CALCUTTA HIGH COURT

Tarun Ranjan Majumdar

Vs.

Siddhartha Datta

F.M.A. No.600 of 1988

(A.M. Bhattacharjee and Ajit Kumar Nayak, JJ.)

10.04.1990

JUDGEMENT

A. M. Bhattacharjee, J.

1. The proceeding under Section 25 read with Section 12 and Section 7 of the Guardians and Wards Act 1890, giving rise to this appeal, appears to be a tug of war between the father on the one hand and the maternal grand-parents on the other, over the custody of a child who was aged about 11 months only when the proceeding was initiated in November, 1987. There should be no manner of doubt that a child of such tender age ought not to be subjected to tugging by zealous or jealous relations, whoever they may be, fighting with the bellicosity of relentless combatants. It is settled beyond doubt that in matters relating to custody of child, it is not the legal right of the claimant which is decisive, but it is the welfare of the child which is the primary and paramount test and no one can recover custody of a child merely by brandishing his legal right or financial affluence.

2. An impression has gained ground, erroneous though, that once a legal guardian proves his lawful right to the custody of the child and that he is in a position, financially and otherwise, to look after the welfare of the child, an order for the return of the child to his custody is almost a must and a matter of course. We are afraid that this is not the position in law as would appear from a proper reading of the provisions of Section 25(1) of the Guardians and Wards Act, material provisions whereof are as hereunder :-

> "25(1). If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return..:... :"

Even though the expression may has been used, we find no reason as to. why the Court shall not order return "if it is of opinion that it will be for the welfare of the ward" to return to the custody of the guardian and in our view, therefore, the expression "may" in the context of the words underlined hereinabove does not confer a discretion but conveys almost a mandate. But whether

the jurisdiction of the Court under Section 25(1) is mandatory or directory, it can order a return if and only if"it is of opinion" that such a returnis for the welfareof the ward in the context of the facts and circumstances of the case. Our reading of the provisions of Section 25(1) is that even if a child is in the custody of one who hasno legal right thereto and its welfare is reasonably looked after in a manner in which it should, the legal guardian cannot claim an order of return or recovery merely on the strength of his legal right and by parading his financial or other capacity to provide a welfare custody, unlessthe Court forms a definite opinion that even though its welfare is reasonably looked after, such order of return would be for its better or further welfare. If the welfare of the ward is in fact duly taken care of by the person who has the factual, though not the legal custody, the expression "welfare" in the words "it will befor the welfareof the ward to return" in Section 25(1) should reasonably mean more or better or further welfare.

3. In a rather recent Division Bench judgment of this Court in *Raj Kumar v. Barabara*[1], we have held that "if a mother has in fact the custody of the minor of tender years, even though she may not have the legal right to such custody, the same should not to changed or altered except for compelling reasons" and reliance was placed by us on the observations of Lord MacDermot in the *House of Lords in J. v. C*[2]. to the effect that "even though some of the authorities convey the impression that the upset caused to a child by change of custody is transient and a matter of small importance", "a groaning experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change".

4. It is true that, as pointed out that by one of us in another Division Bench judgment in *Gopa Guha v. Rathin Guha*[3] even where a child in the factual custody of another, is detained by the latter against the will of the legal guardian, the child shall be deemed to have been removed by that other within the meaning of Section 25(1). Therefore, even though in this case the appellants have in fact the custody of the child, they having no legal right to such custody, their retaining or detaining the child against the will of its legal guardian, the father-respondent, would amount to removal within the meaning of Section 25(1). But even then, as held in *Raj Kumar v. Barbara*[4], we should order a return and a consequential change of the existing custody only if we are satisfied that the welfare of the child, which is the primary and paramount consideration in all such matters, warrants such a course.

5. It is not disputed that the child, born in November, 1986, is all along staying with its maternal grand-parents the appellants, since the death of its mother in August, 1987 at the residence of her parents, the appellants. It is not the finding of the Court below, nor do we find any materials on record to hold, that the child, not even three years old now, has not been properly looked after and its welfare has not been duly attended to or taken care of by the appellants and the members of their family. The maternal grand-father, appellant No.1, is admittedly a Reader in the Calcutta University and lives in the ground floor of a multistoried building, while his eldest brother lives with his family in the second floor and the third floor, his youngest brother and his wife live in the first floor. The youngest brother and his wife have no issue of their own and the said brother's wife also looks after the child with all the maternal care, as does the maternal grand-mother, the appellant No.2, to whom the child is the only source of solace for the shock received by her due to the ultimately death of her daughter, the mother of the child. The eldest brother has also

[1] AIR 1989 Cal 165
[2](1969) 1 All England Reporter 788 at 824
[3](1987) 1 Cal HN 64
[4] AIR 1989 Cal165 at 174

two small grand-children who also are very fond of the child and "the child is hale and

hearty in the environment and atmosphere" at the residence of the appellants. All these assertions made by the maternal grand-father, the maternal grand-mother, the former's brother and others in their respective affidavits have gone unchallenged.

6. It is true that the respondent-father is a Lecturer in the Jadavpur University and resides with his parents and brothers and the elder brother has also minor children. But assuming that the custody which the respondent father would provide is in no way bad or undesirable, we have already pointed out that the existing custody of a child of tender years should not be disturbed except for compelling reasons, as, to borrow from *Lord MacDermot in J. v. C (1969 1 All England Reporter 788)* (supra), serious harm may be caused to young children by such a change. As we have found nothing to hold that the custody of the maternal grand-parents, with whom this child of less than three years of age is staying almost since its birth, is not good or beneficial and is likely to affect the proper growth and development of the child, we should not order return of the child solely on the ground that the father has, but the maternal grand-parents have not, the legal right to such custody. As we have already observed, Section 25(1) never mandates a return to the custody of the legal guardian as a matter of course, but the Court may order such return only "if it is satisfied" that the welfare of the child warrants such an order. A legal guardian cannot claim such an order merely by dangling his legal right, unless he can demonstrate that his custody would be conducive to the better or greater welfare of the child than what it is having and is expected to have in the existing custody of the person, even though without a legal right to such custody.

7. We would accordingly allow the appeal and overturn the order of the Court below directing return of the child to the respondent. But we must however make it clear that this order of ours would not, as it cannot, prevent the respondent from initiating proceeding for the custody of the child at any later stage and to obtain such order on making out a case therefor to the satisfaction of the Court. And we would also make it clear that even though we are setting aside the order of the Court below directing return of the child to the respondent, the appellants must allow all reasonable facilities and opportunities to the respondent-father to have access to his child so that the father and his son do not stand alienated from each other and are able to foster a proper and healthy filial relationship.

8. The appeal is accordingly allowed and the impugned order of the Court below is set aside, but without any order as to costs.

Ajit Kumar Nayak, J.

9. I agree.

Appeal allowed.