

RAJASTHAN HIGH COURT

Govind Sahai Bagarhatta

Vs.

Santosh Mishra

D.B. Civil Misc. Appeal No. 375 of 1998
(Shiv Kumar Sharma and Khem Chand Sharma, JJ.)

09.10.2001

ORDER

Sharma, J.

1. Late Smt. Kumkum was married to the respondent on 8.7.1989. Out of this wedlock, a female child Priymvada @ Sona and a male child Parijat @ Jaideep were born. In 1992, the respondent deserted his wife and she along with her daughter Priymvada and son Parijat started living with her father, petitioner No. 1. At the time of her desertion, Smt. Kumkum was suffering from cancer and she passed away on 20.8.1993. In the month of April, 1993, while she was admitted in SMS Hospital, Jaipur, respondent forcibly took with him Priymvada and since then she is living with the respondent and the boy Parijat is living with the appellants.

2. The respondent filed an application under Section 10 of the Guardian and Wards Act in the Family Court, Ajmer for custody of his son Parijat @ Jaideep on the ground being father he is the natural guardian of his son. The petitioners herein contested the above application on various grounds. On the basis of the pleadings of the parties, the Judge Family Court framed following three issues including issue regarding relief :

- (i) Whether the welfare and interest of minor Parijat would be better served in giving his custody to his father ?
- (ii) Whether the respondent is entitled to the custody of child and if so, to what extent ?
- (iii) Relief ?

3. The parties led their evidence. The learned Judge, Family Court decided all the

issues in favour of respondent and accordingly allowed respondent's application and vide its order dated 16.6.97 directed the petitioners to hand custody of minor Parijat @ Jaideep to respondent Santosh Mishra within three months from the date of order. The court also directed the respondent to arrange the meeting of his son and daughter with the appellants on particular occasions and dates. The respondent further moved an application before the court below making allegation against the appellants that they have not yet handed over Parijat and that custody of the boy should be made available through police. The appellants submitted reply to this application and *inter alia* submitted that the boy was not mentally prepared to live with the respondent. The appellants prayed for review of the earlier order and prayed that custody should not be ordered to be given to the respondent. The appellants also moved an application dated 11.9.97 stating therein that the respondent does not have any income and he is unemployed. It was also stated that despite various letters written to the respondent, he did not come to him and therefore, the order passed on 16.6.97 be reconsidered. The appellants also filed some applications on different dates praying that some time may be granted for handing over custody of the boy. The learned Judge, Family Court decided all these applications vide its order dated 19.2.96 and *inter alia*, directed the appellants to handover custody of Parijat to the respondent before 30.4.1998 and if it is not done by 30.4.98, arrest warrant of Pradeep @ Parijat u/Section 25(2) of the Guardian & Wards Act be issued. It is against these orders that the appellants have approached this court through the present appeal under Sec. 19 of the Family Courts Act.

4. Respondent Santosh Mishra has also preferred separate appeal, challenging the rider put by the learned Judge, Family Court in its judgment dated 16.6.1997 to the effect that respondent shall take his children to their maternal grandfather's family on various occasions mentioned in the judgment.

5. Since both the appeals involve similar questions and arises out of the same judgments, they are being disposed of by common judgment.

6. We have heard learned counsel for the parties and perused the judgments impugned & also the record of the case.

7. The reasons which prevailed with the learned Judge, Family court while making an order for handing over custody of boy Parijat to respondent are :

- (i) appellant No. 1 (Govind Sahay) is the maternal grandfather of Parijat and he is 73 years old and that his wife is also of the same age;
- (ii) In this old age, the appellant and his wife are being looked after by others and thus it is not possible for them to take care of the boy;
- (iii) appellant No. 2, who is maternal uncle of Parijat, himself is a divorcee. He was granted divorce on the ground of cruelty and demand of dowry and that his 10 years old son is living with his mother and the appellant No. 2 has never cared for his own son.

8. The admitted factual position is that respondent was married to late Smt. Kumkum on 8.7.89 and both remained together as husband and wife only for a period of 3 years, during which two children were born. Some time in August 1992, the respondent deserted his wife. The date of birth of their male child is 13.11.1991 and thus, at the time of desertion of late Smt. Kumkum, the male child named Master Parijat was only 9 months old. After desertion, Smt.

Kumkum along with her 9 months old son Parijat started living with her parents. Smt. Kumkum was suffering from Cancer and she passed away on 20.8.1993.

