BOMBAY HIGH COURT

Saraswatibai Shripad Ved

Vs.

Shripad Vasanji Ved

O.C.J. Appeal No. 28 of 1940

(John Beaumont, Kt. C.J. and B.J. Wadia, J.)

11.10.1940

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal from a decision of Mr. Justice Kania on a petition presented by the father of a minor: under Section 25 of the Guardians and Wards Act. Under that section the Court can return the custody of the minor to his father, who is his natural guardian, if it is of opinion that to do so will be for the welfare of the minor ward.

2. The parents of the minor were married in February, 1936, and the minor, a boy, was born in October, 1938. After the birth the mother unfortunately contracted tuberculosis, and she had to go away for treatment, and the child was taken by the father and kept at his mother's house. The mother of the minor was discharged from the sanatorium at the end of July, 1939, but she was advised to remain at hill stations for a time in order to complete her cure, and she came back to Bombay, considering herself to be cured, at the end of May, 1940. On May 29 the child was out with a servant in attendance, and was taken round to the house of the mother and her parents, and it has been retained by the mother ever since. The circumstances in which the child was taken by the mother are in dispute. The father says that it was virtually kidnapped by an uncle of the wife. The uncle, however, has put in an affidavit denying that he kidnapped the child, and saying that it was taken by the servant to the mother's house. As the servant, in charge of the child when it is alleged to have been kidnapped, has not put in an affidavit, it is probable that the mother's story is true. However, that is not very material. The fact is that from the end of May, 1940, the child has been in the custody of the mother, and the father now asks to have it returned to him. As I have said, under the Act we have to consider what will be in the best interests of the minor.

3. I think the law on questions of this sort is the same in this country as in England, though, of course, social habits may be different. The modern view of Judges in England is that it is

impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural mother. If the natural mother is a suitable person, the Courts in England will as a general rule hand over the custody of a child of tender years to the mother. The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in England, but at the same time the right of the mother to the custody of her young children is undoubtedly recognized in this country, see for example *Bid Tara v. Mohanlal*[1], However the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world over, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years.

4. It is suggested here that the mother's health has not recovered. It might be dangerous to send a child to live in the custody of a woman suffering from tuberculosis. But the evidence before the Court is that the mother has recovered. She was discharged from the sanatorium about a year and a half ago, and the doctor says in his letter, exhibit No. 1, that she was discharged as an arrested case. The subsequent examination of her sputum has not shown any change, and Dr. Billimoria in exhibit No. 3 reported on June 13, 1940, that no T.B. was detected. On the evidence before the Court there is no reason for supposing that the health of the child will suffer if its custody is handed over to the mother. Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court. In this case the father can apply to the Court at any time; and if he thinks that the health of his child is suffering, he can ask the Court to appoint a doctor to examine the child. I do not think that on the evidence before us there is at the moment any necessity to appoint a doctor to examine the state of the mother's health, but if at any time there is any reason for supposing that her ailment has returned, the father can apply to the Court to get her examined by an independent doctor, and submission to such an examination could be made a condition to her retention of the custody of the child.

5. There is no question here of removing the child from the guardianship of the father. The father is the natural guardian, and there is no application to remove him from that position. He remains the natural guardian, but in the interests of the child itself we are satisfied that its custody ought, for the present, to be with the mother.

6. The parents unfortunately are not living together, and probably will not live together, because the father has contracted marriage with another woman. That under Hindu law he is entitled to do, but it is difficult to suppose that a step-mother, whose age we are told is about seventeen, is likely to be a good substitute for the natural mother; whilst the father himself will have other occupations and will have to entrust the actual upbringing and charge of a child of this age to somebody else. In my opinion, there is not the slightest doubt that the natural mother is the proper person to have the custody of the? child, and there is no evidence before the Court to justify us in thinking that she is not a proper person to have that custody. Her parents appear to

have adequate means to maintain her and the child. The father is, of course, entitled to access to his child. Probably there will be no difficulty in arranging that. If there is, he will have to apply to the Court to arrange the circumstances in which he can see his child.

7. I think the learned Judge in the Court below went wrong in the exercise of his discretion, because he did not recognize that the paramount consideration in a case of this sort is the interest of the minor. He refers to the interest of the minor as being a vague

[1](1922) 24 BOM LR 779

ground for exercising his discretion. That is the paramount ground, and prima facie it is in the interest of the child that it should be brought up by the mother. We, therefore, direct that the custody of the child, until further order, be with the mother. The appeal is allowed.

B.J. Wadia J.

8. I agree with the order proposed by the learned Chief Justice.

9. No doubt it is laid down by their Lordships of the Privy Council in *Besant v. Narayaniah*[2]*,* that among Hindus, as in England, the father is the natural guardian of his children during their minorities and that the guardianship is in the nature of a sacred trust. That natural right of the father has received statutory recognition in Section 19(b) of the Guardians and Wards Act, VIII of 1890. But Section 19 is in my opinion controlled by Section 17 of the same Act, according to which the paramount consideration is the welfare of the minor.

10. The father of the minor has married again. That in itself may not be a ground for depriving him of the custody of his minor child. But the Court has got to consider all the circumstances of the case, and taking human nature as the same here as elsewhere, a step-mother cannot be expected to be very much interested in the welfare of a minor step-son, nor likely to give him the attention, love and sympathy which the child naturally requires. It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration; and I agree with Shah J. in *Bai Tara v. Mohanlal*[3]*,* where he observed as follows (p. 782):--

> The boy is of tender age and I think that at present the) personal care of the mother is a paramount consideration.

11. In that case the boy was seven years old. In this case the boy is just about two years of age, and what was urged in *Bai Tara v. Mohanlal* can be applied with even greater force to the case of a boy who is two years old.

12. Taking all these circumstances into consideration, I think that at present the custody of the child should be with the mother. But that will not, as has been pointed out by the learned Chief

Justice, prevent the father from making a further application to the Court at any later date, under the liberty reserved to him to apply, when he may be able to satisfy the Court that it will then be in the interest and for the welfare of the minor child on account of the mother's health or the child's health, or on account of want of means for maintenance, or on any other just and reasonable ground, that it should leave the mother's custody and instead live with the father.

13. For these reasons I agree that the appeal should be allowed, and I agree with the order proposed.

[2]1914 - 1 - LW 520 : (1914) L.R. 41 I.A. 314, P.C.

[3](1922) 24 BOM LR 779