PATNA HIGH COURT

Bimla Devi

Vs

Subhas Chandra Yadav

A.F.O.O. No. 307 of 1986

(Bhuvaneshwar Prasad, J.)

16.10.1990

JUDGEMENT

Bhuvaneshwar Prasad, J.

1. This is an appeal filed under Section 47(a) of the Guardians and Wards Act, 1890 (hereinafter referred to as the '1890 Act'). It is directed against the judgment dated 15-7-1986 passed by Shri Bharat Prasad Sharma, IVth Additional District Judge, Gaya, in Guardian Case No. 4 of 1985 / 163 of 1983.

2. It appears that originally one Raj Nath Mahto, Maternal grandfather of the three minor girls, had filed this case before the learned District Judge, Gaya, under Section 7 of the 1890 Act for being appointed as their guardian. It was registered as Guardian Case No. 163 of 1983. Subsequently on his death the present appellant his widow has been substitued in his place. From the petition filed by Raj Nath Mahto before the learned District Judge it would appear that one Bharati Kumari was his daughter who was married to the present respondent in the year 1976. At that time, the respondent was working as Chargeman in the C. L. W. Chittranjan, Eastern Railway and Bharati Kumari, the deceased daughter, was auxiliary Nurse Midwife in Jamtara Block, she however, resided at Chittarajan with her husband. Three daughters were born to her out of this wed-lock. However, since Bharati Kumari herself was in service, she had left the three daughters under the guardianship the present appellant who was her mother. It was further urged that the three daughters were born at Gaya and they had been looked after and brought up by the present appellant. The respondent was a man of bad temperament. Bharati had sufficient bank account with her which the respondent wanted to be transferred in his name. On her refusal, he was annoyed and he killed her by burning her with petrol on 5-5-1983 for which U. D. Case No. 13 of 1983 was registered at Chittaranjan Police Station. The three daughters, namely, Radha alias Bulbul, Laxmi Kumari and Sunita Kumari are living with the present appellant. It was, accordingly, prayed that Raj Nath Mahto the petitioner be appointed as guardian of the minor girls to look after their person and property.

3. The case of the present respondent, before the learned Court below, was that he is the father and natural guardian of his minor daughters and he had happy conjugal life with Bharati who

accidentally died leaving behind the three daughters. He further denied that Bharati had any separate bank account or that he ever demanded the transfer of her money to him or that he even mal-treated and threatened her (Bharati). He had asserted before the learned Court below that he had full love and affection for her three minor daughters and he wanted to keep them under his own guardianship. He has denied that the girls were ever born at Gaya of that his wife Bharati ever entrusted the present appellant to look after them and for upbringing them. They were living with their parents till the death of Bharati Kumari and were taken away by the present appellant surreptitiously for which he had filed a case before the Sub-Divisional Judicial Magistrate, Asansole, West Bengal. The learned IVth Additional District Judge, Gaya, after hearing the parties dismissed the petition filed on behalf of Raj Nath Mahto and continued by the present appellant. He held that here was no reason to deprive the present respondent of his right for the custody and guardianship of his minor daughters. Accordingly, he directed the present appellant to deliver the custody of the girls to the respondent at the earliest. It is against this order that the present appeal has been filed.

4. In this appeal it has been contended that all the witnesses of the appellant had supported her claim as will appear from paragraph 5 of the impugned judgment. The earned Court below should have held that the minor girls were brought up and nursed by the appellant since their birth. The learned lower appellate Court has based his judgment on the 1890 Act which is not applicable since the procedure as contained in the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the '1956 Act) would be applicable in the present case. The learned Additional subordinate Judge should have held that the respondent had got two young from his first wife and the three minor daughters from his second wife would naturally get step motherly treatment. The learned Court below should also have held that the respondent had killed the mother of the girls for wrongful gain in order to lay his hand on her bank deposit and her life insurance policy. Even during the lifetime of Bharati there were altercation between the husband and the wife. There was atleast some *prima facie* evidence to show that the respondent was involved in the killing of his wife. Under these circumstances, it was prayed that the order and judgment passed by the learned Additional District Judge, IVth Court, Gaya, be set aside.

5. Before proceeding to the discuss the respective cases of parties I will firstly like to make the position of law clear. The petition before the learned Court below, was filed under Section 7, 1890 Act. Its sub-section (1) runs as follows :

> (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 guardian the Court may make an order accordingly.
> xx xx xx
> As stated above, the learned Court below had dismissed this petition filed under Section 7 of the Act and had directed the custody of the minor girls to be delivered to the respondent at the earliest.

6. In the present appeal it has been contended that the learned Court below had based its judgment on the 1956 Act which was not legally permissible since he should not have gone

beyond the purview of 1890 Act. However, the law on this point appears to be quite clear. Section 2 of 1956 Act provides that the provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided in derogation of, the Guardians and Wards Act, 1890. From this section itself it would become clear that 1956 Act should be treated to be supplement to 1890 Act and, therefore, there is no question" of any exclusion of the one by the other. In this connection, a reference may also be made to sub-section (b) of Section 5 of the 1956 Act which runs as follows :

> "5. Overriding effect of Act.- Save as otherwise expressly provided in this Act,-
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act".

