
(2014) 12 BOM CK 0048

In the Bombay High Court

Case No : Guardianship Petition No. 14 of 2013

Navin

APPELLANT

Vs

Pradhana

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

Citation : (2015) 3 ALLMR 248 : (2015) 4 BomCR 85

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Udaipuri, a/w. J.P. Dhanuka, Advocate for the Appellant; Mamta Sadh, a/w. Rahul Singh, a/w. Chetan Agarwal, Advocates i/b. Legal Catalyst, Advocate for the Respondent

Judgement

R.S. Dalvi, J.—This petition is filed by the uncle, aunt, paternal grandfather and paternal grandmother of the minor child Udit Sarawagi for declaration of the uncle and in the alternative of the paternal grandfather as the guardian in respect of the person and property of the minor child. It is also for injunction restraining the biological mother of the minor child (respondent) from disturbing the custody of the minor child with the petitioners.

2. The Family Court, Mumbai would have jurisdiction for declaration of the guardianship of the person of the minor child. However, the petitioners have shown certain properties of the minor child annexed to the petition being the mutual fund in ICICI Prudential and Life Insurance policy in respect of child Exh.D and D1 to the petition. Consequently this Court would have inherent jurisdiction to dispose of the petition (See the case of Girish J. Bobade Vs. Ajay Thakur and Others, .

3. The minor child was born to the respondent and her husband, one Sunil Sarawagi, since deceased. The respondent and her husband had an elder child born to them. That child has undergone certain medical treatment related to certain cardiac problem suffered by the child. A bypass surgery was undertaken. The husband of the respondent suddenly expired about 8 years ago. The

respondent was then pregnant with the minor child. After the death of her husband and 7 days after the birth of the child the respondent admittedly handed over custody of the child to the petitioners.

4. It is the petitioners' case that she voluntarily handed over custody and it was agreed between the parties that the child would be brought up by the petitioners. The petitioner Nos. 1 and 2 have two minor biological daughters.

5. It is the case of the respondent that the child was taken away from her upon playing a fraud upon her and making her believe that she would not be able to take care of child and that she could be remarried after the death of her husband. Nevertheless the respondent handed over custody of the child to the petitioners.

6. The respondent has since been married to her present husband. He has been earlier divorced. He has one biological son. That son is in the custody of his biological mother. The elder son of the respondent lives with the respondent and with her present husband. He is stated not to have adopted the elder son of the respondent.

7. The child Udit has been brought up by the petitioners. Though the mother claims that she was misguided into handing over the custody of her child and was in state of tremendous depression due to the death of her husband as also the ill health of her elder son, the mother did not apply for custody of the child during the prime impressionable years of the child's upbringing. Though she may not be faulted under these circumstances, the fact that remains is that the child grew up in the petitioner's home, not knowing about his mother.

8. After the child was about 6 years old the respondent claimed custody of the child as his biological mother. The respondent instituted a petition for declaration of a guardianship in the District Court, Hubli, though she was residing with her present husband at Mira Road, Dist. Thane. That petition has been pending since 2013. The petitioners herein claim that Court has no territorial jurisdiction to determine the dispute between the parties. The petitioners, therefore, filed this petition in this Court for declaration of the guardianship in respect of the person and property of the minor child.

9. As the biological mother failed to claim the custody of the child, the child failed to obtain care and love of his biological mother for the first six years of his life. The child was cared for by the petitioners in their joint family as has been happily settled. At the time of the filing of the petition the child was admitted to K B Patil International School. The petitioners have produced the school records and certain certificates showing the maintenance and education of the child.

10. Since the biological mother claimed custody of the child this Court deemed it fit to allow certain access to the biological mother so that the mother and the child come to know one another which was absent for the first six years of the child's life. An order in that behalf came to be passed on 1st July, 2013.

11. Whilst the child was brought up by the petitioners in their joint family, the existence of his biological mother was not made known to the child. Since it was considered to be a wholly unhealthy upbringing, in which the truth of the primary relationship of the child was not made known to the child, information about the fact of the biological mother of the child was required to be imparted to the child in the best psychological manner. Consequently the child was referred to a counselor in that behalf.

12. The child counselor appointed by the Court was requested to interview the child about this sensitive aspect. The counselor has interviewed all the family members including child and has sensitively and slowly informed the child about his biological mother. She has performed her duty with sensitivity and empathy. The child has now been informed of the fact and has accepted the fact of his biological mother.

13. Thereafter the child and the mother are stated to have met on certain occasions, once in the house of the petitioners and on certain occasions in a mall and a temple. The visits between the child and the mother have yet been infrequent.

14. Despite the Court's endeavor in that behalf, the union between child and the mother has not been as smooth as would be required.

15. There are allegations by both the parties about the conduct of the other. It would not be fit and proper for the child to live in an atmosphere where family members constantly make allegations against one another.

16. Under these circumstances, it was deemed fit not to uproot the child from his settled environment. The respondent mother has been allowed to meet the child. The Court interviewed the child as also all the parties including petitioner Nos. 3 and 4 who wanted to state facts to the Court. The biological brother of the child, the minor child, as also his sisters who are children of petitioner Nos. 1 and 2, were brought together in the chamber of the Court. They met and played with one another without rancour or inhibition, as children do. However, though a lot of time was allowed to pass thereafter hoping that the children would themselves make their relationship work, all the parties to the petition did not agree in the best interest of the child themselves. The mother has been allowed only once to go into the house of petitioners. The child has met his mother only outside as stated above. Such meetings between the mother and child do not enure for the benefit of child. The child must be able to meet his mother as well as his brother unsupervised by the petitioners and without them being present. He must be entitled to meet his mother and his brother over a longer period of time at each meeting. It is only then that bonding between them would develop. This was expected of all the petitioners. However that is not materialised.

