
(1973) 06 CAL CK 0020
In the Calcutta High Court
Case No : Appeal No. 101 of 1973

Jamshed Framroze Kalyanvala APPELLANT
Vs
Mrs. Zerina Jamshed Kalyanvala RESPONDENT

Date of Decision : 07-06-1973

Acts Referred:

Parsi Marriage and Divorce Act, 1936 — Section 47, 49

Citation : AIR 1974 Cal 111 : 77 CWN 1044

Hon'ble Judges : S.K. Mukherjea, J;S.K. Datta, J

Bench : Division Bench

Advocate : Sankardas Banerjee, D.K. De and Ajay N. Ray, for the Appellant;
Manjula Bose and Manjushree Roy Chowdhury, for the Respondent

Final Decision : Partly Allowed

Judgement

S.K. Datta, J.—This is an appeal against the order of Salil Kumar Roy Chowdhury, J., dated March 30, 1973 on the application of the husband u/s 49 of the Parsi Marriage and Divorce Act (Act III of 1936). The parties were married according to Parsi rites on December 6, 1958 and a son, Framroze, also known as Vip, was born to them on June 22, 1960. Thereafter on September 17, 1962 a daughter Leena was born to them. On January 4, 1967 the husband filed an application for restitution of conjugal rights while the wife also thereafter filed a suit for divorce or in the alternative, for judicial separation. The wife's suit was decreed on November 15, 1967 by Sushil Kumar Dutta, J., for judicial separation. Custody of the children was given to the father subject to some interim orders which were passed in course of those proceedings. It was directed thereby that the children who were studying as day scholars in St. Xaviers and Loreto House, Calcutta would spend during the terms of their schools four days and a half with the mother and two days and a half with the father at their respective residences and the parents would share the children's company equally during schools holidays.

2. The husband's solicitor wrote to the wife's solicitor on April 2, 1969 informing

that Framroze had been admitted to Bishop Cotton School, Simla which was objected to by the wife expressing that he should be admitted to St. Lawrence School. Coonoor. The husband insisted on Framroze being admitted to the Bishop Cotton School whereupon the wife filed an application for an order directing that the boy be admitted and educated at St. Lawrence School. This application was dismissed by Masud, J., on June 14, 1969 by a judgment reported in (1970) 74 Cal WN 51. An appeal therefrom was also dismissed by the appeal court and the judgment was delivered by my learned brother, reported in (1970) 74 C WN 261. Thereafter the husband made an application for permission to put Framroze as a boarder of the Bishop Cotton School, a school where the husband had his education. The permission was given by the court by order dated January 8, 1970, with direction regarding access of the parents to the boy. On another application filed by the wife the court did not grant her prayer for admitting Leena to Loreto Convent, Tara Hall, Simla at that stage giving her liberty to apply for the same for 1973 session.

3. The husband took out a notice of motion on March 15, 1973 supported by a petition affirmed by him on March 14, 1973 for an order to take the children to Delhi and to educate them in suitable day schools. In the petition it was stated that there had been some material change of circumstances affecting the career of the husband which necessitated a variation of the orders passed by the court. Since June 1972 upto March 1973, the husband was without employment and he recently got an offer for a suitable job at Delhi which he decided to accept. This meant closure of his establishment at Calcutta and shifting to Delhi where he was shortly expecting a decent residence. The results of the son in the Simla school had been unsatisfactory and his progress had been retarded. He was also unwilling to continue in the school and desired to go to any other boarding school and would be happier to be in a day school. Leena was impressed by her brother's experience in boarding school and was also unwilling to go to any boarding school. Framroze's studies at Bishop Cotton School were discontinued as he flatly refused to go there from March 1973. Leena's studies in the Loreto house were also discontinued from January 1973 for going over to Delhi with the father. The children were very much attached to each other and they should study together at Delhi in day schools there, staying at the husband's house to be looked after by him and his mother which was necessary as the children were growing up. Along with the petition were annexed, amongst other papers, copies of the letters of Framroze which according to husband showed his apathy and disinclination to study at Bishop Cotton School and preference for a day school. It was also stated that the school had gone down in standard and most of the boys were not coming back to the school and the letters also indicated that the son's result was not satisfactory while his progress was retarded. The son also made complaints of ragging by senior students. In these circumstances the husband prayed for an order granting him leave to take the children to Delhi and to educate them in suitable day schools there.

