

(2006) 02 AHC CK 0158

In the Allahabad High Court

Case No : First Appeal from Order No. 832 of 2004

Rajendra Kumar Shukla and Smt. Kusma Shukla APPELLANT

Vs

Vishnu Kumar Shukla, Smt. Ansuiya Devi @ Bitti and Usha RESPONDENT
Devi

Date of Decision : 10-02-2006

Acts Referred:

Guardians and Wards Act, 1890 — Section 12, 17, 17(3), 17(5), 7
Hindu Minority and Guardianship Act, 1956 — Section 4, 6

Citation : AIR 2006 All 173 : (2006) 2 AWC 2039 : (2006) 3 RCR(Civil) 343

Hon'ble Judges : K.N. Ojha, J

Bench : Single Bench

Advocate : M.P. Yadav, for the Appellant; S.K. Pal, Anil Srivastava and Amit Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Ojha, J.—Instant appeal has been preferred against order dated 10.2.04 passed by learned Addl. District Judge, court No. 4 Fatehpur in civil suit No. 26/70/02(Rajendra Kumar Shukla and Ors. v. Vishnu Kumar Shukla and Ors.) whereby the Application 4-A- moved by the appellant Rajendra Kumar Shukla and his wife Smt. Kusma Shukla for handing over minor Yakendra Kumar Shukla in their guardianship was rejected.

2. Heard Sri M.P. Yadav, learned counsel for the appellant and Sri S.K. Pal learned counsel for respondent No. 1 and 2 and Sri Amit Srivastava learned counsel for the respondents and have gone through the record.

3. The facts as disclosed from the record is that Rajendra Kumar Shukla is resident of village Shivramau, P.S. Ghazipur, district Fatehpur. At present he lives in House No. 92/93 LIG, Avas Vikas Colony, Civil Lines, Fatehpur. Opposite party No. 1 Vishnu Kumar Shukla and opposite party No. 2 Smt. Ansuiya Devi @ Bitti wife of Vishnu Kumar Shukla live in Mohalla Krishna colony, Hariharganj, Town Fatehpur. Vishnu Kumar Shukla is real brother of applicant Rajendra Kumar

Shukla. Opposite party No. 3 Smt. Usha Devi is wife of Late Tej Kumar Shukla Jives in village Shivramau, Police Station Ghazipur, district Fatehpur. Late Tej Kumar Shukla was real brother of Rajendra Kumar Shukla and Vishnu Kumar Shukla, who died in prime of his age. They are permanent resident of village Shivramau, P.S. Ghazipur, district Fatehpur where opposite party No. 3 Smt. Usha Devi lives. Her husbands brothers Rajendra Kumar Shukla "and Vishnu Kumar Shukla and their families live in Town Fatehpur.

4. The case of Rajendra Kumar Shukla is that age of Yakendra Kumar Shukla was about 14 years in the year 2002 when the application was moved, which has been rejected by the court below. It is alleged that Tej Kumar Shukla was real brother of Rajendra Kumar Shukla- he died during service. In order to console his widow opposite party No. 3 Smt. Usha Devi youngest son of Rajendra Kumar Shukla was left by him at the residence of Smt. Usha Devi in village Shivramau. Now Yakendra Kumar Shukla has become of more than 17 years since he has grown up therefore there is necessity that he should live with him so that he may be properly educated and employed, therefore Application 4-A was moved which was rejected by learned Addl. District Judge, Fatehpur on 10.2.04 therefore instant appeal has been preferred.

5. Opposite party No. 3 Smt. Usha Devi filed objection and denied that Yakendra Kumar Shukla @ Monu is son of Rajendra Kumar Shukla. It was alleged that Yakendra Kumar Shukla @ Monu is son of Tej Kumar Shukla and she is wife of Tej Kumar Shukla. Yakendra Kumar Shukla @ Monu was living with opposite party No. 3 but later on opposite party No. 1 and 2 brought him to Fatehpur and at present he is living with opposite party No. 1 and 2.

6. Opposite party No. 1 Vishnu Kumar Shukla and opposite party No. 2 Smt. Ansuiya Devi @ Bitti wife of Vishnu Kumar Shukla filed objection against the application that Tej Kumar Shukla died in the year 1988 when he was in Military service in New Jalpaiguri. At that time opposite party No. 3 was living at her father's residence where she gave birth to Tej Kumar Shukla. This boy was named Ajay son of Tej Kumar Shukla instead of Yakendra Kumar Shukla @ Monu He is studying in 8th class and at present he is living with opposite party No. 1 and 2. After the parties' field affidavit and counter affidavit the contention of the opposite party No. 1 and 2 was believed and the application was rejected.

