

# SUPREME COURT OF INDIA

Shyamrao Maroti Korwate

Vs.

Deepak Kisanrao Tekam

C.A.No.2817 of 2008

(P.Sathasivam and Dr.B.S.Chauhan JJ.)

14.09.2010

## JUDGEMENT

### **P.Sathasivam, J.**

1. This appeal, pertaining to the custody of a minor child, is directed against the final judgment and order dated 17.10.2007 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in First appeal No. 501 of 2007 whereby the High Court reversed the judgment and order dated 16.04.2007 passed by the District Judge, Yavatmal, Maharashtra.

### 2. Brief facts:

“(a) On 03.06.2002, the marriage of the respondent was solemnized with Kaveri, the daughter of the appellant herein. Out of the said wedlock, on 23.03.2003, a son, namely, Vishwajeet @ Sangharsh was born. After giving birth to son, on the same day, the respondent's wife died due to excessive bleeding. Vishwajeet is residing with the appellant-maternal grandfather and his family since his birth. After the death of his wife, the respondent contracted second marriage and also has a son from the second marriage.

(b) On 07.08.2003, the appellant-maternal grandfather of the minor filed an application in the Court of District Judge II, Yavatmal, Maharashtra under Section 7 of the Guardians and Wards Act, 1890 (hereinafter referred to as `Act 1890') being M.J.C. No. 10 of 2003 for appointing him as guardian of the minor Vishwajeet. The said application was opposed by the respondent and, on 15.10.2003, he also filed an application under Section 25 of the Act 1890 being M.J.C. No. 12 of 2003 for the custody of his son.

The District Judge by a common judgment dated 16.04.2007 in both the proceedings, allowed the application filed by the appellant herein and appointed him as a Guardian of Vishwajeet till he attains the age of 12 years and directed him to deposit the

amounts inheritable by the minor due to the demise of his mother, in any Nationalized Bank in Fixed deposit in the name of minor, which may be renewed from time to time till he attains majority and also directed that nobody can withdraw the principal or interest amount without prior permission of the Court. The District Judge further directed the newly appointed guardian to allow the respondent-father to meet the minor once in a month. The application filed by the respondent was dismissed by the District Judge with the liberty to file such application after completion of the age of 12 years by the minor.

(c) Aggrieved by the said order, the respondent herein filed First Appeal No. 501 of 2007 in the High Court of Bombay, Nagpur Bench, Nagpur. On 17.10.2007, the learned single Judge of the High Court allowed the appeal filed by the respondent herein and directed the appellant herein to hand over the custody of the child to the respondent. Challenging the said order, the appellant has preferred this appeal by way of special leave petition before this Court.”

3. Heard Mr. Anantbhusan Kanade, learned senior counsel for the appellant and Ms. Anagha S. Desai, learned counsel for the respondent.

4. The appellant herein is the maternal grandfather of the child and the respondent is the father of the child.

“Since we have already narrated the events for filing the petition for custody/guardian of the child, there is no need to traverse the same once again. Before considering the claim of both sides, it is useful to refer the statutory provisions relevant for our purpose.”

5. The Act 1890 consolidates and amends the law relating to guardians and wards. Section 4 of the Act defines "minor" as "a person who has not attained the age of majority". "Guardian" means "a person having the care of the person of a minor or of his property, or of both his person and property". "Ward" is defined as "a minor for whose person or property or both there is a guardian".

“Sections 5 to 19 of the Act relate to appointment and declaration of guardians. Section 7 thereof deals with "power of the Court to make order as to guardianship" which reads as under:

"7. Power of the court to make order as to guardianship.

--(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-- (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

6. Section 8 of the Act 1890 enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced hereunder:

“17. Matters to be considered by the court in appointing guardian.--(1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the court may consider that preference.

Xxx xxx xxx (5) The Court shall not appoint or declare any person to be a guardian against his will.”

7. The Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as `Act 1956') is another important statute relating to minority and guardianship among the Hindus. Section 4 defines "minor" as "a person who has not completed the age of eighteen years". "Guardian" means "a person having the care of the person of a minor or of his property or of both his person and property", and includes a "Natural guardian". "Natural guardian" means any of the guardians mentioned in Section 6 of the Act 1956.

8. Section 6 enacts as to who can be said to be a "Natural guardian". It reads thus:

“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).

Explanation.--In this section, the expressions `father' and `mother' do not include a stepfather and a stepmother.”

9. Section 8 thereof enumerates powers of natural guardian and Section 13 deals with welfare of minor which reads thus:

“13. Welfare of minor to be paramount consideration.-- (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

10. If we analyze the above provisions, one thing is clear that in a matter of custody of a minor child, the paramount consideration is the "welfare of the minor" and not rights of the parents or relatives under a statute which are in force. The word "welfare" used in Section 13 of the Act 1956 has to be construed literally and must be taken in its widest sense.