4. The wife opposed the application filing an affidavit-in-opposition affirmed on

March 22, 1973 stating inter alia that the application was not bona fide, nor was it made in the interest or welfare of the minors. The altered circumstances as alleged were vague and devoid of particulars. It was not stated if his service was temporary or not. The children being of tender years required to be looked after, supervised and disciplined during the formative periods of their lives and particularly a young girl as she grows up requires guidance and advice of mother or alternatively should be kept in a suitable boarding house. It was denied that the son was unhappy in his school or his progress was retarded which was mainly on account of Hindi and Sanskrit which subjects he did not like. The complaint of bullying by senior students over trifling matters was not unusual for a young boy of that position and such bullying could not be avoided. The letters did not indicate that the boy had any preference for living with the father or that he was not desirous of living in a boarding school. The action of the husband withdrawing the children from schools was an irresponsible act, detrimental to their interest and was in violation of the orders of this Court. As for Leena who was deeply attached to her brother, it was stated that she should be allowed to live in the same place. Further, a man is not the proper person to look after the requirements of a growing girl and the husband's mother was too old to meet the same. It may be mentioned here that the old lady unfortunately died in the first part of May, 1973, as stated by the husband's counsel. It was incumbent that the girl should be in a boarding school as otherwise she would be left along with the son in care and at the mercy of the attendants and school holidays may not coincide with the husband's free time while it will not be possible for the husband to be with the children throughout. The children should accordingly be placed in boarding schools for being looked after, guided, educated and disciplined in the formative periods of their lives. The proposal to take the children to Delhi to be brought up there of their own so long as the husband's employment lasted was not for the welfare of the children but would be positively to their detriment. The fall in standard of educational institutions at Simla was due to indisciplined conduct of the boys and had been a general feature of the country. The wife accordingly prayed for immediate direction on the husband to place the children in boarding schools and she also appended to her affidavit a list of reputed public and other schools. Some letters of the boys were also annexed to the affidavit to give indication of the boy's mind. The son stated in the letters that some boys were not going back to school and he would have no friends left while bullying over food was also continuing. He also disclosed that he would like to leave the school and wanted to go to Lovedale. It would also appear that his results were not bad except for Hindi and Sanskrit which brought down his average marks and position in the class.

5. The husband filed an affidavit-in-reply affirmed on March 26, 1973, stating that he did nothing to disentitle himself to the custody of the children. Now that the son had joined senior school, he should be allowed to develop his potentiality. It was denied that there was any violation of order of court. The husband submitted that he had the right to take and maintain his children

according to his circumstances and the custody of children should be given to him. He had obtained employment at Delhi and there are suitable schools for schooling children there.

6. The learned Judge interviewed the children in his chamber and noted that they were conscious of the broken home and were sad and morose on that account. It was also apparent that they were deeply attached to each other and would be very happy if they were allowed to study in one school or at least in one place. They were charmed with the prospect of living at Delhi, obviously on the suggestion of the father. The son also indicated that he would not like to be in a boarding house as he was afraid of ragging and bully-fag by big boys, of which he had sad experience at Bishop Cotton School at Simla. The learned Judge did not accede to what he called his "childish desire without experience of life". He was of opinion that ragging and bullying were common and could not be avoided in a day or boarding school. Accordingly he was of the view that the court was required to consider only good boarding schools for both, with opportunity to them to live and spend holidays with parents in turns, and the order of the court for sharing company of children by the parents should not be disturbed until it becomes necessary due to change of circumstances.

