
(1993) 02 AHC CK 0036
In the Allahabad High Court
Case No : Criminal Revision No. 1585 of 1993

Vakil Ahmad

APPELLANT

Vs

Aqila Khatoon & Anr.

RESPONDENT

Date of Decision : 11-02-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 97

Citation : (1993) 02 AHC CK 0036

Hon'ble Judges : M.C.Agarwal, J

Final Decision : Dismissed

Judgement

M. C. Agarwal, J.—This revision petition under Section 397, Cr. P. C. is directed against an order dated 23rd September, 1993, passed by the learned Sessions Judge, Ghazipur, whereby he allowed a criminal revision filed by the respondent Smt. Aqila Khatoon and directed that the custody of the child be handed over to her.

2. I have heard the learned counsel for the revisionist and the learned counsel for the respondent.

3. The revisionist and the respondent No. 1 were husband and wife. The later approached the Magistrate under Section 97, Cr. P. C. for recovery of their baby boy. Her allegation was that the husband turned her out of the house and on 8th February, 1993, he removed the child from her custody and took him away. The revisionist contended that he has divorced the applicant (respondent) and the child was living with him. The child was produced before the learned Magistrate. He was about 3 years 4 months of age and was attached to the father and was not responding to the mother.

4. The learned Magistrate dismissed the application moved by the respondent observing that the child was not attracted to the mother and there was likelihood of her marrying again and that it was not desirable that the custody of the child be changed from time to time.

5. The respondent Smt. Aqila Khatoon preferred a revision petition before the learned Sessions Judge who reversed the order passed by the Magistrate and directed the child to be delivered to her. The learned Sessions Judge took the view that under the Muslim Personal Law, the child being less than seven years of age, the mother had the preferential right of custody and that the child is too young to have any discretion about his welfare.

6. Learned counsel for the revisionist contended that in the case of a minor child, the interests and the welfare of the child are paramount considerations in deciding the question of custody and that since child was living with the father and had developed affection for him, there was no justification for ordering the custody of the child to be given to the respondent for whom the child has shown his disinclination. Reliance was placed on *Mrs. Chandrakala Menon v. Capt. Vipin Menon and another*, 1993 JIC 542 (SC): 1993 (30) ACC 124 and *Kirtikumar Maheshanker Joshi v. Pradip Kumar Karuna Shanker Joshi*, AIR 1992 SC 1447. In *Mrs. Chandrakala Menon's* case, the marriage between the parties had been dissolved and the question was about the custody of their daughter Soumya. The Hon"ble Supreme Court observed that after the marriage was dissolved, the question regarding the custody of a minor child cannot be decided on the basis of the legal rights of the parties and has to be decided on the sole and predominant criterion of what would best serve the interest and welfare of the minor. The Hon"ble Supreme Court handed over the custody of the girl to the mother, as it felt that it would be in the interest of the minor that she should be permitted to be in the custody of her mother.

7. In the case of *Kirtikumar Maheshanker Joshi v. Pradip Kumar Karunashanker Joshi* (supra), the question was about the custody of the minor children; a boy and a girl. Their mother had died and the father was facing a charge under Section 490A, I.P.C. in respect of the death of the mother. The children were living with their maternal uncle and were not willing to live with the father. Recognising that the father was a natural guardian and had a preferential right to the custody of his minor children, the Hon"ble Supreme Court declined to shift the children to the custody of the father in the circumstances, mentioned above.

8. On behalf of the respondent, it is contended that the child is too small to distinguish between persons and his behaviour in the court of the Magistrate in not responding to the mother is of no relevance whatsoever because having been with the father for some time, he would naturally be attracted towards him and forget the mother. According to the respondent, the child being so young, needs the care of the mother and she is equally, if not better, capable of rearing up the child and under the Muslim law, has a preferential right of custody at least up to seven years of age.

9. Reliance was placed on *Thirty Hoshie Dolikuka v. Hashiam Shavekasha Dolikuka*, AIR 1982 SC 126. In that case, the dispute was between the parents of a girl, aged 11 years. There were bitter squabbles between the husband and the wife and looking to the adverse effect that the atmosphere would have had on

the child, she was directed to be kept in a hostel under the guardianship of her mother.

10. A reading of the aforesaid judgments of the Hon^{ble} Supreme Court shows that in disputes for the custody of the children is between the parents, the considerations of the welfare of the child play a predominant role in determining as to who should have the custody of the child. The question of the welfare of the child cannot be weighed in golden scales and a person, who is, in law, entitled to the custody of the child, cannot be deprived of that right simply because the other parent may bring up the child in a slightly better way. If the dispute is between the parents on the one hand and some relative or stranger on the other, the considerations regarding the welfare of the child would play only a subservient role and cannot be the sole consideration for deciding the question of custody of the child. Otherwise every poor parent could be easily divested of the custody of his or her child by a more affluent person.

11. In the case before me, there is nothing in the judgments of the courts below to show that the mother is not well-equipped to bring up the child whose custody she is, admittedly, entitled to under the Muslim Law. As already stated, the child is too young to form any opinion and preferences that may be legally acceptable. Since he is living with his father for some time, it was natural for the child to cling to the father and be repulsive to the mother when she wanted to hold him before the Magistrate. That would be particularly so when the child was placed in a strange atmosphere of a court of law. A child of this age needs constant attention all the 24 hours of the day and no person other than the natural mother can come up to the expectation of care required for such a child. It does not even seem to have contended at any stage of the proceedings that the natural mother, the respondent No. 1, was incapable of taking care of the child or that the father had made better arrangements for the bringing up of the child. It is necessary for the better development of the child that, at this age, he should receive the motherly affection and care in full measure and, in my view, the father cannot compensate for the loss that the child would suffer from being deprived of the motherly affection and care. In my view, therefore, the learned Sessions Judge was right in directing that the custody of the child be delivered to the mother.

12. I find no error in the judgment rendered by the learned Sessions Judge and, consequently, this revision being without any substance is dismissed.

Revision dismissed.