7. It has been submitted by learned counsel for the appellant that u/s 4 of The Hindu Minority and Guardianship Act, 1956, a guardian means a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian, a guardian appointed by the Will of the minor's father or mother, a guardian appointed or declared by a Court. Natural guardian means any of the guardians mentioned in Section 6 of Hindu Minority and Guardianship Act, 1956, Section 6 of the Act, 1956 contemplates that in a case of a boy it is the father and after him the mother who is natural guardian provided the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother.

8. Under The Guardians and Wards Act, 1890 Clause 4 (2) the term Guardian has been defined " guardian means a person having the care of the person of a minor or of his property, or of both his person and property." Section 7 of the Guardian and Wards Act, 1890 contemplates that where the Court is satisfied that it is for the welfare of a minor that an order should made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly. It also provides that an order in this section shall imply the removal of any guardian who has not been appointed by Will or other instrument or appointed or declared by the Court.

9. Section 12 of the Act 1890 contemplates that the Court may direct that the person, if any, having the custody of the minor, shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

10. Section 17 of the Act 1890 envisage that in appointment or declaration of a Guardian of a minor, the Court shall be guided by what appears in the circumstances to be for the welfare of the minor and for 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.

11. Section 17 Clause (3) of Guardians And Wards Act, 1890 provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. Section 17 Clause (5) of the Act contemplates that the Court shall not appoint or declare any person to be a guardian against his will.

12. In instant case the minor boy Yakendra Kumar Shukla was summoned before me Court. He stated that he was aged about 17 1/2 years and he wanted to live with opposite party No. 1 Vishnu Kumar Shukla. He also stated that he is studying in Class X in A.S. Inter College, Fatehpur, He also stated that he is living with opposite party No. 1. Vishnu Kumar Shukla therefore he prefers to live with him. He told his name to be Ajay Kumar Shukla instead of Yakendra Kumar Shukla and gave in writing to this Court that opposite party No. 2 Vishnu Kumar Shukla is brother of his father and he is looking after his welfare and therefore he prefers to live with him and therefore his guardianship may not be changed. Learned counsel for the respondent has cited Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha, wherein it has been laid down by Hon. the Apex Court that in the matter of custody of children welfare and interest of the child are the paramount consideration and not the convenience and pleasure of the parents.

13. In this case the minor boy is aged about 17 1/2 years. He will gain majority within six months. The appointment is to be made for six months only. He has been living with opposite party No. 1 Vishnu Kumar Shukla and he is studying in

Class X. This fact is not denied that he is living with opposite party No. 1 Vishnu Kumar Shukla. The minor boy aged about 17 1/2 years was summoned in the Court. He stated as well as gave in writing that he wanted to live with Vishnu Kumar Shukla with whom he is already living. Since the welfare of the minor child is the paramount consideration for handing over in new custody or guardianship of a person. Therefore in this case it is the guardianship of Vishnu Kumar Shukla, which will be more proper, in which the minor boy continues to live. The minor boy has gained confidence to live with his uncle Vishnu Kumar Shukla he is studying while living with him. After six months he will be free to live with any person and the guardianship will come to an end when he gains the age of 18 years.

14. Considering the provisions of law as is contemplated in Section 17(3)(5) of Guardians and Wards Act 1890, his age borders majority. He appeared before the Court and Court found him to be intelligent enough to decide his welfare and he preferred to live with Vishnu Kumar Shukla opposite party No. 1. Section 17(5) of the Act, 1890 contemplates in mandatory terms that Court shall not appoint or declare any person to be guardian against his will. In this case the minor boy is not aged about 5 and 6 years but he is aged about 17 1/2 years. Therefore, his preference to live with opposite party No. 1 is a material consideration. When he is studying in Class-X and by the time his examination of Class-X is over he will become major. He is studying in a College and attends the classes while living with opposite party No. 1 Vishnu Kumar Shukla who makes arrangement of his cloth and education. To disturb his guardianship during the Session of Education will not be in the welfare of the minor boy. To transfer his guardianship will also disturb his feelings and sentiments, which he has developed with opposite party No. 1 Vishnu Kumar Shukla his uncle and Smt. Ansuiya Devi his aunt. Such mental tension may cause disturbance to his study and health. Considering the age of the minor boy the preference, which he has given before the Court the fact that he is already living with opposite party No. 1 Vishnu Kumar Shukla and the fact that the guardianship is to be made only for six months and change of guardianship will disturb his health and study, It is not a fit case in which the guardianship of the minor boy be given to Rajendra Kumar Shukla who are appellants in this case.

15. After appreciating the aforesaid circumstances relating to the welfare of the minor. This Court subscribes the view of the learned Addl. District Judge, court No. 4, Fatehpur which has been expressed in impugned order dated 10.2.04.

16. Therefore impugned order does not call for interference by this Court and the appeal deserves to be dismissed.

17. The appeal is dismissed.