7. After considering the respective contentions of counsel of the parties the court was of opinion that as the husband's employment at Delhi was not stable, there was possibility of the children's education being interrupted at Delhi which would hamper their studies and proper education which again could be avoided if they were put up in a boarding School. Accepting the contention of Mrs. Bose learned counsel for the wife that a girl growing into womanhood and son on the threshold of life should not be kept at Delhi, going to day Schools, and remaining in charge of servants or old grand mother, the Court was of opinion that the children should be put in boarding schools and choice was between Simla and the Nilgiris. But as the husband had objection to co-education at St. Lawrence School Lovedale, Coonoor : respecting his sentiment, the Court selected Simla. As to ragging and bullying by big boys the Court was of opinion that the same could not be avoided anywhere and therefore had to be left out of consideration. It was accordingly directed that Framroze for his welfare, benefit and future career should be put back to Bishop Cotton School to continue his studies there and complete his education. Framroze wanted to be a pilot of air-craft and that was the more reason that he should continue his studies there as the background of the School was conducive to the sentiment of the boy and it was the father who had put him in that School. The Court in coming to its decision took notice of the notorious fact that the present day situation at Delhi according to general opinion could not be very conducive to young minds and growing children. Though opinions might differ, the Court had to take into account all relevant circumstances, that is, the changing circumstances in the matter of education, all over the country. Reiterating that the paramount consideration being the welfare of the children, the court was of opinion, that it would be beneficial for the children to be put in the schools at Simla, Framroze to Bishop Cotton School and

Leena to Loreto Convent. Tara Hall, Simla. This arrangement would also mitigate their feeling of loneliness as they would have opportunity to meet each other. The Court further directed that costs of education of the daughter should be borne by the wife who was in a favourable position with her job and the father would bear charges and expenses of the son as before. The previous order as to " access to and sharing company of children was to continue as before and the parties were directed to take immediate steps for getting children admitted in the schools and till that was done current arrangement as to their custody was to continue.

8. As already stated the present appeal is against this order by the husband.

9. After the appeal was opened by Mr. Sankardas Banerjee (Mr. D. K. De and Mr. Ajay Nath Ray appearing with him) for the appellant husband Mrs. Manjula Bose appearing for the respondent wife raised a preliminary objection about the maintainability of the appeal. Mrs. Bose contended that the appeal to the High Court against the decision of a court established under the Parsi Marriage and Divorce Act, 1936--here the trial court -- has been provided u/s 47 in the said Act. Such appeal is limited only:

"..... on the ground of the decision being contrary to some law or usage having force of law, or a substantial error or defect in procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits and on no other ground."

The trial court came to the decision regarding the place of education and the upbringing of the children of a wrecked matrimonial home upon materials on record and on a consideration of relevant circumstances. The question of putting up the children in boarding schools at Delhi was never under consideration before the trial court so that it could not be said that the decision under appeal was the outcome of an error or defect in procedure or investigation, even if any, in the trial proceeding. The decision under appeal according to Mrs. Bose is neither contrary to law nor usage nor is there any substantial error or defect in procedure or investigation which could be said to have caused error or defect in the decision of the case upon merits. Further the appeal court, it was contended, should not interfere even if it had a view or opinion different from the one arrived at by the trial court. It was also stated that the court arrived at its decision on a consideration of other relevant facts and not merely on its opinion of the educational atmosphere at Delhi. For all these reasons it was submitted that no appeal did lie against the impugned order.

10. Mr. De contended on the other hand that the provisions of Section 47 are analogous to those of Section 100 of the CPC as has been held in Dr. Hormusji M. Kalapesi Vs. Dinbai H. Kalapesi, where a finding of fact regarding the quantum of alimony arrived at by the trial court without considering additional evidence on record or its own findings was interfered with in appeal. It was contended that the finding of the trial court that the atmosphere of Delhi was not conducive to

children's education and upbringing was not based on any evidence and such an assumption led the court to exclude Delhi from its consideration altogether. Section 47 was thus directly attracted and an appeal lay from such decision.

