

(1969) 08 CAL CK 0008
In the Calcutta High Court
Case No : Parsi Matrimonial Suit No. 2 of 1967

Zerina Jamshed Kalyanvala	Vs	APPELLANT
Jamshed Framroze Kalyanvala		RESPONDENT

Date of Decision : 14-08-1969

Acts Referred:

Citation : 74 CWN 51

Hon'ble Judges : S.A. Masud, J

Bench : Single Bench

Advocate : B.K. Ghose and G. Chakravarty, for the Appellant; S.D. Banerjee and D.K. De, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Masud, J.—The present application has been made after a decree for judicial separation which was passed between the plaintiff and the defendant on November 15, 1967. On or about June 4, 1966 the respondent/husband filed a suit in this Hon'ble Court for restitution of conjugal rights and other reliefs against the petitioner. On 17th June 1967 the petitioner filed the present suit against the defendant for a decree of dissolution of the said marriage and also, alternatively, for judicial separation and for other reliefs. The suits were tried one after the other. The learned Judge on the basis of a verdict of the delegates of the Parsi community delivered a judgment on 15th November, 1967 granting a decree for judicial separation. There are two children of the marriage, Framroze, the son, born on June 22, 1960 and Leena, the daughter, born on September 17, 1962. The learned Judge, after taking into consideration all the relevant circumstances was pleased to give custody of the said children to the father subject to previous orders of the learned Judge whereby the children were allowed to stay with the mother for 5 days and 2 days with the father in a week. On 2nd April 1969, the father's solicitor wrote to the mother's solicitor intimating that the son had been admitted to the Bishop Cotton School, Simla and necessary fees had already been paid to the said school. On 3rd July 1969

the mother's solicitor replied to the letter of the husband's solicitor expressing her desire to have her son admitted to the St. Lawrence School, Lavdale in the Nilgiris. Apart from the fact that St. Lawrence is a better school than the Bishop Cotton School it is stated in the said reply that St. Lawrence is a co-educational school where the daughter also can be admitted in proper time so that the brother and sister can study together at the same place and the family ties between the brother and the sister would be deepened. It is also stated there that the St. Lawrence School is situated at a distance of a few miles from Coonoor where the mother's parents have a house and reside there for certain periods of the year. The children during the summer vacation can spend their holidays with the grand-parents and accordingly, it is suggested that the admission in the St. Lawrence School would be for the benefit and welfare of the children. The father, however, insisted that the son should be admitted to the Bishop Cotton School. The petitioner, thereafter, has made the present application on 9th July, 1969 where she has asked for an order, inter-alia, that Framroze be admitted and educated at the St. Lawrence School. Mr. B.K. Ghosh, counsel on behalf of the petitioner, has submitted that in the interest and welfare of the child the son should be allowed to have his education at the St. Lawrence School whereas Mr. Sankar Banerjee on behalf of the father has asked me to hold that the father's desire to have his son admitted at the Bishop Cotton School should get preference to the mother's desire to have the son schooled elsewhere.

2. I have given thoughtful consideration to all aspects of this matter and it appears to me that there are difficulties in according to the mother's desire to get the son admitted to the St. Lawrence School. Firstly, this is not an interlocutory application in a pending matrimonial suit where considerations of a different nature have to be taken into account. In such a case, the Court should ordinarily preserve the status quo without in any way interfering with the welfare and happiness of the child, which it is well settled, is of paramount importance in all situations. In the present case the two cross-suits have been finally disposed of and Datta, J., agreeing with the delegates, came to the conclusion that the specific allegations of the mother against father were not proved; but although the mother could not get decree for dissolution of marriage she was granted judicial separation and naturally the father's suit for restitution of conjugal rights was dismissed. With respect to the custody of the children the learned Judge, however, has categorically stated as follows:-

Hence, there is no question of depriving the father of the custody of the children to which he is only entitled.

3. The arrangement of the children to remain with the mother for 5 days in a week was continued by the learned Judge on the grounds of the young age of the children and their natural dependence on mother. The children are now growing up and have got to be given suitable education. It is the desire of both the parents that the son should be educated in a public school outside the state

of West Bengal. It is nobody's case that the children should be allowed to have their future education in Calcutta or in the Hill Stations in State of West Bengal. Both the father and the mother are working in Calcutta. It is not the mother's case that if the son is educated outside the State of West Bengal she would be deprived of the care and company of the son, or that the son will suffer on account of separation from the parents. In a situation like this where the matrimonial court has already in a judgment allowed the custody of the children to the father such custody must also imply the father's right to the children's education. Reliance may be placed on the observation in Tolstoy's Law and Practice of Divorce and Matrimonial Causes (5th Edn.) where at page 196 the learned author has been made the following observation:

Child's education and upbringing. When deciding on custody or access the court does not generally make special provisions as to the children's education, leaving it to the party having custody to decide on this. Where it becomes necessary for the court to consider the children's education and upbringing, whether on the application of the parties or on the court's own initiative, it considers this from the point of view of their career, or their station in life and general upbringing, and of their religious education. Except in special circumstances, the children would follow their father's religion, but though the father has a right to have his wishes considered unless he has abandoned that right, the children's welfare is always the paramount consideration, whether the parents are alive or dead.

