
(2013) 02 BOM CK 0214
In the Bombay High Court
Case No : Writ Petition No. 345 of 2013

Nirali Mehta

APPELLANT

Vs

Surendrakumar Surana and Another

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Guardians and Wards Act, 1890 — Section 8

Citation : (2013) 4 ABR 787 : AIR 2013 Bom 123

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : D.H. Mehta, instructed by and A. Lahir, for the Appellant; Kaushik Kothari, for the Respondent

Judgement

Roshan Dalvi, J.—Rule. Made returnable forthwith. The Petitioner is the mother of the minor child Eklavya. The Petitioner is his guardian. The Petitioner and her husband have been divorced by mutual consent in MJP No. F-497/2010 filed in the Family Court at Bandra, Mumbai. The Petitioner's husband has given up custody and access to his child. He filed an affidavit in the Family Court on 27th September, 2010. Clause Nos. 4 and 5 of the affidavit giving up his legal guardianship as also access and his visiting rights run thus:

Clause 4: I state that it is agreed between Petitioner No. 1 and me that the permanent irrevocable custody and legal guardianship of the minor child Ekalavya shall remain with Petitioner No. 1, even under changed circumstances, including in the event of her remarriage.

Clause 5: I state that it is agreed between Petitioner No. 1 and me that the I have waived my visitation rights to the minor child "Ekalavya" and have undertaken not to make any claims regarding the same in future in lieu of the Petitioner No. 1, waiving the child support and undertaking to maintain Ekalavya.

2. The Petitioner husband was the natural and legal guardian of the child. In his absence the Petitioner would be the natural and legal guardian of the child. (See

Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another,)

3. The mother has both the guardianship as well as custody of the child. The father agreed not to have any access to the child. The father, therefore, gave up whatever could be stated to be his "rights" in lieu of the mother waiving child support and undertaking to maintain the child. Giving up of visitation rights and any "claim", entails the custody claim as also access claim to be given up. The mother thereafter has been the only guardian of the child.

4. The parents of the husband filed a petition claiming custody and access. The Petition is filed u/s 19 of the Indian Guardian and Wards Act and Section 16 of the Hindu Minority and Guardianship Ship Act, 1956 for claiming custody, and mandatory injunction in respect of access and visitation rights.

5. Section 19 of the Guardian and Wards Act, 1890 runs as follows:

19. Guardian not to be appointed by the Court in certain cases. -

Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person.

(a) of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person; or

(b) of a minor, other than a married female, whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor; or

(c) of a minor whose property is under the superintendence of a court of Wards competent to appoint a guardian of the person of the minor.

6. It is not understood how the grandmother and grandfather of the child could claim to be guardians of the child under the aforesaid Section when the mother of the child is present, available, appointed and taking care of the child as such guardian.

7. Section 13 of the Hindu Minority and Guardianship Act, runs as follows:

13. Welfare of minor to be paramount consideration.-

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

8. For the appointment of a guardian of the child, (under Section 7 & 8 of the Guardian and Wards Act, 1890) a person desirous of being his/her guardian or

his/her relative or friend may be so appointed if the Court is satisfied that it would be in the welfare of the minor.

9. U/s. 6 of the Hindu Minority and Guardianship Act, 1956 under which the petitioners are covered, the father and after him the mother can be the only guardian of the child. It is only when the father and mother are dead or not available then another person may, showing how it would be in the welfare of the child, claim to be his guardian and accept the responsibilities and the duties which would otherwise be of his parents without any such application and without making out a case for being appointed guardian, none can claim simplicitor custody, or access or visitation rights.

10. Being conscious of this position in law and knowing and accepting that the mother of the minor can only be his legal guardian the grandparents have not even claimed guardianship of the child. They have only claim custody of the child and access to the child and visitation rights. These are not legal rights available to any person who is not a guardian or who cannot be appointed guardian.

11. Consequently the entire application of the grand parents of the child is wholly misconceived and totally alegal.

12. In determining who the guardian of the child would be, the welfare of the child is the prime aspect which would come up for consideration. Custody and access are ancillary reliefs in a guardianship petition. A legal guardian can be granted custody or access as interim or as ancillary reliefs. Custody and access are not paramount rights which can be enforced without making out a case of guardianship. Hence only a legal guardian validly appointed as such guardian of a minor child can claim custody or access to the child. Hence custody and access can be granted to the person who has a legal right to be appointed guardian.

13. The welfare of the child does not imply that any stranger can be given the custody and access rights. Of course, in a family set up it would be in the interest of the child to see his own roots. The child, however, is not a chattel. His access has not to be taken and given from person to person depending upon the whatever rights they claim even if the person, claiming such access is not even a person who can be his/her guardian. Indeed, there is no law which grants any such right to any person. The only aspect of guardianship is to claim legal, lawful, parental responsibility. It is when a person claims to be responsible as guardian and shows the he/she alone is a fit and person to be appointed guardian that he/she may be appointed guardian of the child pursuant to which he/she may get the custody and access of the child depending upon the welfare of the child. A person who has not the inherent right to be appointed guardian cannot claim the right to custody and access. In fact, no one can claim to be guardian of any child when the child has a natural guardian present and able to act as such.