17. Similarly, the mother must meet the child bereft of any ill feelings that she may harbour against the petitioners in view of their past history. The mother must only be congenial and friendly with the child as also show cordiality

between her and the petitioners. This aspect was specifically impressed upon the respondent mother by the Court during her interview in the chamber. Even that has not materialised.

18. All the parties were sent to the counselor and the counselor's report shows her meeting with the parties as also the child. Despite her best efforts in sensitively informing the child about his lineage as also his relations, which the child appears to have shown to have accepted, the adult members of the child family unfortunately fell short of the standard of maturity as also sensitivity required in their attitude towards one another and consequently the child.

19. Whilst this order is not required to be punitive against the respondent mother, it certainly requires to be protective of the child. Whilst the petitioners have not shown exemplary conduct, they have not been otherwise shown to be unfit to be appointed guardians if the child was left in their custody without any reference or attachment to his biological mother. They are seen to have provided good education to the child though it is contended by the respondent mother that the child is sent to a school inferior to the one to which the biological daughters of petitioner Nos. 1 and 2 are sent. The name of the school is not material; the reports of the child do not show lack of good education.

20. The present husband of the respondent wife, who was also interviewed by the Court, was neither very anxious and welcoming to care for the child in his own home, nor antagonistic towards the child.

21. The respondent mother claims that the custody of the child be entirely given to her and that she would provide access to the petitioners at all times whenever asked for. This would mean and entail uprooting the child from his present home and his surroundings. The counselor's report shows that he is a happy child well settled in his family and has bonded with his siblings. It would be unfair and unjust to alter the present family situation of the child. Of course, the addition of the biological mother and brother of his family would only augur for his more balanced growth and security.

22. The Court must remember that any order passed in favour of the petitioner, or even the respondent mother, must only account for the rights of the child in a healthy happy family environment and not for granting any rights claimed by either of the parties. It may be mentioned that an application either under the Guardian and Wards Act, 1890 or under Hindu Minority & Guardianship Act, 1956 with regard to the declaration of guardianship or the consequent custody of the child or access to the child must be only in the interest and welfare of the child.

23. The Court must have present to its mind the golden words of Judge Cardozo in the New York Court of Appeals with regard to the "Best Interest Theory" :

"The Chancellor, in exercising his jurisdiction, does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other, or indeed against anyone. He (the Chancellor) acts as parents patriae to

do what is best for the interest of the child. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights as between a parent and a child, or as between one parent and another... Equity does not concern itself with such disputes in their relationship to the disputants. Its concern is for the child."

24. Consequently the declaration and appointment that the petitioners have sought for the person and property of the child and the restraint that they have applied for against the mother from disturbing the custody must be tampered to provide the child the best of both the petitioners and the respondent whilst leaving the child in the present family setting and atmosphere with some modification thereto.

25. Hence the following order.

1. The petitioner Nos. 1 and 2, who are husband and wife and consequently the known as the father and mother of the child, are appointed guardians of the child Udit Sarawagi.

2. The minor child Udit shall continue to live with the petitioners as member of their family during his minority and shall continue to receive the maintenance and education which he is presently having.

3. The respondent mother, who is the biological mother of the minor child Udit, as also the biological elder brother of the child Krish shall be entitled to meet the child one day in each week commencing from Monday and ending on Sunday either at the residence of the petitioners or in any public place such as a mall, temple, film, theater, garden, etc. where the child may be taken by the respondent mother upon notice in that behalf being given by her to petitioner Nos. 1 and 2 either over the telephone or by Email. The meeting of the mother and brother may be at any time convenient to the child Udit having regard to his school hours and may extend over a continuous period of 5 hours at a time.

4. In the alternative to the direction in point No. 3 above, the respondent mother may take the minor child Udit to her residence on any three Saturdays in a month between 9 am to 4 pm. In such a case the respondent mother shall engage the child Udit with or without his elder brother Krish in any useful, purposeful activity such as any sport classes, swimming, private activity or academic classes extending at least two hours out of the total time period between 9 am to 4 pm that the child would live with her in her own home.

5. The respondent mother shall also be entitled to take the child out of Mumbai initially for a period of 1 week during the summer vacation in his school.

6. The parents shall, however, be entitled to make modifications in the time and days of the above access by consent as necessitated for the aforesaid activities.

7. The respondent mother shall take the minor child Udit from the residence of the petitioners and return the minor child at their residence or at other places of

his activity as feasible within the aforesaid time periods.

8. The respondent mother shall be responsible for the safety and security of the minor child Udit during the period that she keeps him in her custody.

9. It is clarified that these directions are passed so as to give an unfettered, unsupervised access to the respondent mother to allow the essential bonding between the biological mother and child.

10. It is further clarified that the aforesaid access is in the nature of joint custody of the biological mother, (who is otherwise the legal guardian of the child) but to the above extent only.

11. It is also clarified that no further access is given at this stage so that the child's present family setting is not disturbed.

12. It is hoped that all parties shall improve their behaviour at least to the child and in the presence of the child so that the minor child grows without any mental stress in the unique relationship he holds with the parties.

13. Guardianship Petition is disposed of accordingly.