9. From the above facts it is evident that since 1992, Parijat son of respondent has been living with the appellants' family and is being looked after by his maternal grandmother and maternal grandfather. The respondent, father of Parijat moved an application under Section 10 of Guardian and Wards Act before the Family Court for the custody of his son and the learned Judge, Family Court ordered for granting custody of Parijat to his father for the reasons enumerated in the earlier part of this judgment.

10. On a perusal of evidence and material on record it is crystal clear that the date of birth of Parijat is 13.11.1991 and thus, by now he is about 10 years of age. He has been living with the appellants' family since birth and presently he is prosecuting his studies and is being properly taken care of.

11. True it is that father being a natural guardian of a minor child has a preferential right to claim custody of his son. However, in the matters concerning the custody of minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Though Section 6 of the Hindu Minorities & Guardianship

Act, 1956 constitutes 'father' as the natural guardian of minor son or daughter, but that provision also cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. For arriving at a just and proper decision, keeping in mind that welfare of child is the paramount consideration, we thought it proper to call the child and find out his wishes as to with whom he wants to live. Pursuant to the court's order, Master Parijat, aged about 10 years was produced before us on 14.8.2001. On being asked as to with whom he wants to live, Parijat @ Jaideep frankly stated that he is willing to live his with maternal grandfather Shri Govind Sahay Bagerhetta. Thus, it appears that he was not interested to live with his father and in our opinion, rightly so, because since birth he has been happily living with the appellants' family, prosecuting his studies very well and that both father and son are foreigner to each other. We also tried to persuade the children to go and live with his father for some time but he refused to do so. On being talked to Parijat, we found him intelligent enough to understand his well being. There are catena of decisions of various High Courts and of the Apex Court, wherein, the principle has been recognised that in deciding the question of handing over custody of a Hindu minor, the welfare of the minor shall be the paramount consideration. Reference may be made to one of the decisions of the Apex Court in *Kirtikumar Maheshanker Joshi v. Pradip Kumar Karunashanker Joshi*,¹ wherein their Lordships of the Apex Court have observed as under :

"After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage."

12. I have also gone through the entire record and the judgments impugned. The reasons prevailed with the learned Judge, Family Court, in my considered opinion, do not appear to be just and proper, inasmuch as Master Parijat is happy at the appellants' family. His welfare and interest will be better served in the custody of his maternal grandfather, appellant No. 1 in comparison to his custody with his father, with whom he never lived after the age of only 9 months. Therefore, we are not inclined to hand over the custody of Parijat to his father at this stage.

13. It may also be observed that Kumari Priyamvada has been residing with her father respondent Santosh Mishra since her birth. Through this appeal, the respondent seeks to challenge the rider that he shall take his daughter to the appellants on various occasions as put by the learned Judge Family Court in his judgment dated 16.6.97, which is also under challenge in the appeal preferred by Govind Sahai and others, appellants. The only ground of challenge to the rider is that the only question before the court below was with respect to the custody of minor Parijat and that daughter of respondent was not the subject matter and therefore, the learned Judge, Family Court has committed serious error in imposing rider.

14. There is no dispute that Kumari Priyamvada has been residing with her father and Parijat @ Jaideep has been residing with the family of his maternal grandfather. Considering the question of well being of minor Parijat we have already declined his custody to his father Santosh Mishra, respondent.

15. We, therefore, dispose of these appeals by issuing following directions :

- (i) We allow the custody of Parijat @ Jaideep, minor son of respondent Santosh Mishra to the appellants who are maternal grandfather and maternal uncle;
- (ii) Santosh Mishra, father of the children shall be permitted by the appellants to meet Parijat on holidays or on any other day with prior notice to the appellants. Santosh Mishra can take the child out of the house for recreation, entertainment or for shopping with the concurrence of the child',
- (iii) If in due course Santosh Mishra wins over the love and affection of the child, he would be at liberty to move this court for the modification of the order regarding custody of the child;
- (iv) We set aside the impugned judgments of the learned Judge, Family Court;
- (v) We give the parties liberty to move this court for modification of this order or for seeking any directions regarding the custody and the well being of Parijat, if there is change in the circumstances for the welfare of the children.

16. The appeals stand disposed of with the above directions. No order as to costs.

Order accordingly.

Cases Referred.

1. 1993(1) RRR 413 (SC) : AIR 1992 SC 1447