14. In the facts of this case the mother has explained in her Written Statement filed in reply to the divorce petition filed by her husband in the Family Court how

she has suffered at the hands of the same grandparents so that her marriage broke down. She has shown how the father of the child, as his natural as well as legal guardian, has thrown his hands up so as not to give or afford any maintenance to his child.

15. She has, therefore, singly claimed parental responsibilities. She is the single parent and the single guardian of the child. She alone is entitled to the child's custody.

16. The grandparents have not shown how without being the guardians of the child they can claim access or visitation "rights" which they have claimed. It is not shown absolutely how it would be in the welfare of the child to be tossed from one place to another to be given "custody" or "access" to the grandparents of the child who are not and who cannot claim to be guardians of the child whilst the mother is alive and present.

17. It is interesting in this context to appreciate how the concept of "welfare of the child" which corresponds with the "Responsibility of the guardian" is considered in other jurisdictions. The pre-requisite and qualifications for applying for any custody or access to a child, even by a parent, in the UK is upon the premise of "Responsibility" and not "Right". Hence such an applicant must show and offer parental responsibility if he desires to have any contact with the child. Parental Responsibility" is explained in Section 3 of the Children Act, 1989 in the UK thus:

3. Meaning of "parental responsibility".

(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect-

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who-

(a) does not have parental responsibility for a particular child; but

(b) has care of the child, may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

18. It is imperative to note that none is granted legal "rights" over the person of any child under any law. The law in India (Section 6 of HMG Act) cited above has only conferred guardianship of a child. This conferment is upon the parents of the child. Similarly, the law in the UK has not granted any "rights" over any child. The expression "parental responsibility" u/s 3(1) of the Children's Act, 1989 cited above, embraces within itself any right alongside the duties, powers and responsibilities that the position of such person entails. Hence a person who, as the father of the child in this case, shirks his duties and responsibilities would have no corresponding rights over the child. In his sagacity and discretion the father has accepted such position upon his own choice not to carry out his duties towards his child, the prime duty of which is to maintain the child. He has shown no parental responsibility.

19. For any person other than the parents of the child, the guardianship would be considered only in their absence. There "rights" are similar for such guardians u/s 3(2) of the Children's Act cited above. These rights cannot be exercised, availed of, demanded or granted without the corresponding duties, responsibilities and obligations. Such other person indeed has no duties, responsibilities and obligations per se in respect of the person or property of the minor child. Such would be the duties only of his own guardian-the father, and in his absence, the mother. Such person also, u/s 3(5) of the Children's Act, 1989 cited above, would have the responsibility to do acts only for safeguarding and promoting welfare of the child in the UK as u/s 13 of the HMG Act in India.

20. The appointment of a person as the guardian of the child in the foundation of such right. The ground for such appointment is only when the child is bereft of a natural guardian (as specified in Section 6 of the HMG Act). Amongst the persons who may be the guardians of the child-the father, and in his absence, the mother-only may have not the parental responsibility but only the care of the child. None else would have such a seminal right when the guardian of the child is already available for the child and has accepted parental responsibility. In the absence of such appointment, therefore, the custody of the child and further the access to the child cannot be demanded or granted.

21. The grandparents of the child have filed an application in the Family Court, Mumbai simpliciter demanding custody/access/visitation rights. Such an application is, therefore, wholly, alegal. Their case does not emanate from a legal right. No legal right can be established as the guardian of the child-fit and proper-is available for the child. The basic legal right being totally absent, ancillary rights, which would flow only from the main right as a corollary, cannot be availed on the established proposition of law-that no interim relief can be granted

when the final relief cannot be granted to an individual. The initial application, therefore, itself deserves to be dismissed as not made under the provisions of any law applicable to the applicants.

22. This must be appreciated also from a different angle. A husband, who neglects, dodges and evades his own parental duties and responsibilities may easily give up custodial rights to his child so as to be free from the obligations of parenthood as has been done demonstrably irresponsibly by the father of the child in this case. Such a father may, from the back-door, gain entry and access to the child through his parents agitating on his behalf in another garb. This also cannot be allowed to happen upon the sublime equitable principle that none can do indirectly what he cannot do directly. The Courts must see thorough the game. The Courts cannot allow a child to be "used" for the mental satisfaction of another. That would go totally against the mandate of "safeguarding and promoting the welfare of the child".

23. Seen from all standpoints, the order of the family Court is alegal. It is not based upon the provisions of law. It considers the child as a chattel. It requires the mother to give the access to the child on certain holidays etc. Such order cannot at all be sustained under any law. At best the grandparents may work out their differences with the mother of the child for what they can do with the child which, in the interest of the minor child, the mother may consider so that the child may not be deprived of the best which the contact with the grandparents would offer. However, that is not a legally enforceable right obtainable in a Court of Law based upon the laws governing the grandparents of the child.

24. Consequently the order of the Judge, Family Court 3, Bandra Mumbai dated 29th October, 2012 is set aside. Rule is granted accordingly.