

(2013) 07 BOM CK 0170

In the Bombay High Court

Case No : Appeal (LODG.) No. 2 of 2013 in Guardianship Petition (LODG.) No. 163 of 2012

Louella Fernandes

APPELLANT

Vs

Rajan Chawla

RESPONDENT

Date of Decision : 08-07-2013

Acts Referred:

Guardians and Wards Act, 1890 — Section 17
Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2013) 5 ALLMR 532 : (2013) 5 BomCR 698 : (2013) 6 MhLj 469

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Joquim Reis, instructed by Thakordas and Madgaonkar, for the Appellant; Rohan Cama and Ms. Lata Bachani instructed by I.R. Joshi and Co., for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—These Appeals arise from a judgment of a Learned Single Judge on two petitions for guardianship filed under the Guardians and Wards Act 1890. The Appellants before the Court are the father (Lisbon John Miranda) and paternal aunt (Louella Wilson Fernandes) of the minor child Angelina. The parents of the minor, Lisbon and Bindiya married on 5 October 2008. Lisbon is a Roman Catholic. Bindiya was a Hindu belonging to the Sindhi community. Angelina was born on 13 March 2009. A residential flat being 401 Neelgagan at D.N. Nagar, Andheri (West), Mumbai was purchased on 29 February 2012. The mother of the minor died an unnatural death on 25 May 2012. The father was arrested and has been charged of the offence of murder u/s 302 of the Penal Code and of an offence u/s 498A. Bail has been denied to him. Angelina who was living with her parents and was three years old when her mother died has since then been in the care of her maternal grandparents who reside in Mumbai. On 18 July 2012 the maternal grandfather filed a guardianship petition before this Court seeking appointment as guardian of the person and properties of Angelina. The

petition was served on the father of the minor in jail on 12 September 2012. He filed a reply opposing the Guardianship Petition. On 26 November 2012 when the petition of the grandfather came up before the Learned Single Judge another petition by a paternal aunt (father's sister), Louella was filed before the Learned Single Judge. Both the Petitions were heard together.

2. The Learned Single Judge by a judgment dated 6 December 2012, which is impugned in these proceedings, held that having due regard to the provisions of Section 17 of the Guardians and Wards Act 1890, guardianship should be granted of the person and property of the minor to the maternal grandfather. The Single Judge has considered each of the circumstances which is required to be borne in mind u/s 17 including, in a paramount sense, the welfare of the child.

3. Section 17 provides as follows:

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.

4. Sub section (1) of Section 17 requires the Court, subject to the provisions of Section, to be guided by what appears in the circumstances to be for the welfare of the minor, consistently with the law to which the minor is subject. The welfare of the minor is above all, the most important consideration. Sub-section (2) stipulates that in determining what would be in the interest of the welfare of the minor, the Court shall have due regard to the (i) age; (ii) sex; and (iii) religion of the minor. The Court has to also consider (i) the character and the capacity of the proposed guardian; (ii) his nearness of kin to the minor; (iii) the wishes, if any, of a deceased parent; and (iv) any existing or previous relations of the proposed guardian with the minor or his property. The first set of circumstances relate to the minor. The second set of circumstances relate to the character, position and fitness of the proposed guardian, besides the wishes if any, of the deceased parent. One set of circumstances cannot be read in isolation. Just as the age, sex and religion of the minor are all of relevance, so are the factors which have a bearing on the fitness of the guardian who is proposed to be appointed. Underlying the provisions of sub-section (2) of Section 17 is the judicial duty which is cast upon the Court to be solicitous of, and protective towards the welfare of the minor.

5. In the present case, the following circumstances are of crucial importance:

- (i) The minor is a girl child, who is a little over four years of age;
- (ii) The mother of the child has died an unnatural death and the father is in jail as an under trial facing prosecution on a charge of murder;
- (iii) The child has resided continuously since the death of her mother with her maternal grandparents.

