

(2016) 11 JH CK 0048

In the Jharkhand High Court

Case No : First Appeal No. 91 of 2013(Against the Judgment and Decree dated 27.06.2013, passed in Guardianship Case No. 09 of 2009, by Principal Judge, Family Court, Bokaro)

Nagesh Kumar Pathak

APPELLANT

Vs

Krishna Pathak

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Guardians And Wards Act, 1890 — Section 17, Section 8

Citation : (2017) 2 AIRJharR 817 : (2017) 1 JBCJ 586 : (2017) 1 JCR 443 : (2017) 1 JLJR 272

Hon'ble Judges : Mr. H.C Mishra And Mr. Dr. S.N. Pathak, JJ.

Bench : Division Bench

Advocate : xxx, for the Respondent; Mr. Indrajit Sinha, Advocate Mr. Bibhash Sinha, Mr. Ajay Kumar Sah, Mr. Krishanu Ray, Mr. Arpan Mishra, Advocates, for the Appellant

Final Decision : Dismissed

Judgement

Dr. S.N. Pathak, J. - Heard learned counsel for the appellant. Nobody appears on behalf of the respondents. The respondents have not appeared in spite of valid service of notice.

2. The petitioner/appellant is aggrieved by the Judgment and Decree dated 27.06.2013, passed in Guardianship Case No. 09 of 2009, by Principal Judge, Family Court, Bokaro, whereby the petition filed by the petitioner/appellant under Section 8 of the Guardians and Wards Act for guardianship of minor son Harshvardhan Pathak has been held to be not maintainable and the petitioner/appellant is not entitled to get the relief prayed for and accordingly suit has been dismissed.

3. Case of the petitioner/appellant in brief is that appellant was married with defendant no. 1/respondent no. 1 Krishna Pathak on 12.05.2001 at Bokaro Steel City as per Hindu rites and custom and out of their wedlock they were blessed

with a son Harshvardhan Pathak on 05.11.2002 who is living under the care and protection of his maternal grandmother. After the marriage the appellant came to know about mental disease of his wife i.e. Schizophrenia and thereafter got her treated at Dehradun and Haridwar by specialist doctors. Though the doctors had prescribed medicines but the respondent no. 2 used to call her daughter (respondent no. 1) at her residence and used to threaten the appellant to implicate him in false cases. Lastly, appellant gave in writing to Women Helpline, Haridwar where he gave in writing that he will provide proper medicine to the respondent no. 1 and after one month respondent no. 1 will be brought to Haridwar at the residence of the petitioner. However, on false and flimsy allegations the respondent no. 2 did not allow the respondent no. 1 to reside at her matrimonial home. During eight years of marriage the respondent no. 1 lived for about 12 months only. The only aim and ambition of the respondents is to extort money from the appellant. The brother of the respondent no. 1 is unemployed and minor son of the appellant has been living with his widow maternal grandmother, who is dependent solely on the pension of her deceased husband. The mother of minor son is mentally ill and his maternal grandmother is herself facing financial hardship and the family situation will badly affect the upbringing and future of the minor. The appellant is well educated person and has sufficient income to maintain and up bring the minor Harshvardhan Pathak and as such, guardianship of minor son Harshvardhan Pathak be given to appellant who is biological father/natural guardian.

4. On being noticed, the defendants/respondents appeared and filed their written statement denying the allegations and alleging therein that the Guardianship Case has been filed for some wrongful gain by creating pressure on the defendants. It is alleged that defendant no. 1 is a highly qualified lady and of sound mind and she does not require any medication as alleged by the petitioner/appellant. It is further alleged that petitioner/appellant and his family members hatched a conspiracy to declare defendant no. 1 of unsound mind though the defendant no. 1 always tried to adjust with her husband. It is also alleged that the petitioner/husband and his family members used to torture defendant/respondent no. 1. It is also stated that minor son Harshvardhan Pathak is studying in Chinmaya Vidyalaya, Bokaro under proper care and protection. It is further alleged that the petitioner and his family members are creating problems in order to arrange his second marriage. Defendant no. 1 is of sound mind and is able to maintain minor son and give him proper education and as such the guardianship claimed by the petitioner is fit to be rejected.

