A MAUSAMI MOITRA GANGULI

v.

JAYANT GANGULI

(Civil Appeal No.3500 Of 2008)

MAY 12, 2008

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[C.K. THAKKER AND D.K. JAIN, JJ.]

Guardians and Wards Act, 1890 – ss.10, 17 and 25 – Hindu Minority and Guardianship Act, 1956 – s.13 – Custody C *of male child – Parents divorced – Mother left matrimonial home leaving the child, 3 year old at that time, with father – Child now 10 years old – To which parent, the care and control of the child should be committed – Held: The first and the paramount consideration is welfare and interest of the child* D *and not rights of the parents under a statute – Stability and security of the child is alsc an essential ingredient for full development of child's talent and personality.**

Appellant left her matrimonial home at Allahabad leav- E **ing her three year old son with her husband, Respondent. Subsequently she filed a suit for divorce against Respondent which was decreed. Since no appeal was filed by Respondent against the said decree, it attained finality. Thereafter, Appellant moved a petition under ss.10 and** F **25 of the Guardians and Wards Act, 1890 read with the provisions of the Hindu Minority and Guardianship Act, 1956 before the Family Court. The application was allowed and Appellant was declared as the lawful guardian of the minor child. Respondent filed appeal before the High** G **Court which set aside the order passed by the Family Court and granted custody of the child to Respondent. Hence the present appeal.**

Dismissing the appeal, the Court

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HELD: 1. 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 (s.17) or the Hindu Minority and Guardianship Act, 1956 (s.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. 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. [Para 14] [269-A-G]

Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840 – referred to.

A *Halsbury's Laws of England,* Fourth Edition Vol.13 – referred to.

2.1 In the present case there is nothing on record to suggest that the welfare of the child is in any way in peril B in the hands of the father. The stability and security of the child is also an essential ingredient for a full development of child's talent and personality. [Para 17] [270-G, 271-A]

2.2 Having interviewed the child in the chambers for C some time, this Court finds it difficult to accept the stand of the appellant that the father does not have sufficient time or resources to look after the welfare of the child. The dislocation of the child, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would D not only impede his schooling, it may also cause emotional strain and depression on him. [Para 17] [271-C,D]

2.3 Significantly, during course of hearing on one of the dates, when this Court had not yet interviewed the E child, it was suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing this, the child started crying and whining and, showed reluctance to go with the mother. Watching his reaction, the proposal was dropped by this Court. F Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, this Court is convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. [Para 17] [271-D,E,F]

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2.4 The order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. It will, however, be open to the parties to move this Court for modification of this or- H der or for seeking any direction regarding the custody

and well-being of the child, if there is any change in the circumstances. [Para 17] [271G, 272-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal NO. 3500 of 2002

From the final Judgment and Order dated 28.2.2007 of the High Court of Judicature at Allahabad in First Appeal No. 755 of 2005

A.K. Sengupta, Suraj Prakash and Dr. Kailash Chand for the Appellant.

K.K. Mohan for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: Leave granted.

2. Whether the father or the mother should have the custody of an almost ten year old male child is the short question which falls for consideration in this appeal.

3. The appellant-mother and respondent-father got married on 18th April, 1996. It was a love marriage against the wishes of the parents. On 28th May, 1998, a boy, namely, Master Satyajeet was born from the wedlock. However, within a short time, the relationship between the spouses came under strain. The appellant, who was employed as a teacher, felt that the respondent had misrepresented to her about his occupational status; he did not have any regular income to support the family; he was addicted to alcohol and smoking and also had contacts with anti-social elements. The appellant, it is claimed, had to support the respondent and his family with the meagre income she earned from her school job and private tuitions. It was alleged that the respondent would force her to keep all her savings in a joint bank account, from which he used to withdraw

money. She was subjected to physical violence, due to which, on 16th August, 2001, she was forced to leave her matrimonial home at Allahabad, leaving the infant with the father.

4. On reaching Calcutta, where her parents were living, she filed a suit for divorce against respondent, which was decreed ex-parte on 12th September, 2002. Since no appeal was preferred by the respondent against the said decree, it attained finality.

5. On 5th April, 2003, the appellant moved a petition under Sections 10 and 25 of the Guardians and Wards Act, 1890 read with the provisions of the Hindu Minority and Guardianship Act, 1956 before the Family Court, Allahabad seeking a declaration in her favour to be the lawful guardian of her minor son, Satyajeet and a direction to the respondent to hand over the custody of the child to her.

6. The application was hotly contested by the respondent. Resisting her claim, it was alleged that having left him when he was less than three years of age, the appellant had no emotional bond with the child; after leaving Allahabad, she had not even talked to the minor child over the telephone or enquired about his welfare; being the natural guardian of the child he was capable of and was, in fact, looking after the welfare of the child; the child was studying in a prestigious school at Allahabad for which he was paying a fee of Rs.25,000/- per annum and had also nominated him in his insurance policy. As regards his financial position, it was stated that he owns a house, telephone and a motor car whereas the appellant has no house of her own and is living with her mother and brother in a two-room flat at Calcutta.

