

(1995) 09 BOM CK 0019
In the Bombay High Court
Case No : First Appeal No. 960 of 1994

Abdulsattar Husen Kudachikar

APPELLANT

Vs

Mrs. Shahina, Abdulsattar Kudachikar

RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:

Guardians and Wards Act, 1890 — Section 17, 24, 25, 7, 8

Citation : AIR 1996 Bom 134 : (1996) 1 BomCR 553 : (1996) 98 BOMLR 591 : (1996) 1 MhLj 892

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : Mr. Sawant and Miss Smita Mane, for Prafulla Shah, for the Appellant; T.S. Ingale, for the Respondent

Judgement

A.V. Savant, J.—This is an appeal against the Judgment and Decree dated September 20, 1994 directing the father to hand over the custody of the minor son Mohammad Wasim to the mother Smt. Shahina Abdulsattar Kudachikar. There is no dispute before me that the original application was made by the mother u/s 24 of the Guardians and Wards Act, 1890. On evidence being led, the trial Court has come to the conclusion that the mother was entitled to the custody of the child. Consequently, Miscellaneous Civil Application No. 81 of 1994 for custody has been allowed. Hence, this appeal.

2. A few admitted facts necessary for the disposal of this appeal may be stated as under:

The parties are Sunni Muslims and were married at Pune on 17th November, 1988. The father is working as a Medical Representative with Eber's Pharmaceuticals Limited and gets a salary of Rs. 4,500/- per month. He is stationed at Miraj in Sangli District, but from the very nature of his job he is required to travel around. The mother is working with the Telecommunications Department at Sangli and gets Rs. 3000/- per month as her salary. On 7th May, 1990 son Mohd. Wasim was born out of the wedlock. On 15th August, 1991

daughter Heena Kausar was born. On 15th May, 1994 the appellant gave talaq to the respondent and there is no dispute before me that on April 20, 1995 he has married one Noorjehan Tahasildar.

3. Misc. Civil Application No. 81 of 1994, out of which this appeal arises, was filed by the mother on 13th June, 1994 for custody of her son Mohd. Wasim. The mother alleged in her application that in accordance with the Personal Law applicable to the Parties, she was entitled to the custody of her son. The appellant was already having an affair with Noorjehan Tahasildar when the application was filed on 13th June, 1994 and now he has married her on April 20, 1995. The mother complained that the child was snatched from her custody and was illegally detained by the father in his custody. The child needed mother's care, love and affection. Since the child was below 7 years of age, she was entitled to custody of her male child. She was able to look after her son and the welfare of her son was safer with her.

4. The appellant filed his say in reply to the application for interim relief, which say at Exh. 12 was treated as the written statement. He denied the allegations made against him. He contended that he was able to look after his son. He denied having an affair with Noorjehan Tahasildar. In short, the appellant contended that he was able to look after his son Mohd. Wasim, whose welfare was safer with him. This say, at Exhibit 12 has been filed on 29th June, 1994.

5. The parties examined themselves in support of their contentions. The evidence of the respondent-mother, who was the applicant in the trial Court, is at Exhibit 26 and the evidence of the appellant is at Exhibit 37. In her evidence, the respondent contended that she had two children from the appellant. She was entitled to the custody of both the children. However, the father had snatched the son away on 22nd May, 1994, at Miraj, and when the mother tried to see the child thereafter, the appellant had even refused to permit her to meet the son. She deposed that she was able to look after her son. There is nothing in her cross-examination which detracts from the claim which she made in her application and in her Examination-in-Chief.

6. The appellant examined himself and contended that he was better suited to look after his son, though his job involved touring. He contended that he was earning more than his wife. However, in his cross-examination he had to concede that his being a touring job, he had to go out of Miraj. He feigned ignorance about the School in which his daughter Heena was studying. He denied that he had snatched away the son from the mother or that he had denied permission to the mother to meet the son. He contended that it was on his own volition that the son was staying with him.

7. On this evidence on record, the learned trial Judge has come to the conclusion that the respondent-mother was entitled to the custody of the son and accordingly, the respondent's application for custody of her son was allowed on September 20, 1994, which order has been challenged before me.

