

RAJASTHAN HIGH COURT

Bhagwandas

Vs.

Dhanwanti

S.B. Civil Misc. Appeal No. 591 of 1998

(H R. Panwar, J.)

08.01.2002

JUDGEMENT

H R. Panwar, J.

1. This appeal is directed against the judgment dated 22-7- 1998 passed by Additional District Judge, Abu Road, District Sirohi in Civil Misc. Case No. 6/96 whereby the trial Court dismissed the application filed by the appellant under Section 10 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act'). The appellant being aggrieved by the judgment dated 22-7-1998 filed the present appeal under Section 47 of the Act.

2. Brief facts, which are necessary for the decision of this appeal are that the marriage was solemnized between the appellant and the respondent. The appellant filed an application under Section 10 of the Act before the trial Court stating therein that out of the wedlock, a male child named Om Prakash was born on 1-8-1986. There were some differences between the appellant and the respondent and, therefore, the respondent has been living with her parents at Mount Abu along with the child Om Prakash. When the child Om Prakash attained the age of 6 $\frac{1}{2}$ years, the father of the child the appellant sought custody on the ground that he being the natural guardian and is in a better position to look after the child, therefore, he requested for the custody of the child. The respondent filed a reply before the trial Court and stated that the future of her son Om Prakash is not safe in the hands of the appellant as he is not leading a good life. It was also alleged that she has been subjected to cruelty by appellant her husband and, therefore, she went to her parents' house and started living there although at the relevant time, she was pregnant and after three months, she delivered a child.

3. The trial Court after considering the evidence led by both the parties, reached to the conclusion that the child is being well maintained by the mother respondent and his maternal grandfather and maternal uncles at Mount Abu, his schooling is well looked after by them. The child has secured first division marks in class Vth. That shows that the interest of the child is being looked after properly by the mother and her parents. The child was examined before the trial Court and he categorically stated that he is being properly looked after. He was examined as N.A.W. 2. He stated that he is living with his mother, maternal grand father and maternal uncles at Mount Abu. He stated that he is getting food, clothes etc. properly. He stated that his father never met him and he does not know him. He came to know through his mother that his father's name is Bhagwandas. He stated that last year he passed Vth class with first division. In his statement, he desired to remain in the custody of the mother. On appreciation of the evidence, the trial Court dismissed the application filed by the appellant. However, it was directed that the appellant will have a right to meet his son Om Prakash once a week. It was directed that the appellant can go and meet his son at the place where the respondent Smt. Dhanwanti is residing once a week.

4. I have heard the learned counsel for the parties.

5. The learned counsel for the appellant submits that the appellant is serving in Railway Department on the post of Khalasi and as such being Govt. employee, he can well maintain his son and, therefore, he is in a better position to look after the welfare of the child. He further submitted that the respondent is not having any gainful employment, and, therefore, it is not safe to keep the child in the custody of the respondent having no means of livelihood.

6. The learned counsel for the respondent submits that right from the date of birth, the child is in the custody of the mother and he is being looked after by the maternal grand father and maternal uncles, who are employees of Air Force at Mount Abu. The minor Om Prakash is being provided education in Govt. Higher Secondary School, Mount Abu. The respondent has placed on record before the trial Court the marks sheet of Vth Class Ex.A-6 to show that the child has passed Vth class with first division. By order dated 6-11-2001, the respondent was directed to remain present in the Court and to produce the child Om Prakash. In pursuance of the direction, the child Om Prakash is also present. I have enquired about his well being in the Court in the presence of the parties. He was specifically asked as to whether he wants to go with his father, who is present in Court. He refused to go saying that this father has never bothered for him and he was properly looked after by his mother, maternal

grand father and maternal uncles. He has shown me school records of various classes. Every year he is successful in his class and presently studying in class Xth, the school in which he is studying is situated at Mount Abu near to the house of his maternal grand father and uncles.