11. It appears from the judgment that the trial court expressed its opinion about Delhi in no uncertain terms in respect of education and upbringing of growing children there. The court took notice of the "notorious fact about present day situation at Delhi which according to general opinion cannot be said to be very conducive to young minds and growing children." With great respect to the learned Judge, this opinion was arrived at without any evidence or investigation but was based merely on assumption. This was a substantial error and defect in procedure in complete absence of any investigation in arriving at a finding of fact. It would further appear that the trial court, on the basis of this opinion, completely excluded Delhi from its consideration as to its suitability as a place of the children's education either as day scholars or as residents of a boarding school. This assumption of the trial court about Delhi not being conducive to children's education and upbringing produced again a substantial defect and error in the decision of the trial Court upon merits, as, as already stated, Delhi never came up for the trial court's consideration after the formation of the opinion on a relevant aspect of the question at issue. Accordingly, we are of opinion that the provision; for section 47 are attracted and the appeal is maintainable in law against the decision based on the assumption about the suitability of the place regarding children's education.

12. Mr. Banerjee next contended that the father under the earlier orders of the Court in connected proceedings between the parties was given the custody of the children and accordingly and also as father, he had the right to determine the places and schools in which they would get their education during the relevant periods. Such right has been recognised and given by the Court to the petitioner and he had done no act or has never been guilty of any conduct which would disentitle him to have the primary right to be the guardian and also to direct the children's education. There is also no scope for presumption that the husband will not act for the welfare of his children and the proposal made by the husband in the context of the relevant circumstances ought to have been accepted by the trial court.

13. Mrs. Bose on the other hand contended that paramount consideration in such cases is welfare of the minor which will outweigh the right of the father to have complete control regarding children's education and upbringing. Even though father has been given their custody it does not mean or imply that the children would always be under the complete control of the father as regards their education and upbringing. Mrs. Bose referred to the decision in *Rosy Jacob Vs. Jacob A. Chakramakkal*, where in considering the question of custody of children under the Guardians and Wards Act 1890 the Court observed as follows (p. 854-55):--

"Merely because the father loves his children and is not shown to be otherwise

undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels: nor are they mere play things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

14. Strongly relying on this authority, Mrs. Bose contended even though the petitioner has been given the custody of the children as their father he does not have any additional or extra right to determine and decide on his children's education and upbringing in the formative periods of their lives and the wife is as much competent to determine and decide the course which will be the best in the circumstances for the welfare of the children.

15. There can be no doubt as has been held above that merely because the father has been given the custody of children and there is nothing against him so far as the children are concerned, it cannot be said that the husband has any absolute overriding right in the matter of children against the wife. Section 49 of the Act imposes a duty on the court to make such orders and provisions with respect to the custody, maintenance and education of the children as the court may deem just and proper. It is obvious that the welfare of the children is the paramount consideration in all matters regarding their education, maintenance and upbringing and the court in the event of a dispute will decide on the best course for the children on the above principle. We are therefore unable to accept Mr. Banerjee's contention that the father merely because of his position as father and the earlier order of the court is entitled to have any absolute say in such matters. The position will have to be considered in the light of all the circumstances and in the context of children's welfare.

16. Mr. Banerjee next contended that in any event the order of the trial court cannot be sustained as it is beyond the ambit of the application filed by the husband in so far as it directs the admission of Leena to Tara Hall, Loreto Convent, Simla. It would however appear to us that this contention, as has been pointed out by Mrs. Bose, is without basis inasmuch as the husband in his petition prayed for taking the children to Delhi and to educate them there at suitable day schools. It is also within the competence of the court to pass, on such an application, such orders as may be found necessary for the welfare of the children. Accordingly we are of opinion that order passed by the trial court

does not suffer from the infirmity as contended on behalf of the husband.