11. In *Gaurav Nagpal vs. Sumedha Nagpal*<sup>1</sup>, this Court held:

“51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense.

The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases.”

12. In the light of the above background, let us consider whether the custody of the minor is to be entrusted with the maternal grandfather as ordered by the District Court or with the father as directed by the High Court. We have already referred to the fact that on 23.03.2003, after giving birth to the child, the mother died and the child was taken by the maternal grandfather. The maternal grand-father filed a petition for custody on 07.08.2003 and father also made a similar petition for custody on 15.10.2003. Before the District Judge, it was highlighted that immediately after the death of his wife, the respondent-husband married another woman and also has a son from his second marriage. Though the exact date of marriage is not mentioned anywhere, the fact remains that within a period of one year after the death of Kaveri, daughter of the appellant herein, the respondent- husband married another woman. It is also highlighted by the appellant that the respondent is working as an Operator in the Maharashtra State Electricity Board at a distance of 90 kms from his residence. It is further stated that the place where respondent is residing is a rural village and there is lack of better educational facilities. It is the claim of the maternal grandfather that he is a pensioner getting sizeable income by way of pension and other retiral benefits and also own agricultural properties.

“It is his further claim that he is living with his wife i.e. maternal grandmother of the child and other relatives such as sons and a daughter. It is also his claim that he is residing in a Taluk Centre where good educational facilities are available.”

13. Though several allegations have been made by the parties against each other, we feel that in the absence of any specific finding by the Courts below on either of them, it is unnecessary to refer to the same. It is true that under the Act 1890, the father is the guardian of the minor child until he is found unfit to be a guardian of the minor. In deciding such question, this Court consistently held that the welfare of the minor child is the paramount consideration and such a question cannot be decided merely on the basis of the rights of the parties under the law. This principle is reiterated in *Anjali Kapoor (Smt.) vs. Rajiv Baijal*<sup>2</sup>.

14. Though father is the natural guardian in respect of a minor child, taking note of the fact that welfare of the minor to be of paramount consideration inasmuch as the respondent-father got married within a year after the death of his first wife-Kaveri and also having a son through the second marriage, residing in a rural village, working at a distance of 90 kms and of the fact that the child was all along with the maternal grand-father and his family since birth, residing in a Taluka Centre where the child is getting good education, we feel that the District Judge was justified in appointing the appellant maternal grandfather as guardian of the minor child till the age of 12 years.

15. The High Court reversed the said conclusion and appointed father of the child as his guardian. It is true that the learned single Judge interacted with both the parties and the child separately and noted that "the child could not be unhappy, uncomfortable and unsafe in the custody of the father". However, there is no material to show that at any point of time the respondent-father had attempted to meet the child when he was in the custody of maternal grandfather. No doubt, it is true that on attaining the age of 12 years by the minor, the father

is free to make a fresh application and depending on the welfare and wish of the child, further order has to be passed in the matter of custody. It is said that as on date, the child is aged about 8 years. Our anxiety is that after four years, i.e., after attaining the age of 12 years whether the child would show any inclination to join with his father. It is relevant to note that the maternal grandfather is aged about 63 years and if his sons are married, undoubtedly the child cannot get the same love and affection from him and his family.

16. Inasmuch as the child has continuously been living with the maternal grandfather and his family from the date of his birth i.e. 23.03.2003 and getting good education at their hands, taking note of the position of the father of the child who is working 90 kms. away from his house in a rural village, we modify the order of the High Court and permit the appellant grandfather to have the custody of the child Vishwajeet @ Sangharsh till the age of 12 years as ordered by the District Judge. The above conclusion is based on welfare of the minor as provided in Section 13 of the Act 1956. Since on completion of 12 years, a fresh decision is to be taken about entrusting the custody of the minor child, while modifying the order of the High Court as mentioned above, we issue the following directions about the visitation rights of the father:

“1) During long holidays/vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven days.

(2) The period shall be fixed by the father after due intimation to the maternal grandfather who shall permit the child to go with the father for the aforesaid period.

(3) In addition to the same, twice in a month preferably on Saturday or Sunday or a festival day, maternal grand-father shall allow the child to visit the father from morning to evening.

Father shall take the child and leave him back at the maternal grand-father's place on such days.'

(4) The father is free to provide facilities such as payment of school fees, books, dress materials, eatables etc. during this period to develop a conducive relationship with the child.”

17. With the above direction, the impugned order of the High Court is modified. The appellant-maternal grandfather is permitted to continue the custody of the child till the age of 12 years as ordered by the District Judge. The decision regarding investment in the name of minor child is also restored. To the extent mentioned above, the appeal is allowed. No costs.

<sup>1</sup>(2009) 1 SCC 42

<sup>2</sup>(2009) 7 SCC 322