

(2010) 03 UK CK 0065

In the Uttarakhand High Court

Case No : First Appeal No's. 137 and 142 of 2009

Anand Dubey

APPELLANT

Vs

Smt. Sarika Dubey
 Sarika Dubey Vs Anand Dubey

RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Family Courts Act, 1984 — Section 19
Hindu Marriage Act, 1955 — Section 26

Citation : (2010) 1 UC 570

Hon'ble Judges : Nirmal Yadav, J;B.C.Kandpal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon'ble B.C. Kandpal, J.—Since both the First Appeals arise out of the same judgment and order and similar controversy is involved, they are being decided by this common judgment and order.

2. These appeals, u/s 19 of Family Court Act, have been preferred against the order dated 30.11.2009 passed by Judge, Family Court, Dehradun in Misc. Case No. 116/2009 arising out of Original Suit No. 102/2004 between Anand Dubey v. Smt. Sarika Dubey, connected with Original Suit No. 410/2009 between Smt. Sarika Dubey v. Anand Dubey, pending in Family Court, Dehradun.

3. Brief facts of the case are that Appellant Anand Dubey filed Original Suit No. 102 of 2004 before the Principal Judge, Family Court, Dehradun u/s 13(1)(g) and Section 26 of the Hindu Marriage Act, 1955, which was ultimately decided on the basis of compromise, as both the parties settled their disputes and they filed joint application on 23.08.2007 before the Principal Judge, Family Court, Dehradun, praying therein that since both the parties have entered into compromise, therefore, the suit be decided in terms of the compromise and as per the compromise it was decided that all the cases pending between the Appellant Anand Dubey and Respondent Sarika Dubey shall be withdrawn by the parties. It was also decided that since the Respondent Sarika Dubey is residing

and working at Delhi, therefore, child Kamakshi @ Somya will be in custody of her father Anand Dubey and during the visit of Respondent Sarika Dubey at Dehradun, she will meet her daughter and Appellant will not oppose the same in any manner. It was also decided between the parties that the Appellant as well as the Respondent will live separately than the other family members and maintenance of child Somya will be borne out by her father-appellant.

4. It appears from the record that subsequently Appellant Anand Dubey moved an application u/s 26 of Hindu Marriage Act for modification of the order dated 23.08.2007 on the ground that whenever Respondent-Sarika Dubey visits Dehradun the child will meet her in his presence. At the same time, the Respondent also moved an application for custody of the child on the ground that she has permanently started living at Dehradun, therefore, the child be given in her custody.

5. The learned Principal Judge, Family Court, Dehradun after having considered the submissions raised by Learned Counsel for the parties, passed an order on 30.11.2009 directing therein that the child shall remain in custody of mother and father in rotation for three months. The order dated 30.11.2009 passed by Principal Judge, Family Court, Dehradun, is Annexure-1 to the appeal.

6. We have heard Sri Rahul Sripat, Advocate along with Sri R.K. Raizada, Learned Counsel for the Appellant-Anand Dubey, Sri Pankaj Miglani, Learned Counsel for the Respondent-Sarika Dubey and perused the record.

7. On the previous date i.e. on 15.02.2010, this Court summoned the child Somya and she was produced before the Court. We called the child in chamber and put certain questions to her. The child had given an impression that she will be happy in the company of both the parents i.e. father and mother. We thereafter directed that the child shall be given in the custody of her father till the next date of listing. Today, both the parties have also appeared before this Court in person along with the child also.

8. As per the settled law with regard to the welfare of the child, we, after having perused the impugned order, have come to the conclusion that the Judge, Family Court, Dehradun, has fell into error in ignoring this aspect that as to whether the paramount consideration with regard to the welfare of the child will be in whose custody. The welfare of the child is the primus consideration which should have been taken into consideration by the Judge, Family Court. We, however, direct both the parties to open their plea before the Judge, Family Court with regard to this aspect that the paramount consideration of the child would be in whose custody. However, we are of the view that the impugned order dated 30.11.2009 cannot be sustained in the eye of law especially in absence of any finding recorded by the Judge, Family Court with regard to the aspect of absence of paramount consideration pertaining to welfare of the child.

9. Accordingly, appeals are allowed. The order dated 30.11.2009 passed by Judge, Family Court, Dehradun, is set aside. We remand the matter with the

direction that the Judge, Family Court, Dehradun, after giving an opportunity of hearing to the Learned Counsel for the parties, shall decide the matter afresh recording the reasons pertaining to the welfare of the child. As the matter pertains to the custody of the child whose life, under the aforesaid circumstances, has come to peril at present, we direct that the Judge, Family Court, shall decide the matter as early as possible and without causing any unreasonable delay, preferably within a period of two months from the date of filing of certified copy of this order. In the intervening period the child shall remain in the custody of her father.

10. Let a copy of this judgment be placed in the file of First Appeal No. 142 of 2009.