

(2016) 12 BOM CK 0015

In the Bombay High Court

Case No : Family Court Appeal No.62 of 2016

Shrirang Purushottam Deshmukh

APPELLANT

Vs

Smt. Radhika Shrirang Deshmukh

RESPONDENT

Date of Decision : 14-12-2016

Acts Referred:

Guardians and Wards Act, 1890 — Section 25

Hindu Minority and Guardianship Act, 1956 — Section 13

Citation : (2017) 1 KerLJ 25

Hon'ble Judges : A.S. Oka and Smt. Anuja Prabhudessai, JJ.

Bench : Division Bench

Advocate : Mr. Vaibhav Prakash Patankar, Advocate, for the Appellant; Mr. Bhavesh Parmar and Mr. Devmani J. Shukla, Advocates, for the Respondent (Wife)

Final Decision : Dismissed

Judgement

Anuja Prabhudessai, J. (Oral)—The Appellant father has taken an exception to the judgment dated 26th November, 2015 passed by the Family Court, Nashik in Petition No.D/11/2012 (old 99/2010) filed under section 25 of the Guardian and Wards Act, 1890.

2. The Appellant and the Respondent were married on 19th July, 1992. They adopted a girl child of six months old on 27th August, 2008. The marital discord between the parties led to the Respondent No.1 leaving the matrimonial home on 13th December, 2009. Since then the Respondent-mother is residing with her mother along with her minor child.

3. The Appellant-father therefore, filed an application under section 25 of the Guardian and Wards Act, 1890. The main grievance of the Appellant-father is that the Respondent-mother has no known source of income and hence she is not in a position to maintain the child. He has stated that surroundings and culture of Respondent's family members, specially the conduct of the mother of the Respondent, who has taken divorce twice, is unsuitable for the minor child.

4. The Respondent-mother contested the application and claimed that she was compelled to leave her matrimonial home because of cruelty inflicted upon her. She claimed that the Appellant-father has no love and affection for the minor child. She also denied that the atmosphere at her parental home is detrimental to the child's welfare. She has stated that it is in the interest and welfare of the child that she remains in the custody of the mother.

5. Both parties adduced evidence in support of their respective claims. By the impugned judgment the learned Judge, Family Court dismissed the said application. The learned Judge was of the view that it is not the financial capacity of the spouse for deciding the custody of the child but the welfare and interest of the child which is of paramount consideration. The learned Judge held that the child is of tender age and needs mothers' love and care. Being aggrieved by the same the Appellant-father has preferred this appeal.

6. The main thrust of the learned counsel for the Appellant-father is that the Respondent-mother has no source of income and is not capable of taking care of basic necessities of the minor child. He has further submitted that the atmosphere in the maternal house of the Respondent-wife is not conducive to the welfare or growth of the child.

7. We have carefully perused the record and the impugned judgment and considered the submissions advanced by the learned counsel for the Appellant-father. It is well settled that while deciding the question of custody, the welfare of the minor child is of paramount consideration. In the case of *Mausami Moitra Ganguli v. Jayant Ganguli* (2008) 7 SCC 673 the Apex Court has observed as under:

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents

or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

8. In the instant case, the girl child is about seven years of age. She is in the care and under protection of the Respondent mother since the time she was barely one & half years old. There is nothing on record to indicate that the Respondent-mother has neglected the child or deprived her of physical comfort and other needs and necessities due to financial constraints.

9. The girl child of tender years would require mothers love, care and affection. There is no material on record to indicate that there are elderly female members in the house of the Appellant-father or other children in the age group of the child to take care of the child or to keep her company. Under such circumstances depriving the child of mothers care, company and guidance and further dislocating her from familiar surroundings can cause mental stress and psychological trauma. Thus, disturbing the custody will be detrimental to the interest of the child. We may add here that the Appellant-father's financial position cannot override considerations of the welfare of the child. Consequently, the Appellant-father cannot have preferential claim over the mother solely because of his financial position. Rather it will be in the best interest of the child if the Appellant-father makes valuable contribution and takes care of educational, medical and other needs of the child. Such approach will ensure healthy growth and development of the child.

10. Though the learned counsel for the Appellant-father has submitted that the atmosphere in the parental home of the Respondent is not conducive for the welfare of the child, we do not find any pleadings to support such contentions. We therefore, do not propose to go into the merits of such allegations. Suffice it to say that the mother of the Respondent has married twice or that she is a divorcee is not a relevant factor in deciding the entrustment of the child.

11. under the circumstances and in view of discussion supra, we do not find any compelling reason to disturb the custody of the child. Accordingly we pass the following order:

ORDER

1. The Family Court Appeal is dismissed with no order as to costs.