17. Before we consider the case of Framroze, the question of Leena's schooling may be taken up for consideration. It is obvious that apart from the husband, the only female inmate of his house was his mother, who, as we have already noted, unfortunately died recently. In this situation it is obvious that Leena cannot be kept in the husband's residence at Delhi in the care of servants and maid servants during this period of her life. There is no alternative suggestion before the court and accordingly we are of opinion that the proposal of the wife to put Leena in Tara Hall Loreto Convent, Simla deserves approval. The wife has taken pains, which we appreciate, to ensure an accommodation for Leena in the said institution. In agreement with the trial court, we are of opinion that this arrangement will be just and proper for the welfare of Leena and accordingly we affirm the order passed by the trial court in so far as Leena is concerned. We are also in agreement with the trial court, taking into consideration the circumstances of the wife and her desire to pay for her daughter's education, and we direct that expenses for education of Leena be borne by the wife as ordered by the trial court.

18. Coming to the question of Framroze in view of the husband's service at Delhi and his desire to have the boy's schooling there as a day scholar residing in his own home, the position has to be considered in this context. That is the natural desire for a father who is of a homely type and it is not suggested that he is not fond of his children. All these aspects have to be taken into consideration in coming to a decision about the boy's education and upbringing. The result of study of the boy at the Simla school does not appear to be unsatisfactory except for Hindi and Sanskrit, but then again Hindi is the national language and a compulsory subject. The boy has expressed a strong dislike for the school. The trial court has disregarded the wishes of the boy. It is true, as has been pointed out by the learned Judge, that such desire may not always be the guiding factor to decide his welfare but all the same, that is a factor to be considered. The trial Court considered the husband's service as unstable and was apprehensive that the boy's education might be interrupted. There is however no evidence to indicate that this is so and the letter of appointment of the husband produced in court before us does not indicate that it is basically or at all a transferable service. The trial court has also considered the boy's aspiration to be a pilot officer and has considered Bishop Cotton School to be suitable for the purpose. We are however unable to agree with this aspect of the trial court's opinion as the same cannot be a relevant consideration for determining the boy's schooling when other schools may be equally suitable for that purpose. The boy's complaint against the school about ragging and bullying was considered by the court but it was held that it was unavoidable in any school. It however appears to us that there is little scope for ragging in a day school though a certain amount of bullying by senior students may be unavoidable in some day schools. The husband's desire to have Framroze in his residence at Delhi while prosecuting his studies at school should be given adequate consideration and respect unless

the husband has otherwise disqualified himself by his acts and it can be presumed that a father would take proper steps for his son's education in a suitable school. The petitioner has indicated through his counsel his eagerness to put his son in a suitable school as a day scholar where the session starts in July and we do not think there is any reason for us to exclude Delhi from OUT consideration as was done by the Trial Court. The wife's complaint that during his off hours the boy would be in charge of the servant and husband's free hours may not always coincide with the free hours of the son and his holidays leaving him in the care of the servants deserves consideration but this is inevitable in most homes in the present state of the society where both the husband and the wife happen to be in employment. We are of opinion that in the existing circumstances the father's prayer in the matter of education of the boy is not unreasonable. The above arrangement appears to us to be the best arrangement that can be made for the welfare and education of the boy in the existing circumstances. In coming to the above decision we have not been unmindful of the submissions of the learned counsel of the parties praying that the children in view of their deep attachment to each other should be kept in the same place if possible. Though we very much wish that such an arrangement could be made, we do not find it possible to ensure it. After all, a good education and not each other's society is the primary consideration.

19. We accordingly dispose of the appeal by varying the order of the trial court relating to Framroze while we affirm the order of the trial court as regards Leena. The father is given liberty to take Framroze with him to Delhi and to get him admitted into a suitable school there as a day scholar and during the period of his education Framroze will reside with the petitioner at his residence at Delhi. As to sharing the children's company by parents we direct that parents will share Leena's company equally during holidays and about Framroze the wife will have his company for a period of 2/3rds of the long holidays more or less the mother having their company in the earlier part of the holidays.

20. The appeal is allowed in part and disposed of as above. The parties will bear their own costs in the appeal. Certified for two counsel.

S.K. Mukherjea, J.

I agree.