8. I have heard both the learned Counsel -- Mr. Sawant for the appellant-father and Mr. Ingale for the respondent-mother. I have perused the entire record that was placed before me; the pleadings and the entire evidence has been perused by me. The only point which arises for my consideration is, who is entitled to the custody of the son Mohd. Wasim, who is aged 5 years? My answer to this point is that it is the respondent-mother, who is entitled to the custody of her son. The reasons are as follows.

9. There is no dispute that in accordance with the principles of Mohammedan Law, which is the law applicable to the parties, it is the mother who is entitled to the custody of a male child until he has completed the age of 7 years or of a female child until she attains puberty. This right continues though she is divorced by the father of the child, unless she married a second husband, in which case the custody belongs to the father. If we refer to "Mulla's principles of Mahomedan Law", 19th Edition, in Chapter XVIII under the Heading (B) Guardians of the Person of Minor, Para. 352 at page 287 reads as under:--

"352. Right of mother to custody of infant children -- The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she married a second husband in which case the custody belongs to the father (f)".

I need not elaborate the Case Law on this point, because this position was not disputed before me.

10. Admittedly, Mohd. Wasim is aged 5 years. The respondent-mother is, therefore, the guardian of her son as at this moment. The respondent is employed and earning more than Rs. 3,000/- per month. She is staying with her father at Sangli and has been able to look after her daughter Heena Kausar, aged 4 years. Her evidence shows that she has all the concern for her children. There is no allegation that the respondent is likely to remarry or is indulging in any affair with any one which would result in her neglecting her children. On the other hand, it is clear from the evidence on record that the appellant was having an affair with Noorjehan Tahasildar and it is admitted before me now that he has married her. The appellant is a Medical Representative and by the very nature of his job he is required to tour not only in and around Miraj Town but also Sangli District. It is true that he is drawing a higher salary than that of the respondent inasmuch as he is drawing Rs. 4,500/- per month as against Rs. 3,000/- drawn by the respondent. But for children of tender years, it is not money alone which matters. It is the natural love and affection and particularly, the care which the mother can take which is more important and which has no substitute.

11. It is well-settled that in proceedings under the Guardians and Wards Act, 1890, what is of paramount consideration is the welfare of the child. Section 4 of the Guardians and Wards Act, 1890 is the defining section. It defines words such as "minor", "Guardian", "Ward" etc. "Minor" is defined to be a person who, under

the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. "Guardian" means a person having the care of the person of a minor or of his property or of both his person and property. "Ward" means a minor for whose person or property or both there is a guardian. Section 7 provides that 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 of his property or both;

(b) declaring a person to be such guardian, the Court may make the order accordingly.

12. Section 8 deals with the persons, who are entitled to apply for an Order u/s 7. Section 17 is of some importance, and it reads as under:--

"17. Matters to be considered by the Court in appointing guardian--

(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.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent, preference, the Court may consider that preference.

(4) XXX XXX XXX

(5) The Court shall not appoint or declare any person to be a guardian against his will".

Similarly, Section 25 reads as under:--

"25. Title of guardian to custody of ward--

(1) If award leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Sec. 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is

not his guardian does not of itself terminate the guardianship."

13. On a true construction of the provisions of Section 17 and Section 25, there can be no doubt that in appointing or declaring a guardian of a minor, the Court must have regard to the welfare of a minor which is of paramount consideration. Taking into account all the relevant facts such as a age, sex, religion, character and capacity of the proposed guardian, nearness of kin to the minor, the paramount consideration is the welfare of a minor. It is for deciding this paramount consideration of the welfare of a minor that all other factors must be taken into account. In this behalf, a reference may be made to some of the decisions of the Supreme Court briefly:--

(i) In *Rosy Jacob Vs. Jacob A. Chakramakkal*, , it has been observed that whether the proceedings were under one Act or the other viz. the Guardians and Wards Act or the Indian Divorce Act (which was relevant in that case), what was of paramount consideration was the question of welfare of the minor. It may be useful to reproduce the observations in Para. 14 of the Supreme Court decision at pages 2098 and 2099:--

"In our opinion, S. 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under S. 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is S. 25..... But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents". It was not disputed that under Indian Divorce Act this is the controlling consideration. The Court's power under S. 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being

seldom -- if ever -- identical."