4. Further, "Custody" according to Shorter Oxford English Dictionary, means "safe-keeping, protection, charge, care, guardianship". The father has already been given the custody of the children by Datta, J., subject to mother's right to live with her children at her place of residence 5 days a week. Father's comprehensive right to have the charge, control or care of the children remains unchanged. Right to have custody must include the right of upbringing the children which again implies the right to make plans for future education of the children. But this right of the father to educate his children in the way he thinks best is not an absolute right. Such right must not over-ride the welfare and the happiness of the children. It is quite possible that in a proper case the court may be satisfied that the father is a man of bad temper or otherwise unreliable in which case the court will not act according to the wishes of the father. But where there are no such allegations against the father and the court finds that he is not hostile to the children the court should not deprive the father of such right. In the present case, I find no special reason why the mother's desire to educate the child in St. Lawrence should get preference. In the case, (1) In re W 1964(1) Ch. 202, relied on by Mr. Ghosh, the Court of appeal decided in favour of the father, granting custody of the infant to the father and ordering that the infant should not be removed from the care and control of the mother. The question in that appeal was whether a stipendiary magistrate had jurisdiction to make an order of divided custody under S. 5 of the Guardianship of Infants Act, 1896. It is nobody's case here that Datta J. had no jurisdiction to make the order in respect

of the custody of the children.

5. Secondly, the two children of the marriage, the son and the daughter are of about 9 and 7 years old. The wife rightly or wrongly left the husband's house in September 1966 and started residing at her father's place. Thus, the relationship between the parties did not become strained before 1966. But I find from the correspondence between the father and the authorities of the Bishop Cotton School dated 5th December 1960, 8th December 1960, 16th December 1960, 30th December, 1960, 2nd January 1961, 13th January 1961, 17th January 1961, 18th November 1965, 23rd November 1965, 26th Nov., 1965 & 29th Nov., 1965 that father was anxious to have his son admitted to the Bishop Cotton School. As the conjugal relationship was normal before 1966 the mother must have had knowledge of the said letter and did not consider her son's schooling in the said school to be undesirable or detrimental to his interests. It cannot be denied that Bishop Cotton School, alike the St. Lawrence School, Lavdale or the Mayo College, Admer, Doon School, Dehradun, is also one of the well established public schools with good reputation. It is also situated in picturesque surroundings with modern amenities. It is stated by the Counsel for the mother that the standard of the Bishop Cotton School has been deteriorated. But I find that there is no substantial difference in the standard of the said schools which compels me to hold that the St. Lawrence School is the best. On the contrary, two letters dated 22nd July, 1969 and 25th July, 1969 written in reply to the petitioner's letters show that the petitioner recently wrote to the Headmaster, the Mayo College, Admer and the Headmaster Doon School for her son's admission. Further, the father has made final arrangements with the authority of the Bishop Cotton School, paid necessary registration fees etc. He has been intimated by the letter of the authority of the said school dated 14-2-69 that Framroze would be definitely admitted in March 1970. The father admittedly is an ex-student of Bishop Cotton School and it just happens that one of his teachers is now the headmaster of the said school. Thus all these facts show that the father's desire to have the son educated in Bishop Cotton School is in consonance with the welfare of the son.

6. Thirdly, one of the grounds on the basis of which I have been asked to exercise my discretion in favour of the mother is that St. Lawrence is a co-educational school where Leena also might be admitted in a year or two in the same school where her brother would be studying. Strictly speaking, the admission of Leena in a public school at this stage does not arise. Leena is at present studying in the Loreto school and Framroze in St. X'aviers school in Calcutta. Mr. Dey, on behalf of the father, has assured me that the father would get her admitted in the Loreto school in Simla so that the brother and sister can study in different schools at the same town, as they are doing now. This suggestion on the part of the father appears to me to be very reasonable. Further the father has expressed his desire that the children should not study in coeducational institution. I do not feel justified in ignoring such desire of the father in respect of his own child. Fourthly, it is said that admission of Framroze

in the St. Lawrence would enable him to spend his summer holidays with his grand-parents in their residence at Coonoor. Thus, the cordial tie which has been already developed between the grand-parents and Framroze would continue and the son would be happy. It is also said that at that time Calcutta will be too warm and as such it is also beneficial for the health of the son to get him admitted in the St. Lawrence School. There is great force in the said contention. Framroze's mother's father Mr. Kanga is a respectable, cultured and rich man and undoubtedly the son will be very happy to stay with him at Coonoor or elsewhere. But as the father has been given the custody of the child and as also, by the order of the court the children have been allowed to stay with the mother and the father in Calcutta, I do not think the son's stay with the grand-father would satisfy all the requirements of the case. It is not stated that the mother also would be able to stay with the son at Coonoor. The mother is working in Calcutta, She may or may not be able to get leave from the office to spend her holidays with the son in Coonoor. The father has been given a right to see the son and to stay with him for two days in a week. The relationship between the parties is also strained that it is not possible for the father to go and see his son at the residence of the mother's father. It would be natural for the son to see his parents during the summer holidays if the son is allowed to come down to Calcutta and give company to both the father and the mother on the basis of the said order of Datta, J. The principles laid down in the case, cited by Mr. Ghosh, (2) Ward v. Lavery 1925 A.C. 101 have no application to the facts of the present case. In that case the father fell into habits of intemperance, mother died, and the children were allowed to be brought up in the custody of maternal grand-parents.

For all the reasons stated above the application is dismissed. Each party to bear its own costs.