6. The Learned Single Judge has found, as a matter of fact, that the maternal grandparents have the capacity, both financially and physically, to look after the welfare of their grandchild. The grandfather is sixty-one years of age and carries on business. He resides as a family together with his wife, who is fifty-two years of age and his son and daughter-in-law. The child has resided with them ever since the death of her mother and the arrest of the father on the same day. At present, this Court has been informed that the child is in Junior KG at Poddar Jumbo Kids situated close to her residence.

7. The principal grievance of the Appellants is the denial of guardianship to the paternal aunt of the minor child. Now in dealing with this grievance, it must be noted at the outset that the petition for guardianship by the paternal aunt was lodged on 26 November 2012 just when the petition of the maternal grandfather was to be heard. All along the child had been in the care and under the protection of her maternal grandparents. The paternal aunt who is one of the Appellants stated in her petition that the Guardianship Petition of the child's grandfather was served on the father of the minor child in jail by a covering letter dated 12 September 2012 after which the petition was listed before the Court on 24 September 2012, and on 23 October 2012 when an interim order was passed. The reason for the filing of her petition is stated to be thus:

In such peculiar facts and circumstances, the present petitioner submits that the brother of the present petitioner who is detained behind bar at Arthur Road Central Prison was requested to give suitable instruction. Accordingly, he has instructed to file a guardianship petition. Similarly, he has sworn in affidavit contesting the Guardianship Petition No. 25 of 2012. Considering the same, it is submitted that as per the request, desire and instructions given by the brother of the present petitioner, who is detained behind bar at Arthur Road Central Prison, this Petition is filed.

8. Having regard to these clear averments the Learned Single Judge was justified in noticing that according to the paternal aunt, she had instituted a Guardianship Petition on the "request, desire and instructions" given by her brother who is an under trial lodged at the Arthur Road Central Prison. The paternal aunt, as the Learned Single Judge, noted is a beautician, now unemployed, while her husband has retired from service. She has two children - a son who is studying and a daughter who is married. She has evidently not had any experience of living with the child. Moreover, the averments in her petition would indicate that she had no personal desire to be guardian of her own accord, since the filing of her Guardianship Petition was on the instructions of her brother who is now in jail.

9. An argument was urged before the Learned Single bearing on the fact that the father of the minor professes the Christian religion, while the maternal grandparents are Hindus and it was urged that the grandparents may not be able to initiate the child into Christian precepts. This submission was not pressed and correctly so, during the course of the hearing of the appeal by counsel appearing on behalf of the Appellant. In any event, even if the aspect of religion is borne in mind, it is evident that the child was born in a family where the father professes Christianity and the mother was a Hindu. Evidently in such a situation it would be most inappropriate to assign to the religion of one parent such an overwhelming importance as to override the balance of other factors which bear on the welfare of the child. Moreover, as the Learned Judge noted, it is a matter of significance that though the child was nearly three years of age when the mother met an unnatural end, she had not been baptized by the parents until then. The mother had not converted to Christianity during her lifetime. This is certainly a matter of relevance and would also have a bearing on the wishes of the deceased parent. The wishes of a deceased parent in a situation such as the present where the mother has met an unnatural end at an early age becomes a fairly subjective if not hypothetical exercise. The legislature has guardedly used the words "the wishes, if any, of a deceased parent". The Court must, in due regard to the statute, weigh this aspect together with all other circumstances. For all these reasons, we are of the view that the Learned Single Judge was justified in allowing the Guardianship Petition filed by the grandfather of the minor child and in rejecting the Guardianship Petition filed by the paternal aunt. During the course of the hearing, counsel appearing on behalf of the Appellant made a grievance of the fact that guardianship has been granted to the maternal grandfather also over the properties of the minor. For, it was urged that this order should not indicate that the residential flat would necessarily have to be taken over by the maternal grandfather. We do not find any substance in the submission. Independent proceedings in relation to the residential flat are pending before the City Civil Court. The grandfather has been appointed as guardian over the person and the properties of the minor since he would be most suited to protect the interest of the minor. This would not come in the way of a disposal on merits of the proceedings which are pending in relation to the residential flat before the City Civil Court.

For these reasons, we do not find any merit in the Appeals. Both the Appeals shall accordingly stand dismissed.

There shall be no order as to costs.