(ii) In Smt. Mohini Vs. Virender Kumar, , which was the case under the Hindu Minority and Guardianship Act, 1956, it was again reiterated by the Supreme Court that the welfare of a minor was the paramount consideration. Considering all the facts of the case, it was found that the minor's welfare was financially and affectionately safer in the hands of the mother.

(iii) Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , it was reiterated that any matter concerning the custody of a minor has to be considered and decided only from the point of view of the welfare and custody of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. These observations are to be found in para. 17 of the judgment at page 1289 of the Report. In para. 19 of the judgment in Thirty Hoshie Dolikuka's case, a reference has been made to Rosy Jacob Vs. Jacob A. Chakramakkal, .

(iv) Then, in the case of Poonam Datta Vs. Krishanlal Datta and Others, , the Supreme Court decided the question of custody of the minor having regard to the consideration of welfare of the child and the parties were directed to consider the interests of the child as paramount and do nothing which would adversely affect the interest or affect the child physically or mentally in any manner.

(v) Recently, in the case of Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and Another, , the Supreme Court again reiterated that the custody of child has to be decided on the sole and predominant criterion as to what would serve best the interest of the minor. This has been categorically observed in Para 7 of the decision at page 8 of the Report where in the facts of the case, the custody was given to the mother, who was residing abroad, though the father was residing in India.

14. Having regard to the above guidelines laid down by the Supreme Court, there is no doubt in my mind that in the facts of the present case the welfare of the child Mohd. Wasim is safer with the mother. The father has admitted that he married a second wife. He has a touring job, leaving his only son from his first wife to the care of his second wife, in preference to the natural mother of the child, would not be in the best interest of the child. The child certainly needs the love and affection of his natural mother, who is anxious to bestow it upon her child. The child has been forcibly snatched from her on 22nd May 1994, resulting in initiation of the proceedings soon thereafter on 13th June, 1994. Under the circumstances, no objection can be taken to the impugned decree passed by the trial Court.

15. Mr. Sawant, however, contended that in the event of this Court not accepting the father's version, the father would, at least, be entitled to access to the child on week-ends and during vacations. The father is living at Miraj and the mother is at Sangli. I see no difficulty in permitting the father to meet the child on week-

ends or during vacations. Both the spouses are available on phone in their respective offices. It would be in the interest of the child if the father informs the mother in advance and meets the child either at weekends or during vacation. I am reminded of the caution sounded by the Supreme Court in Poonam Datta Vs. Krishanlal Datta and Others, . I can do no better than to reproduce Para 7 of the decision of the Supreme Court in that case at page 402 of the Report--

"7. Parties are directed to consider the interest of the child as paramount and do nothing which would be adverse to its interest or affect it physically or mentally in any manner."

I would, therefore, not only direct but appeal to the parties to consider the interest of the son as paramount and do nothing which would be adverse to his interest and affect him physically or mentally in any manner.

16. Mr. Sawant for the appellant makes a request that during long vacations, the father should be allowed to take the child away. Since the child is of tender age, I do not propose to disturb the child mentally at least till the child completes 7 years of age. Let him settle down with his mother. The question of the father taking away the child during long vacation can be considered, if at all, after the child has completed 7 years of age. Needless to say that as and when such an application is made, it would be considered on its own merits and nothing said in this judgment would be construed to mean that the father has a right to insist on the custody of the child during vacation.

17. The child is now studying in ST. K. G. at Miraj. Mr. Sawant, on obtaining instructions, for the appellant, who is present in the Court, makes a statement that the custody of the child would be handed over to the respondent-mother at Sangli in the morning of Saturday, the 14th October, 1995. Statement accepted. Accordingly, the appellant is directed to hand over custody of the child --Mohd. Wasim to the respondent in the morning of Saturday, the 14th October, 1995.

18. It is made clear that as and when the appellant wants to see the child, the appellant will have to inform the respondent in advance and go to her residence to meet the child depending upon the convenience of the parties.

19. Subject to the above directions, appeal is dismissed with costs.

20. Certified copy expedited.

Appeal dismissed.