

(2017) 07 BOM CK 0212
In the Bombay High Court
Case No : 52 of 2014

Lachhman S/o Irranna Shetpalliwar, & Ors.

APPELLANT

Vs

Anil Shriram Marsetwar

RESPONDENT

Date of Decision : 04-07-2017

Acts Referred:

[Guardians and Wards Act, 1890](#), [Section 25](#) of the Act, [Section 25](#) of the Act, [Section 7](#) of the Act, [Section 7](#) of the Act, [Section 17](#) of the Act, [Section 17](#) of the Act - Title of guardians and wards

Citation : (2017) 07 BOM CK 0212

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : N.S. Deshpande, A.S. Deshpande

Final Decision : Allowed

Judgement

1. Whether the appellant the maternal grandfather or the respondent-natural father should have the custody of two minor children, aged 17 years and 13 years respectively, is the question for consideration raised in this appeal, which is directed against the judgment and order dated 03/06/2014 passed by District Judge1, Darwha, District - Yavatmal in M.J.C. No. 12/2010.

2. The said petition was filed by the respondent herein under the provisions of Section 25 read with Section 7 of the Guardian and Wards Act (hereinafter referred to as "Act" for convenience) for the custody of his two minor children. By the impugned judgment and order, the trial court allowed the said application and directed appellant no.1 herein to hand over the custody of minor children to respondent. However, it is a matter of record that as on today the custody of the minor children is with their maternal grandfather appellant no.1 Lachhamanna Shetpalliwar.

3. Facts, which may be relevant, for the purpose of deciding this appeal, can be stated as follows : The marriage of respondent with Ramakanta, daughter of

appellant no.1, was performed in the year 1997. From the wedlock, Ramakanta had given birth to two children, by name, Amruta and Krushikesh. In the year 2010, Ramakanta died on 27/07/2010 at her maternal house at Mandava, Tah. Kinvat, District Yavatmal, as she was suffering from Cancer. At the time of her death, Amruta was studying in 6th standard at Babnaji Maharaj High School Dehni, whereas Krushikesh was studying in 3rd standard at Gurukul Convent (C.B.S.E.) School at Digras.

4. As per the case of respondent, as he was in the mental shock on account of the death of his wife, on the request of maternal uncle of the minor children, he allowed the children to be kept in the house of maternal grandfather, and as a result, since the death of Ramakanta, the children are residing in the house of the appellant no.1. It is the grievance of the respondent that on several occasions he went to bring the children back to his house, so that they can continue their studies in their school, however they were not sent by the appellant no.1. Respondent was, therefore, constrained to file the application before the trial court for getting custody of the minor children. It was stated by him, that he was financially sound and able to maintain and look after the children. Moreover, village Mandava, where the children are residing with the appellant no.1, is a small village and is having only one primary school upto 4th standard only. No convent educational facilities are available at that village. Respondent is having ambition to make his children as Doctor and Engineer and as educational facilities are not available at the village, where the children residing with the appellant no.1, respondent claimed the custody of minor children on the ground that their welfare will be look after better by him, he being their natural father..

5. This application came to be resisted by the appellant no.1 contending inter alia that respondent was addicted to alcohol, he was an uncultured person, he has not treated his wife with love and affection, even he did not provide her proper medical treatment, and hence, there was least possibility of his looking after the minor children properly. It was contended that merely because respondent is the natural father of the minor children, custody of the children should not be handed over to him, as the court has to consider the welfare of the minor children, which has to be of paramount importance.

6. In support of his case, respondent adduced his own evidence. He also examined two witnesses, by name, Shriram Punjaji Marsetwar and Rameshwar Ramnarayan, whereas appellant no.1 herein examined himself and also adduced the evidence of two witnesses, by name, Bhumanna Kolhewar and Vishwanath Nadewar, to prove the second marriage of respondent. Both the parties relied upon various other documentary evidence to prove that they are financially in a better off position to look after the welfare of the minor children.

7. The trial court, in order to satisfy itself about the wishes of the minors, had interaction with both the minors on 29/11/2013 in his chamber. At that time, Amruta was studying in 9th standard, wheres Krushikesh was studying in 6th

standard. In his interaction with the minor children, both Amruta and Krushikesh flatly refused to stay with respondent father on the ground that their father was beating them; he was not treating them properly. Hence they were not even willing to talk with the respondent.

8. Learned trial court, however, after appreciating the evidence on record, held that though the wishes of the minor children are important, they cannot be the deciding factor. It was held that respondent being the natural father of the minor children, the welfare of the children lies in residing with the respondent. As regards the wishes expressed by the minor children, it was further observed by the trial court as both the minors were in the custody of the present appellant no.1 since the death of their mother, there was probability of appellant no.1 tutoring them. Learned trial court held that, in the absence of any evidence showing that respondent was addicted to liquor or any other vices and considering that respondent was the natural father, trial court granted custody of both the minor children to respondent by allowing his application.