5. On the basis of pleadings of the parties, following issues have been framed by the trial court:

(I) Whether the petition as framed and filed is maintainable?

(II) Whether it will be in the interest and welfare of the minor Harshvardhan Pathak to appoint the petitioner as his guardian?

(III) Whether the respondent no. 1 is suffering from Schizophrenia?

(IV) Whether the petitioner is entitled to the relief prayed for by him?

6. Learned counsel for the petitioner/appellant submitted that by adducing oral as well as documentary evidence the petitioner/appellant has proved that his wife/defendant no. 1 is suffering from schizophrenia and she is mentally ill. Defendant no. 2, who is mother and old widow, and is fully dependent on pension of her deceased husband, she herself is suffering from financial hardship and, therefore, proper education, maintenance and upbringing of the minor son is at stake.

7. On the other hand, defendants/respondents submitted that defendant no. 1 is a well educated lady and she is M.A. in Sanskrit and has also qualified NET twice which is not possible for a schizophrenic patient. Moreover, merely by showing attested copies of prescription of Doctors, it cannot be said that the defendant is a schizophrenic lady. Furthermore, those documents have been procured by the petitioner/appellant for the purpose of obtaining decree for divorce in which he succeeded. The minor boy appeared before the Court as P.W.- 3 and clearly deposed that he is not at all willing to live with his father who used to assault him. He is happy with his mother and is not facing any problem at present. He further deposed that he is student of Class-IV of Chinmay Vidyalaya which is a renowned educational institution. So far evidence of this minor who is at present ten years old, is of utmost importance to decide the instant suit of guardianship. Defendant no. 1 herself came before the Court below to depose and from her examination-in-chief as well as from cross examination it is crystal clear that she is not mentally ill. So the suit of guardianship fail.

8. After hearing counsel for both sides and perusing records, the learned Court below came to a finding that so far mental illness of defendant no. 1 is concerned, the petitioner has not been able to prove the same except filing xerox copies of some prescriptions which is not sufficient and cogent evidence. The disease like schizophrenia can be ascertained only after a careful medical investigation/test, pathological test and expert opinion, which is lacking in the instant case. The petitioner/appellant failed to submit opinion of any expert/specialist that they ascertained the disease to be schizophrenia. The petitioner/appellant has not been able to prove that his wife/defendant no. 1 is suffering from schizophrenia.

9. We have heard learned counsel for the petitioner/appellant and perused the records. It is settled law that in case of guardianship of a minor, paramount consideration for the Court is to look welfare of the minor. Minor son himself deposed before the Court that he was studying in Class-IV in a renowned School at Bokaro and his father used to beat him. He is happy with his mother and there is no problem in his education as well as in his maintenance.

Section 17 of the Guardians and Wards Act, 1890 specifically deals with custody of child, rights of natural guardians vis-a-vis welfare of the child. It has been

held by various Courts that what would best serve welfare and interest of the child is sole and predominant criterion. Under the Act, father is guardian of minor child until he is found unfit to be guardian of minor female child. However, in deciding such questions, the welfare of minor child is the paramount consideration and such question cannot be decided merely based upon the rights of the parties under the law. Welfare of child prevails over legal rights of parties while deciding custody of minor child.

In *Anjali Kapoor (Smt.) v. Rajiv Baijal*, reported in (2009) 7 SCC 322, it has been held that natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child. In *Mc Grath (infants), Re*, it was observed that

"... ? The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

In *Walker v. Walker & Harrison*, the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

10. Considering aforesaid facts and circumstances, we are of the considered opinion that the petitioner/appellant has not been able to prove his case that considering welfare of child, his custody may be given to him. The Court below has rightly decided the issue in favour of the defendant and as such, no interference is warranted in the instant case. Accordingly, instant appeal stands dismissed.