

RAJASTHAN HIGH COURT

Goverdhan Lal

Vs.

Gajendra Kumar

D.B. Civil Misc. Appeal No. 270 of 1993
(Shiv Kumar Sharma and Khem Chand Sharma, JJ.)

29.10.2001.

JUDGMENT

Khem Chand Sharma, J.

1. Briefly narrated the facts of the case are that respondent Gajendra Kumar submitted an application under Section 25 read with Sections 10 and 12 of the Guardian and Wards Act (here-inafter to be referred to as "the Act") stating therein that marriage of respondent was solemnized with Smt. Sushma Sharma d/o appellant Nos. 1 and 2. It is stated that out of this wedlock, two children, namely Virendra and Ashish were born. Smt. Sushma passed away on 12.3.1988 and at the time of her death, since there was none to look after minor Ashish aged only 3 months, the respondent, as per the application, left his son Ashish with appellant Nos. 1 to 3. The respondent further averred that appellant No. 3 had great affection for Ashish and as such, appellant Nos. 1 and 2 decided to marry Rama Sharma, appellant No. 3, with respondent. Rama did not agree to this proposal and ultimately, the respondent married himself with one Seema. The respondent prayed that he being natural guardian, the custody of his minor son be ordered to be handed over to him.

2. It is further stated that on 13.2.1999 when the respondent went to the appellant Nos. 1 to 3 and asked them to hand over custody of his son Ashish, they refused to hand over custody of Ashish to respondent.

3. The appellant Nos. 1 and 2 contested the above application and submitted a joint reply. The appellants took the plea that at the time of death of their daughter Sushma, Ashish was hardly 3 months old and there was no one to take care of Ashish and that respondent himself left his son with them. The appellants stated that after the death of Sushma, the respondent did not take care of his son Ashish and that he also performed

his marriage with one Seema and out of this wedlock, one daughter was also born, The appellants further stated that Ashish and respondent are foreigners to each other and that it will not be in the well-being of Ashish to live with his father and step-mother, particularly when a daughter was also born and that respondent was busy with his newly married wife and daughter. The appellants stated that Ashish was very well taken care of by them and they have been imparting education to him. He is happy and getting great love and affection in the company of appellants.

4. On the basis of the pleadings of the parties, the learned Judge, Family Court framed following 4 issues :

1- Whether the respondent is entitled to the custody of Ashish in view of the fact that he is a minor and his father and step-mother are foreigners to each other and that respondent was busy with his newly married wife and daughter. The appellants stated that Ashish was very well taken care of by them and they have been imparting education to him. He is happy and getting great love and affection in the company of appellants.

2- Whether the respondent is entitled to the custody of Ashish in view of the fact that he is a minor and his father and step-mother are foreigners to each other and that respondent was busy with his newly married wife and daughter. The appellants stated that Ashish was very well taken care of by them and they have been imparting education to him. He is happy and getting great love and affection in the company of appellants.

3- Whether the respondent is entitled to the custody of Ashish in view of the fact that he is a minor and his father and step-mother are foreigners to each other and that respondent was busy with his newly married wife and daughter. The appellants stated that Ashish was very well taken care of by them and they have been imparting education to him. He is happy and getting great love and affection in the company of appellants.

4- Whether the respondent is entitled to the custody of Ashish in view of the fact that he is a minor and his father and step-mother are foreigners to each other and that respondent was busy with his newly married wife and daughter. The appellants stated that Ashish was very well taken care of by them and they have been imparting education to him. He is happy and getting great love and affection in the company of appellants.

5. The respondent examined 5 witnesses, whereas, the appellants examined 8 witnesses in support of their respective pleas. The learned Judge, Family Court decided all issues in favour of respondent and *vide* judgment dated 28.4.1993 allowed the application of the respondent and ordered the custody of Ashish to be given to his father, respondent. It is against this judgment that the present appellants have come up in appeal before this Court.

6. We have heard learned counsel appearing for the appellants and perused the impugned order and record of the case.

7. The uncontroverted facts are that respondent was married to Smt. Sushma Sharma (since deceased) and out of this wedlock two children were born. Ashish was born on 10.11.1987. His mother Smt. Sushma Sharma died of 12.3.1988 and thus, at the time of her death, Ashish was only 3 months old and since there was none to look-after

him, the respondent himself left his son Ashish with the appellants. Some time in 1990, respondent performed his second marriage with Seema Sharma and out of this wedlock, one daughter was also born.

8. From the above facts it is evident that right from March 1988, Ashish, son of respondent, has been living with the appellants' family and is being looked after by his maternal grandmother and maternal grand- father. The respondent, father of Ashish, moved an application under Section 25 read with Sections 10 and 12 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 Ashish to his father for the reasons enumerated in the earlier part this judgment.

9. On a perusal of evidence and material on record it is crystal clear that the date of birth of Ashish is 10.11.1987 and thus, by now he is about 14 years of age. He has been living with the appellants' family since breast-fed and presently he is prosecuting his studies and is being properly taken care of.

10. 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 Minority & 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, boy Ashish, aged about 14 years was produced before us on 10.9.2001. On being asked as to with whom he wants to live, Ashish frankly stated that he is willing to live with his maternal grand- father Goverdhan Lal and maternal grandmother Smt. Janki Bai. 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 Ashish, 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 Pradip Kumar. 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."

11. We have also gone through the entire record and the judgment impugned in this appeal. The reasons prevailed with the learned Judge, Family Court, in our considered opinion, do not appear to be just and proper, inasmuch as boy Ashish is happy at the appellants' family.

12. Having considered the above facts situation as also the above principle of law, we are of the considered opinion that the welfare and interest of Ashish will be better served in the custody of his maternal grandfather and maternal grandmother, the appellants before us. In comparison to his custody with his father, with whom he never lived after the age of only 3 months, Therefore, we are not inclined to hand over the custody of Ashish to his father Shri Gajendra Kumar Sharma, at this stage.

13. We therefore, dispose of this appeal by issuing following directions :

- (i) We allow the custody of Ashish minor son of respondent Gajendra Kumar to the appellants who are maternal grandfather and maternal grandmother;
- (ii) Shri Gajendra Kumar Sharma, father of the child shall be permitted by the appellants to meet Ashish on holidays or on any other day with prior notice to the appellants. Respondent Gajendra Kumar Sharma can take the child out of the appellants' house for recreation, entertainment or for shopping with the concurrence of the child;

- (iii) If in due course Shri Gajendra Kumar Sharma 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 judgment of the learned Judge, Family Court;
- (v) We give the parties liberty to move this Court by modification of this order or for seeking any directions regarding the custody and the well-being of Ashish, if there is change in the circumstances for the welfare of the child.

14. The appeal stands disposed of with the above directions. No order as to costs.
Appeal disposed of.

Cases Referred.

1. AIR 1992 SC 1447