9. While challenging this order of learned trial court, submission of learned counsel for appellant no.1 is that, having regard to the age of minor children, the trial court should have given sufficient weightage to their wishes. If such grown up children do not want to reside with the father, it was not proper on the part of learned trial court to hand over their custody and that too, when they are happily settled in the house of appellant no.1. It is submitted that both the children are now quite grown up as Amruta has completed the age of 17 years, whereas Krushikesh has completed the age of 15 years, and in such situation, if the children on their own volition do not want to reside with the respondent father, as he has already performed second marriage and also having one son from second marriage, the interest and welfare of the minor children lies in the fact that appellant no.1 should continue to have their custody instead of disturbing that custody at this stage.

10. Per contra, learned counsel for respondent has submitted that, respondent being the natural father of the minor children, he is not only entitled to have their custody, but welfare of the minor children also lies in residing with their father, who is having sufficient means to maintain them. It is submitted that the fact of second marriage of the respondent or his having one child from the second marriage, cannot be sufficient to deny him the custody of his own children, when he can bestow equal love and affection to the children from his first wife also. Thus, according to learned counsel for respondent, when the trial court has already given the valid reason for handing over the custody of the minor children to the respondent, this court should restrain himself from interfering in the said order.

11. It need not be stated that, the issue of custody of minor children is always a complex and vex issue, entangled in the web of emotions and sentiments and it is always the minor children, who are the worst sufferers in the battle for their custody amongst their custodians. Sometimes it is a battle between husband and

wife and at other times it is the father versus the grandfathermother's father, claiming rights over the children. Whether the rights of the parties, who are parents, custodians or guardians should prevail or the welfare of the minor children? This question is, though raised in every litigation, in view of the legal provision declaring father the natural guardian of a minor child, this issue is no more res integra. As observed by Three Judge Bench of Hon''ble Supreme Court in its judgment in the case of Rosy Jacob Vs Jacob A. Chakramakkal, 1973(1) Supreme Court Cases 840, "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 parties relating to custody of the minor children, 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".

12. It needs to be stated that, in the course of the time, this principle has crystallized into the law that for determining the question as to whom the custody of the minor children should be awarded, the first and paramount consideration or one may call it, as the only consideration, is the welfare and interest of the child and not the rights of the parents under a statute. Therefore, now it is not for the court to strike the balance between requirements of the welfare of minor children and the rights of the respective parents over them, but as held in the recent judgment of the Hon''ble Apex Court in the case of Mausami Moitra Ganguli Vs Jayant Ganguli, (2008) 7 Supreme Court Cases 673, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of the law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a paramount consideration. In fact, no statute, on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

13. However, what can be in the best interest and for welfare of the minor child, that has to be decided in the background of the relevant facts and circumstances. Each case has to be decided on its own facts, and hence reliance placed on the decided cases, can hardly serve as binding precedents, insofar as the factual aspects of the case are concerned.

14. As held by the Hon''ble Apex Court in the above decision of Mausami Ganguli, "it is true that father is presumed by the statute to be better suited to look after the welfare of the child being normally the working member and head of the family, however, that cannot be the sole determining factor. In each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations, but again that

cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration".

15. The law is now well settled that if the children are sufficiently mature to express their intelligent preferences, then the court should give due weightage to their wishes also. In the instant case, admittedly both the children are now sufficiently mature and one may call they are even at the verge of crossing minority. Amruta has already completed the age of 17 years as she is born on 26/05/2000, therefore she is on threshold of becoming major, whereas Krushikesh is born on 08/08/2001, and therefore he has also already completed the age of 15 years. Both the children are studying. Amruta is studying in First Year - B.A., whereas Krushikesh is studying in 10th standard. Therefore, both the children are brought up quite well. They are mature. I had interaction with them in my chamber in order to ascertain their wishes, and in my interaction I found that, both of them are sufficiently mature to express their intelligent preference. Both of them were categorical in their desire and wish to remain in the house of appellant no.1 and to be in his custody. Both of them were confirm about it and also in the refusal to reside or to be in the custody of respondent, their father. The reason assigned by both of them was that their father, respondent has performed second marriage within 15 days from the death of their mother. He is also having a son from the second marriage, and hence they do not want to reside with their father, and they would prefer to continue to reside with their maternal grandfather, the appellant no.1 herein. Both of them stated that they are happy to reside with their maternal grandfather. They, even, are not ready to meet their father.

16. It is pertinent to note that when the trial court had interaction with them, in order to ascertain their wishes, at that time also both the children had expressed strong wishes to stay with their grandfather and refusal to reside with the father. At that time also, both of them stated that they want to continue to reside with their grandfather, who was looking after them quite well. It may be true that at that time, both the children were comparatively minor in the sense that Amruta was of the age of 12 to 13 years and Krushikesh was younger to her. Hence, the trial court might have presumed the possibility of both the children being tutored by appellant no.1, as they were in the custody of appellant since the year 2010 i.e. immediately after the death of their mother. However, in the year 2017 also i.e. after the death of their mother in the year 2010, they are still insisting to remain in the custody of their grandfather by stating that they are happy to reside with him and they do not want to go to the house of respondent. Now at this stage, they are sufficiently mature, and hence the possibility of their being tutored or influenced by the appellant no.1, cannot be accepted.

