances. Concluding his arguments, he submitted that the respondent has purchased a car and arranged the driver for the convenience of the child from the house of the respondent to the school and back and that he can also engage good teachers and tutors for giving special attention to the studies of the child. It is further submitted that the respondent's mother who is alone at home is very healthy and active and can look after the child and that besides his elder sister is also staying near his house in Kerala and that the distance of the present school where the child is studying is only 15 kms. from his house. In the above circumstances, he prayed that the civil appeal lacks question of law to be decided by this Court and deserves dismissal. On 16.11.2006, we interviewed the boy in our chambers. The boy who is now 12 years old appears to be a bright boy. He understands the questions put to him and gave apt replies. At the time of interview, it was ascertained that he had no ill- will or hatred towards his father but at the same time, he is not interested in living with the father permanently as he had expressed his willingness to stay with his mother. The minor further stated that if he is allowed to stay with his mother, that is better for his education and she will teach him properly. He also said that the appellant (mother) treats him and the new born baby with same love and affection and there is no discriminatory treatment. He also further said that his step-father also likes him very much and that he, therefore, would prefer to live with his mother which will benefit his education. The boy also said about the re-marriage of the mother and the birth of the child for his mother. At the time of interview, the boy unequivocally deposed that he would continue to live with his mother since the mother is looking after him with all her love and affection.

We have carefully perused the orders passed by both the lower Courts and of the High Court. The High Court, before setting aside the concurrent finding passed by the courts below, ought to have interviewed the child before coming to a conclusion that for the welfare of the child the custody should be given to the father. Mr. Rajan submitted that since the mother has remarried, she would not devote her time for the welfare of the boy and that in the interest of the child, the child should

be given custody only to the father who is not only healthy but also have other facilities to look after the child, his education and welfare.

We are of the opinion that the remarriage of the mother cannot be taken as a ground for not granting the custody of the child to the mother. The paramount consideration should be given to the welfare of the child. As already noticed, at the interview, the boy has expressed his willingness and desire to live only with his mother and was admitted by him that the mother will provide him good education. The mother is also drawing pension of Rs.6, 000/- p.m. and also having land and properties in her name. When the boy says he prefers to live with his mother, we are of the view that it will be beneficial for the boy and his education for a better future. The High Court, in our opinion, erred in allowing the appeal on the ground of remarriage of the appellant without considering the other aspects of the matter. It is a matter of custody of the child and the paramount consideration should be the welfare of the child. It is not in dispute the boy is living with his mother for the last several years and the separation at this stage will affect the mental condition and the education of the child and considering that the child himself attaches importance to his education if the custody is to be given to the father will now affect his academic brilliance and future.

The High Court, in our opinion, ought to have seen that the re-marriage cannot be taken as a ground for giving custody of the child. There is also no finding by the High Court that the remarriage has adversely affected the mental condition of the minor child.

Shaik Moidin v. Kunhadevi, 1929 AIR(Mad) 33 (Full Bench). The above was a case of a father, a motor driver, applying for writ of Habeas Corpus to get custody of his 7 year aged child. Nobody was available in his house to look after such child. The Full Bench held that the Court has to look to an application under Habeas Corpus in the interest of the child as being paramount. The Court held that prima- facie in the eye of the law, the father is the natural guardian and custodian of the person of his child. But it has been the law for a very long time both in England and in this country that what a Court has to look to on applications under habeas corpus is the interest of the child as being paramount. In Samuel Stephen Richard v. Stella Richard 1955 AIR(Mad) 451, the High Court in deciding the question of custody held as follows:-

"In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not 'ipso facto' entitle him to custody. The principal considerations or tests which have been laid down under section 17, in order to secure this welfare are equally applicable in considering the welfare of the minor under section 25.

The application of these tests casts an 'arduous' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act, 1890. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure the welfare of the ward-a no mean task but the highest fulfillment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others."

In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, , this Court held as under:

"The principles of law in relation to the custody of a minor appear to be well-established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

According to the Hindu Law, the natural guardian of a minor child is the father. In the next place, the guardian of a child is the mother. The very principle of guardianship is that there is a presumption that parents will be able to exercise good care in the welfare of their children if they do not happen to be unsuitable as guardians.

The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. If the Court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court in Sura Reddy vs. Chenna Reddy, 1950 AIR(Mad) 306 where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and that fact a Hindu father has married a second wife is no ground whatever for depriving him of his parental right of custody.

A man in his social capacity may be reckless or eccentric in certain respects and other may even develop a considerable distaste for his company with some justification but all that is a farcry from unfitness to have the natural solace of the company of ones own children or for the duty of bringing them up in proper manner. Needless to say the respondent- husband, in this case, seems to be anxious to have the minor child with him as early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between the respondent and the appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this Court is not called upon to find that the respondent-husband has been entirely blameless in his conduct and few

occasions referred to in this case and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the respondent is of responsible and good citizen and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their children. However, in the present case, we have to decide in the interest of the child as to who would be in a better position to look after the child's welfare and interest. The general view that the Courts have taken is that the interest and welfare of the child is paramount. While it is no doubt true that under the Hindu Law, the father is the natural guardian of a minor after the age of six years, the Court while considering the grant of custody of the minor to him has to take into account other factors as well, such as the capacity of the father to look after the child's needs and to arrange for his upbringing. It also has to be seen whether in view of his other commitments, the father is in any position to give personal attention to the child's over-all development.

As indicated hereinbefore, we have spoken to the child who, in our view, is intelligent and appears to be capable of expressing his preference. In fact, he has in no uncertain terms indicated his desire to stay with his mother. His mother's second marriage, instead of proving to be a disadvantage, has proved to be beneficial for the child who seems to be happy and contented in his present situation and we do not think it would be right to unsettle the same.

The High Court committed a grave error in not ascertaining the wishes of the minor, which has consistently been held by the Courts to be of relevance in deciding grant of custody of minor children. We are, therefore, inclined to restore the order passed by the Family Court and to give custody of the minor boy to his mother, but as indicated hereinbefore, we do not want the child to grow up without knowing the love and affection of his natural father who too has a right to help in the child's upbringing. We are of the view that although the custody of the minor child is being given to the mother, the child should also get sufficient exposure to his natural father and accordingly we permit the respondent to have custody of the child from the appellant during Onam and other important festivals and during the school vacation. We make it clear that the appellant-mother shall hand over the child to the respondent-father during every mid summer vacation for about a month without adversely affecting the child's education. The appellant should not also prevent the respondent-father from coming to see the child during weekends and the appellant should make necessary arrangements for the respondent to meet his child on such occasions. The appellant should not also prevent the child from receiving any gift that may be given by the respondent- father to the child.

In the result, the above civil appeal stands allowed and the judgment and final order passed by the High Court of Kerala in matrimonial appeal No. 208 of 2005 is set aside. However, there will be no order as to costs.