
(2008) 06 UK CK 0039
In the Uttarakhand High Court

Smt. Sudesh

APPELLANT

Vs

Additional Family Court Judge and Another

RESPONDENT

Date of Decision : 19-06-2008

Acts Referred:

Guardians and Wards Act, 1890 — Section 25, 47, 7

Citation : AIR 2008 Utt 62 : (2008) 3 UC 1655 : (2008) 2 UD 28 : (2006) 2 UD 28

Hon'ble Judges : Prafulla C. Pant, J; Dharam Veer, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 47 of the Guardians and Wards Act, 1890, is directed against the judgment and order dated 23-7-2005, passed by learned Additional Judge, Family Court, Roorkee, in Misc. Case No. 04 of 2004, whereby it has allowed the petition, moved u/s 7 read with Section 25 of aforesaid Act and directed that two children, namely, Nitin Kumar and Km. Shivani alias Heena be handed over by the appellant Sudesh (mother) to respondent Madan Pal (father).

2. Heard learned Counsel for the parties.

3. Brief facts of the case are that appellant Sudesh got married to respondent Madan Pal on 30-5-1991. Out of the wedlock three children born, namely, Niraj Kumar, Nitin Kumar and Shivani alias Heena on 28-10-1992, 23-6-1995 and 7-8-1998 respectively. Admittedly, the elder son Niraj is living with the father and the remaining two children are living with mother. It is also not disputed between the parties that vide judgment and order dated 29-5-2001, by Civil Judge (Senior Division)/F.T.C. II, Roorkee, the decree of divorce was passed and the marriage between the present appellant Sudesh and respondent Madan Pal is already dissolved. All the three children are minor.

4. The respondent Madan Pal moved the application under the Guardians and

Wards Act for custody of the two children, namely, Nitin Kumar and Shivani alias Heena on the ground that they are not getting good education in the village and they can be provided better education in Muzzafer Nagar, where the respondent Madan Pal is living. The appellant Sudesh filed the written statement before the trial Court and pleaded that interest of the two children, namely, Nitin Kumar and Shivani alias Heena are secured with her. She further pleaded that the children are going to school and getting good education. Lastly, she has pleaded that she has no plan to remarry and as such the custody of children should not be given to the father (respondent Madan Pal).

5. On the basis of the pleadings of the parties the trial Court framed following issue:

Whether the plaintiff/petitioner is entitled to get the custody of the two minor children, namely, Nitin Kumar and Km. Heena?

6. The trial Court, after recording evidence allowed the petition u/s 7 read with Section 25 of Guardians and Wards Act and directed mother to hand over custody of the two children to the father. Hence this appeal.

7. The main ground on which the trial Court has allowed the petition of the father and directed that the custody of the two aforementioned children be given to him is that the two children would get better education in the city.

8. Learned Counsel for the appellant argued before us that the trial Court has erred in law in ignoring the papers filed by the appellant before it, showing that both the children Nitin and Shivani alias Heena are getting education from the primary school and their performance in the school is good. Our attention is drawn in this regard to paper No. 35C and 37C in the trial Court's record. We have seen the progress reports and other papers and we are satisfied that the children are doing well in their studies in the primary school of Narsan Khurd, where they are studying.

9. Learned Counsel for the respondent Madan Pal argued that the school in which the two children are studying is not a recognised one as is apparent from paper No. 42B, filed on behalf of respondent Madan Pal before the trial Court. Since the children are studying in a primary school as such at this stage whether the school is recognised or not recognised is not of such relevance. The recognition of the school is more relevant to the higher classes particularly from matriculation the higher secondary stage. Apart from this paper No. 44-B, filed on behalf of appellant Sudesh before the trial Court shows that the primary school in which the two children are studying is affiliated to school, which is a recognised one.

10. On behalf of respondent Madan Pal, Sri. M.S. Tyagi, Advocate, submitted that the respondent (Madan Pal) had no plans to remarry in near future. It is further contended by the learned Counsel for the respondent that appellant has no sufficient means to give good education to the children. As such defending the

impugned judgment and order it is contended that the appeal should be dismissed. In reply to this, learned Counsel for the appellant drew attention of this Court to the fact that the petitioner (present respondent Madan Pal) has himself admitted in the proceedings relating to maintenance that though he is literate but he is a labour class man and hardly earns to maintain himself. Learned Counsel for the respondent himself admitted that in compliance of the orders passed on maintenance proceedings only Rs. 250/- per month per child and Rs. 250/- per month for the appellant (in all Rs. 750/- per month) is being paid by the respondent Madan Pal. The amount of Rs. 250/- per month per child and Rs. 250/- per month to the appellant itself shows that the status of the respondent Madan Pal is not such regarding which it can be said that he will be able to provide very good education to his children in the city. As such we are of the opinion that the view taken by the trial Court that the children would get better education with the father appears to be erroneous and not based on the evidence on record. However, we agree with the trial Court with its observation that in the matters of custody of children the paramount consideration is the welfare of the children.

11. The trial Court while allowing the petition of father (respondent Madan Pal) has observed that when the children were made to meet the father it found the children to be happy having their father with them. But in our opinion what has been ignored by the trial Court is that it has not visualized the situation that what will happen to the children when they are deprived of their mother's company. The children have nowhere expressed their desire to the trial Court that they want to go with their father. Had there been too much of difference in the economic status of the father and mother it could have been said that the father would provide very good education to the children as compared to the one provided by the mother. With whatever means she had the mother is giving education to her children. The elder son Niraj is already with the father and he is getting education with him. What is significant in this case is that even after the decree of divorce being passed between appellant Sudesh and respondent Madan Pal, still appellant Sudesh is living in the ancestral house of her in-laws (i.e. ancestral house of parents of Madan Pal). It is also pleaded and stated by the appellant that she had no plans to remarry.

12. In the above circumstances, having considered the submissions of learned Counsel for the parties, we are of the view that the trial Court has erred in law in allowing the petition of Madan Pal (present respondent) and directing appellant Sudesh to hand over the children, namely, Nitin Kumar and Km. Shivani alias Heena to him. Therefore, the appeal deserves to be allowed. The appeal is allowed. The impugned judgment and order dated 23-7-2005, passed by the Additional Judge, Family Court, Roorkee, in Misc. Case No. 04 of 2004 is set aside. The petition u/s 7 read with Section 25 of Guardian and Wards Act, 1890, moved by the father (Madan Pal) is hereby dismissed. However, it is observed that the mother (present appellant) shall permit the father (respondent Madan Pal) to meet his two children as and when he gets time to meet them and comes

to his village.