This will show that 1956 Act has got over riding effect but only over those provisions of 1890 Act which are inconsistent with any of the provisions contained in 1956 Act.

7. The next question that would arise for consideration would be what should be guiding factor to be taken into consideration, according to law in the appointment of a guardian of a minor. I have quoted above Section 7(1) of 1890 Act. It clearly shows that before any guardian is appointed for a minor the Court has to be satisfied that it is for the welfare of the minor. Further a reference may also be made to sub-section (1) of Section 17 of 1890 Act which runs as follows :

> "17(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".

From this also it would become clear that the paramount consideration before the Court at the time of appointing a guardian for a minor is the welfare of the minor child itself and this appears to be the main consideration on which the Court is required to take a decision in the matter. Sub-section (2) of Section 17 of 1890 Act provides that in considering what will be for the welfare of the minor, the Court shall have regard to the character and capacity of the proposed guardian and his nearness of kin to the minor, and any existing or previous relations of the proposed guardian with the minor or his property.

8. Coming to the 1956 Act I will firstly refer to Section 13 which runs as follows :

> "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".

It is well settled that the word "welfare" used in this section 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.

9. On behalf of the respondent it has been submitted that under 1956 Act the father is a natural guardian of a Hindu minor. In this connection my attention has been drawn to Section 6 of 1956 Act which provides that the natural guardianship of a Hindu minor, in respect of the minor's person as well as the minor's property, in the case of an unmarried girl is 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. In the present case admittedly the mother is dead and the contest is between the father and the maternal grand father of the minor daughters. However, on the basis of Section 6 of the 1956 Act the learned counsel for the respondent has submitted that the father should be treated to be the natural guardian and, therefore, the order to this effect passed by the learned Court below cannot be challenged. In this context, it is important to mention that in both the Acts, as noticed above, the minors interest has to be paramount interests to be kept in mind at the time of the making the appointment. This is quite clear from what has been noticed above in the earlier part of the judgment.

10. The learned counsel for the respondent has also placed reliance on the case of *Mrs. G. A. Ayyadorai Pillai v. E. H. B. David*[1], This is a single Bench decision of Madras High Court in which it was held that the father ought to be the guardian of the person and property, of the minor under ordinary circumstances. It was further held that the fact that he had married a second wife after the death of his first wife would be no ground for depriving him of his parental right of custody of his child from the first wife. It was observed in this decision that if the Court forms the impression that the father is a normal and intelligent young man and shows no indication of imbalance of mind in him, then it should not refuse to him the custody of his minor child from his first wife.

11. The learned counsel for the respondent placed reliance on the case of *D. Rajaiah v. Dhanapal*[2], No doubt, in this case it was held by the learned single Judge of Madras High Court that the rule of Hindu Law is that no one other than the further and failing him the mother has an absolute right to have the guardianship over and custody of an unmarried Hindu minor girl. It was further held that the Hindu Law recognizes primarily the father as the legal guardian and the custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contingency. However, in paragraph 3 of the judgment it has been mentioned that the dominant factor for consideration of the Court is the welfare of the child. This has found statutory recognition both in Section 17(1) of 1890 Act and Section 13. of 1956 Act. Both the provisions that the powers of the Court are to be exercised for the welfare of
the minor, which should be the paramount consideration. It was held that since the Hindu Law recognized the father to be the natural guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightaway insist that he should be declared or appointed as the guardian and custodian of such minors more so when the mother is no more, under this circumstance it was held that the maternal grand father has to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of the father.

12. However, in this very judgment in paragraph 7 at page

105 it has been observed as follows :

"The welfare of the minor children is not to be measured only in terms of money and physical comforts. The word "Welfare" 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".

13. In this connection a reference may be made to the case of *Bhola Nath v. Sharda Devi*[3], which is a Division Bench decision of this Court. In this judgment it has been held that under the Hindu Law, the father is the legal guardian of the minor child and under the Guardians and Wards Act, 1890 also he is so. But the most important consideration which must always weigh with the Court in making orders for the appointment of guardians of minors is the welfare of the minor, and in that view of the matter, the legal rights of the father must be understood subject to provisions of Section 17. Under Section 17, the Court should be guided by the sole consideration of the welfare of the minor, and what would be for the welfare of the minor must necessarily depend upon the facts and circumstances of each particular case. From this Division Bench decision of this Court it becomes clear that the paramount consideration in the appointment of guardian is the welfare of the minor and what would be for the welfare of the minor will depend upon the facts and circumstances of each particular case.