17. It is pertinent to note that despite the order passed by the trial court of handing over their custody to respondent, they have not gone to the house of

respondent and continued to reside in the house of appellant. According to them, they are very happy in the house of appellant and very reluctant to go to the house of respondent. The reason assigned by them that as their father has performed second marriage within 15 days from the death of their mother and he is also having one son from the second marriage, in my opinion, one has to consider the said reason from their point of view, their perspective, their feelings of hurt as within 15 days of the death of their mother, their father has got second wife. It is sufficient to create a distance on emotional level between them and respondent. It is also sufficient to create some apprehension in their mind of not being treated properly by their father and his second wife. Such apprehension at the age at which they are at present, is difficult to be removed.

18. Hence from this aspect of emotional alienation, it would not be in the interest of minors to remove them from custody of their grandfather and hand them over to the father, with whom they have lost that emotional bonding. Moreover, now it is a matter of merely some few months or one or two years. As regards Amruta, she will be major in the next year in May, whereas Krushikesh will become major within 2 1/2 years. Therefore, if the children are residing with their grandfather since more than 7 years, considering the aspect of their stability and a sense of continuity, at this stage, it would not be proper to disturb their settled life and change their custody from grandfather to father, merely because the father may have better rights to their custody. If the paramount consideration for deciding the custody of minor children is the welfare of the children, then in the instant case, it follows that the welfare of the minor children lies in continuing their custody with grandfather, in whom they are having faith, confidence and also love and affection. As held by the Hon"ble Apex Court in the case of Mausami Ganguly, the stability and security of the child is an essential ingredient for a full development of child's talent and personality. Hence, shifting these minor children from the familiar surroundings of the house of their grandfather and of their school, to the house of respondent, where his second wife and the son are there, whom they do not know, is definitely going to affect their stability, peace of mind and a sense of security at this crucial age, when they are adolescent, studying in the important educational years of their life, the First Year of Graduation and 10th standard respectively. Therefore, it has to be held that the custody of these minor children be with their grandfather and once they become major, they will be in a position to take their own decisions as to whether they want to stay with their father or otherwise.

19. Learned counsel for appellant no.1 has also, in this respect, placed reliance on the latest judgment of Hon"ble Apex Court in the case of Jitender Arora and others Vs Sukriti Arora and others, (2017) 2 Supreme Court Cases (Civ) 347, wherein the Hon"ble Apex Court was pleased to hold that "When the child is intellectually and emotionally mature enough to understand and decide whose custody would be in her best interest, her preference should be given due weight and court should desist from passing order for custody contrary to her will, which may give rise to tormenting and disturbing experience in her mind".

20. Here in the case as stated above, both the children are happy in the custody of their grandfather. Both of them, as stated, are intellectually and emotionally mature enough to understand and decide whose custody would be in their best interest. Hence, their preference needs to be given due weight and this court should desist from passing any order for custody contrary to their wishes, which may give rise to tormenting and disturbing experiences in their life.

21. Hence looking at it from any angle, inference is inevitable that the best interest and welfare of both the children lies in permitting the appellant no.1, their grandfather to retain their custody. Therefore, this appeal needs to be allowed and the impugned order passed by the trial court of handing over their custody to respondent, needs to be quashed and set aside.

22. However, having said everything, the fact remains that respondent, being the natural father, should also get the right of visitation. It is necessary that bond of love and affection should redevelop between the minor children and their natural father. Therefore, it is desirable, keeping in mind even the welfare of the minor children, that they should visit their father, which will help in creating that necessary bond of love and affection between them and father, and which will help them to trace their roots also. During the pendency of this appeal also, such visitation rights were given to the respondent and it was directed that appellant shall permit the respondent to visit children at Mediation Centre, Pusad on every 1st and 3rd Saturday between 11:00 a.m. to 2:00 p.m.

23. Both the learned counsel for appellant and respondent submit that this arrangement may be continued hereinafter also. However, having regard to the fact that both the children are now taking higher education, hence their studies should not be affected, the visitation right can be restricted to only 1st Saturday in a month.

24. Accordingly appeal is allowed.

25. The impugned order passed by the trial court handing over custody of minor children to respondent, is quashed and set aside.

26. Both the minor children are to continue in the custody of appellant no.1.

27. However, appellant shall permit the respondent to visit the minor children at Mediation Centre in Pusad on every 1st Saturday in between 11:00 a.m. to 2:00 p.m.

28. Appeal is disposed of in above terms.

29. As the appeal is disposed of, C.A. No. 62/2014 pending herein, having become infructuous, it also stands disposed of.