7. The learned counsel for the appellant relied on a judgment of this Court in *Prakash Chandra Jain, v. Smt. Chandrawati Jain* ¹ This Court held as under :-

"The controlling consideration, therefore, for governing the custody of the child, is the welfare of the child and not the rights or sentiments of the parties. In deciding any question as to the custody and up-bringing of the minor, the Court must regard the minor's welfare as the first and paramount consideration and must not take into consideration whether from any other point of view the father's claim in respect of such custody, up-bringing, administration or application is superior to that of the mother or the mother's claim is superior to that of the father. In case of a dispute between the mother and the father for the custody of the child, it is necessary to strike out a balance between the requirements of the welfare of the minor child and the rights of his respective parents over the child. The Court is mainly concerned with the welfare of the child and not with the rights of the parents. The decisions for the custody of the child to a particular person, requires a judicial investigation in order to ascertain (i) with whom the child will be happy; (ii) by whom the health and comforts of the child will be better looked after and to contribute its well being, (iii) who can bring up the child and give education in a manner in which he deserve to be brought-up, (iv) in whose company the child may grow up in normal balanced manner to be useful member of the society, (v) the age and sex of the child; and (vi) the character and capacity of the father or the mother etc. These are some of the considerations which are required to be looked into at the time of delivery of the custody of the minor ."

8. In *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashankar Joshi*, ² the Hon'ble Supreme Court held as under at page 1448; of AIR:-

"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."

9. In that case, the children were present before the Hon'ble Supreme Court and in the chamber proceedings, the maternal uncle and father were also present. Both the children were intelligent. They were more matured than their age. Both of them were bitter about their father and narrated various episodes showing ill-treatment of their mother at the hands of their father. They categorically stated that they are not willing to live with their father. They further stated that they are very happy with their maternal uncle, who is looking after them very well. Considering, the wishes of the children, the Hon'ble Supreme Court refused to give the children in the custody of the father. In the instant case, the child is age of 15 1/2 years of age and is studying in class Xth. He appears to be intelligent enough. He was asked as to whether he would like to live with his father. He bluntly refused saying that he hate his father, who had never bothered for all these years. On the contrary, he says that he is very happy with his mother, maternal grandfather and maternal uncles, who are very well looking after his welfare.

10. In *Chandrakala Menon (Mrs.) v. Vipin Menon (Capt.)* ³ the Hon'ble Supreme Court held that the question regarding the custody of a minor child cannot be decided on the basis of the legal rights of the parties. The custody of a child has to be decided on the sole and predominant criterion of what would best serve the interest and welfare of the minor. In that case also, the girl Soumya appeared in the chambers and her wishes and sentiments were gathered by the Hon'ble Supreme Court. She liked her maternal grandparents and the Court came to the conclusion that it would be in the interest and welfare of minor that she should be permitted to be in the custody of her mother Chandrakala. The custody of the father was refused.

11. In *Bijay K. Prasad v. Ranjana*, ⁴ the Hon'ble Supreme Court held that preference of child is paramount. In that case , the child categorically stated that she would like to stay with her father and considering the wishes of the child, the custody was ordered to be given to the father.

12. In *Jai Prakash v. Shyam Sunder Agarwalla* , ⁵ the Hon'ble Supreme Court while deciding the question of custody held that the paramount interest of the child is to be kept in mind while deciding the custody of the child.

13. Thus, it is clear that while deciding the question of custody of the child, the preference to the wishes of the child as also the paramount interest of the child is to be considered. In the instant case, as discussed above, the child is happy with his mother and maternal grandfather and uncles, who have been looking after the welfare of the

child very well as evidenced. The trial Court has taken into account all these facts while deciding the application filed by the appellant seeking custody of the child. I find no error in the judgment of the trial Court.

14. In this view of the matter, I find no merit in this appeal. Accordingly, it is dismissed. However, the appellant will have a right to meet his son Om Prakash at the residence of the respondent as also in the school in which he is studying once a week or on any festival, if he wishes to meet him. No order as to costs.

Appeal dismissed.

Cases Referred.

1. 1996 (2) RLR 691
2. (1992) 3 SCC 573
3. (1993) 2 SCC 6
4. (1999) 9 SCC 544
5. AIR 2000 SC 2172