14. The matter appears to have been settled in a recent decision of the Hon'ble Supreme Court in the case of *M/s. Elizabeth Dinshaw v. Arvind M. Dinshaw*[4], In this decision Sections 7 and 17 of 1890 Act were under consideration. There was a divorce between the father and the mother of the child, the mother used to live with the child in U. S. A. The American Court granted decree for child's custody to the mother and visitation right to father of the child. The father; however, secretly brought the child to India against express orders of the American Court. Habeas corpus petition was filed by the mother before the Supreme Court of India for restoration of child's custody. It was held that the mother'was entitled to the child's custody with liberty to take the child to the U. S. A. In this decision it was also held that whenever a question arises before a court pertaining to the custody of a minor child the matter is to be decided not only on considerations of legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. Under the circumstances of the above mentioned case it was

held that in view of the facts the petitioner mother had genuine rove and affection for
the child and she could be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing, that the child had not taken root in India and he was still accustomed to the conditions obtaining in the place of his origin in the U. S. A. that the child's presence in India was the result of an illegal act of abduction and the father who was guilty of the said act could not claim any advantage out of it stating that he had already put the child in some school in India, it would be in the best interests of the minor child that he should go back with his mother to the United States and continue there as a ward of the concerned court having jurisdiction. From this decision also it would become clear that the paramount consideration with the court in appointing a guardian of a minor child is the interest and the welfare of the minor and this fact appears to be concluded by the decision of various Courts as noticed above.

15. In the present case the allegation against the respondent is that he had killed his wife, Bharti

Kumari the mother of three minor girls by burning her with petrol on 5-5-1983 for which U.D. Case No. 13 of 1983 was registered in Chittranjan Police Station. The learned counsel for the respondent has submitted that this was a false implication against him and that Chitranjan police after investigation did not find the allegation to be true. The plain true copy of the diary of Chittranjan P.S. Case No. 12 of 1983 dated 5-5-1983 has been filed on behalf of the respondent. From this also it would appear that there was no denying the fact that Srimati Bharati Kumari had died after having received burn injuries. The question whether it was suicidal, accidential or an illegal act of murder on the part of the respondent is not the subject matter of the present case. It is enough that there is such an allegation against the respondent that he had murdered his wife setting fire to her person. Even if for a moment it be presumed that this allegation is false, it cannot be denied that, this incident will create an impact on the immature minds of the three minor girls of tender age. Obviously, the girls would be scared to be left in the custody of their father against whom there were allegations of murder of his wife. Furthermore it has come in evidence that the girls were born in Gaya and that they were brought up by the present appellant and her husband where they were properly looked after. It is the admitted position that both the father and the mother of the girls were in service. Under these circumstances, it would be only natural to think that girls were under the guardianship of their maternal grand lather who happened to be the husband of the present appellant. This is also a circumstance in favor of the appellant.

16. I have gone through the impugned judgment and order. No doubt the learned Court below has taken into consideration a number of decisions on this point. However, it appears to have been mislead by the fact that under law it is the father of minor girls who would be the natural guardian. Referring to Section 6 of 1956 Act he has held that the law treats the father as the natural guardian of a minor unmarried girl and in his absence the mother can be treated as a natural guardian. Since in the present case the dispute was not between the father and the mother but between the father and the maternal grand father, it was held by the lower Court that the father would be the natural guardian of the minor girls. Normally speaking it is well recognized under law that the father is the natural guardian of the mirror daughters However that would always be subject to certain exceptions and facts and circumstances of each case and cannot be said to be universally applicable as held in the case of Bhola Nath (supra). The learned Court below should have also taken into consideration the facts and circumstances of this case in which there is allegation of the murder of his wife against the present respondent.

17. So far as the oral evidence is concerned, A.W. 4 is the appellant herself. She had supported her case and has stated that the three minor daughters of Bharati Kumari were living all along with her and she is looking after their upbringing and education. So far as A.W. 1, Mahabir Prasad Yadav is concerned, he has stated that the wife of the respondent had died on account of some dispute over money matter A.W. 2, Narain Rai, has also stated that the respondent had killed his wife since she was not prepared to apart with money. Since, however, he could not give any detail of this account he appears to have been disbelieved. Similarly, A.W. 1 appears to have been disbelieved on the ground that he had no personal knowledge of the affairs of the family of the respondent. However, under the facts and circumstances of this case, it is clear that the learned Court below has come to the wrong conclusion by handing over the person and property of the minor girls to the respondent by holding him to their guardian in the eyes of laws. Under the facts and circumstances of this case, this finding of the trial Court has to be reversed.

18. In the result, this appeal is allowed and the judgment of the learned trial Court is reversed. The appellant is appointed as a guardian of the minor girls and the respondent is directed to deliver the custody of the girls to the appellant within two weeks from the date of the passing of the Judgment, failing which the appellant shall have a right to obtain the custody of the person and property of the girls through the processes of law.
Appeal allowed.

Cases Referred.

[1]AIR 1960 Mad 519
[2] AIR 1986 Mad 99
[3] AIR 1954 Pat 489
[4](1987) 1 SC 42