

(2004) 03 KAR CK 0075

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 6190 of 2001

Smt. Gundamma

APPELLANT

Vs

Shivasharanappa

RESPONDENT

Date of Decision : 12-03-2004

Acts Referred:

Guardian and Wards Act, 1890 — Section 25, 25 (c), 47 (c)

Citation : AIR 2004 Kar 357 : (2004) 3 CivCC 264 : (2004) 3 KarLJ 575 : (2004) 3 KCCR 1416 : (2005) 1 RCR(Civil) 545

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : R.S. Sidhapurkar, for the Appellant; Party-in-Person and N.P. Vivek Mehta, for the Respondent

Final Decision : Allowed

Judgement

K. Ramanna, J.—The wife, being aggrieved by the judgment and order dated 21-9-2001 passed by the Civil Judge (Senior Division), Gulbarga, in G. and W.C. No. 18 of 1997, has preferred this appeal u/s 47(c) of the Guardian and Wards Act (for short, "the Act"), whereby the said Court allowed the petition filed by the respondent u/s 25 of the Act directing the appellant to give custody of the ward Satish alias Santosh to the respondent-father forthwith, mainly on the ground that the Court below has not considered the welfare of the ward and his willingness as to whether he wishes to reside with mother or father and thus misdirected itself in coming to a wrong conclusion. It is contended that admittedly, the ward is aged about 10 years and is capable of knowing residing with whom his welfare and interest is more secured, but, the Trial Court has not done any exercise to ascertain wish of the ward.

2. The facts of the case, in brief, are that the marriage of the appellant was performed with the respondent in the year 1976 and they lived together for a period of 13 years and from out of the wedlock they got two male issues, Basavaraj and Satish alias Santosh by name. Their relationship became strained

in 1989 when the second child was about 3-4 months older. The eldest son, namely, Basavaraj is residing with the respondent, whereas Satish alias Santosh is residing with the appellant. Since the appellant was residing with her parents at Ingankal Village in Chittapur Taluk. The respondent filed an application u/s 25(c) of the Act for custody of Satish alias Santosh contending that he has sufficient means to provide comfortable living and good education to the ward.

3. On the basis of the pleadings the Trial Court framed the following points for its consideration:

(1) Whether it will be for the welfare of the ward to return the custody of the ward to the father?

(2) To what order?

The Trial Court after considering the evidence and hearing the arguments answered the point No. 1 in the affirmative and directed the appellant to give the custody of the ward Satish alias Santosh to the respondent.

4. We have heard the arguments of the learned Counsels for both parties and perused the records and perused the judgment of the Trial Court.

5. Learned Counsel for appellant would submit that the Trial Court failed to see that welfare of the ward would have been better in the hands of his mother. Further, it was contended that mothers parents have got considerable landed property and she being the only daughter is entitled to succeed to the entire estate of their parents, she had sufficient means to support the ward. It is stated that the parents of the mother have already given 18 acres of land to her. In support of his contention learned Counsel for the appellant relied on a decision reported in the case of Municipal Corporation v. Satish Govila and Anr., wherein the Apex Court held that in order to decide the custody of the child of 10 years, his natural desire and his future development is very important to be kept in mind. He also relied on a Division Bench decision of this Court in the case of Chethana Ramatheertha v. Kumar V. Jahgirdar, wherein the this Court held as under:

" . . . child should not be deprived of the mother's company unless she suffers from any disqualification and she disentitles herself to losing up her child. The mother can disentitle herself only because of her own misconduct or misdeeds or when she is not in a position to take care of the child due to reasons financially or others, the custody should be shifted from the mother".

In the same judgment, the Division Bench also held that to decide the custody of the child, question has to be approached from the angle of mitigating the suffering, the hardship and the psychological trauma that the child may undergo due to separation from the parents. The points to be considered are what promotes the welfare of the child, what are the possibilities to promote the welfare of the child, how best the child's suffering be mitigated.

6. Per contra, learned Counsel for the respondent submitted that the appellant herself deserted the respondent and started living with her parents' house. She left her in-laws' house for delivery and since then she has not returned to her in-laws' house even though the respondent made several attempts to bring her back. Therefore, the allegations made against him and his father are utterly false. Further, it is contended by learned Counsel for the respondent that the Trial Court after considering the welfare of the child entrusted the custody of the child to the respondent as he is the proper person to protect the interests and welfare of the minor child.

7. Having heard the arguments of both parties, the points that arise for our consideration and decision are:

(a) Whether the judgment and order passed by the Civil Judge (Senior Division), Gulbarga, directing her to give the ward to the custody of the respondent is incorrect, perverse or illegal?

(b) If so, whether it calls for interference by this Court?

8. It is an undisputed fact that the appellant and the respondent are wife and husband and their marriage took place in the year 1976. From out of wedlock, two male children were born. It is clear from the evidence that the appellant was ill-treated by the respondent, his father and brother. Since she was unable to bear the ill-treatment, she left matrimonial house when the younger child i.e., Satish alias Santosh was 3 or 4 months older. But, the contention of the respondent is that she had been to parents' house for delivery of second child and since then she has been staying there.

9. In the instant case, as on the date of filing of the said petition, Master Satish alias Santosh was aged about 5 years. When the appellant was examined as R.W. 1 in the Trial Court, he was studying in 4th standard. On 11-6-2003 Master Satis'h alias Santosh and his parents appeared before us. We examined the appellant as well as the ward. During the course of our examination the ward seems to be matured enough to understand where his interest lies. The ward told the Court that he is studying in 9th standard presently and is looked-after well by his mother. It is an undisputed fact that the ward has been staying with his mother since his birth. When we asked the ward as to his relationship with his father the ward told us that he did not know the father at all. Therefore, the attempts made by us to settle the dispute between the parties and to unite them did not yield any fruit.

10. On perusal of the entire evidence it is seen that the Trial Court has not properly appreciated the factual and legal grounds put forth by the parties. Admittedly, both parties have sufficient means to bring up their children. In fact their eldest son by name Basavaraj is residing with the respondent, whereas Satish alias Santosh is residing with his mother since his birth. The Trial Court has totally ignored the law laid down by the Apex Court and this Court in directing the appellant-wife to give the child to its father. In the case of

Kirtikumar Maheshankar Joshi v. Pradip kumar Karunashankar Joshi, the Supreme Court held that when the children are happy with their maternal uncle in view of the ill-treatment to their mother at the hands of the their father and other family members the father is not entitled to get the custody of the children. In the instant case also, the contention of the appellant is that since she was ill-treated and harassed by the respondent, his father and brother, she was forced to leave the matrimonial house when the ward Satish alias Santosh was about 3 or 4 months older. It is not the case of the respondent that the appellant does not have means to maintain herself and the ward. In the instant case, the appellant has produced record of rights extracts of the agricultural lands at Exs. R. 1 to R. 3 to show that her parents have given her 12.24 acres of land in partition. Nevertheless, the Trial Court has wrongly come to the conclusion that she has not produced the partition deed to show that she is having landed property. Record of rights extracts produced by her indicate that she is the absolute owner in possession of the land measuring 12.24 acres. Further, it is shown that except she, there are no legal heirs to succeed the estate of her parents. Therefore, it could be said that the appellant is financially sound and she is capable of giving good education and maintain the ward properly. Therefore, the Court below is not justified in passing the impugned order.

11. In the result, the appeal is allowed, the judgment and order passed by the Trial Court is set aside, however, with no order as to costs.