7. In support of her contentions, the appellant examined herself as PW-1 and two doctors. On the other hand, the re-

spondent examined himself as DW-1 and two of his neighbours as DW-2 and DW-3. Inter alia, observing that the welfare and interest of the minor is of utmost importance in relation to grant of custody to either of the parents and taking into consideration the evidence adduced by the parties, the Family Court found the respondent to be unfit to act as a guardian of the minor child. The Court felt that the appellant had never neglected her child but had to leave Allahabad to save her life. According to the Family Court, several applications moved by the appellant for interim custody, during the pendency of the custody application, showed that she had affection for her child. The Court observed that the appellant was a highly qualified teacher drawing a salary of Rs.22,000/- per month whereas the respondent was only a private contractor without regular source of income and though the child was studying in a prestigious school in Allahabad, there was lack of constant care and protection of the child in the house of the respondent. Finding the testimony of the appellant and her two witnesses to be credible, the Family Court held that for the welfare of the child, the custody should be with the mother. Accordingly, the application was allowed; the appellant was declared to be the lawful guardian of her minor son and the respondent was directed to hand over the custody of Satyajeet to the appellant, within one month of the date of judgment.

8. Being aggrieved, the respondent preferred Regular Appeal to the High Court. Vide order dated 28th February, 2007, the High Court has set aside the order of the Family Court and granted permanent custody of Satyajeet to the respondent. During the pendency of the appeal, vide order dated 7th November, 2005, as an interim measure, the High Court granted the custody of the child to the appellant. The High Court obtained the opinion of the Director of Psychology, Allahabad, who examined the mother, the father and the child and also talked to

A the child practically on every date of hearing. In the proceedings held on 23rd May, 2006, extracted in the impugned order, in response to the question as to whether he would like to stay with his father or mother, the child stated that he would prefer to stay at Allahabad as it is his birth place and his mother should
B come and stay with him at Allahabad. It is significant to note that the child had stated so despite the fact that he was living with his mother since 7th November, 2005, under the orders of the Court. Taking into account the material on record, the High Court found that: (i) the respondent is financially sound and able to
C cater to all the needs of the child for his development whereas the appellant is unable to provide the same since she is living all alone; (ii) the child is not able to reconcile with his uprooting from Allahabad and denial of love and affection of the father;
D and (iii) the questions which were put to the child and answers thereto indicate that the child wants to study at Allahabad. Having regard to the prevalent circumstances and the fact that the child had received his education from primary stage with his father at Allahabad, the Court came to the conclusion that the
E welfare and development of the child and his future would be best served at present at Allahabad in the hands of the father. Accordingly, the High Court set aside the order passed by the Family Court and granted the custody of Master Satyajeet to the respondent, with the following directions:

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> "1. The appellant shall make arrangement for master Satyajeet to continue his studies in best schools of Allahabad and will ensure the development and welfare of the child in the best way possible.
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> 2. The respondent-mother Ms. Mausami Moitra shall be at liberty to visit the child either in the appellant's house or in the premises of mutual friend or at an agreed place at any point of time and the appellant-father shall not object
H to her meeting with the child.

3. The appellant will also allow the child to live with the mother during school vacations or on appropriate occasions.

4. Master Satyajeet shall be allowed to attend and participate in family functions/festivities subject to his school attendance and examinations etc. which are held in the family of her mother or during any other occasions as jointly agreed to by the both the appellant-father and the respondent-mother.

5. Any other further arrangements mutually agreed to between the appellant-father and the respondent-mother in the interest of the child."

Consequently, the custody of the child was restored to the father. It is this order of the High Court which is under challenge in the present appeal.

9. When the matter came up for hearing, while issuing notice to the respondent, it was directed that the appellant-mother and the respondent-father will remain present in Court in person and the father shall also bring the child with him. On 24th January, 2008, both the parties and Master Satyajeet appeared before us. Before hearing the case, we interviewed Satyajeet in chambers and found that he was quite intelligent and was able to understand the facts and circumstances in which he was placed. He could comprehend matters and visualize his own well-being. He seemed to have no complaint against his father. He explicitly stated before us that he was not inclined to go with his mother and would like to stay with his father and continue his studies at Allahabad where he has quite a few friends.

10. We have heard learned counsel for the parties.

A 11. Learned counsel appearing for the appellant submitted that the order of the High Court directing handing over of the custody of the minor child to the father is vitiated because the High Court has ignored the basic principles of law relating to the custody of the child, as enunciated by this Court in several B judgments. It was contended that the High Court has failed to take note of a vital fact that being a contractor, the husband would remain away from the house most of the time and, therefore, will have very little time at his disposal to look after the needs of the child, who is left under the care of father's old C mother. It was also urged that being a school teacher in a public school, the appellant will be in a much better position to take care of the needs of the child. It was pointed out that the appellant has now joined Delhi Public School at Panipat and has been D allotted a staff quarter where the child can stay under her care and can also study in the same school. It is, thus, asserted that the appellant-mother would be in a much better position to take care of the needs of the child in comparison to the respondent.

E 12. Learned counsel appearing for the respondent, on the other hand, while refuting the allegation regarding the non-availability of the respondent, laid stress on the fact that during interview of the child by the High Court and this Court, the child has in very clear terms expressed the desire to stay with the father F which shows that he is being looked after properly and is already studying in a good school at Allahabad. It was submitted that shifting of the child from Allahabad to Panipat in an absolutely new environment, all alone, with the mother, who had abandoned him when he was less than three years of age would not G only adversely affect his studies, it will also affect him emotionally.

13. Thus, as noted supra, the short question for consideration is whether the circumstances as highlighted by the par-

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ties warrant that the custody of the child should be changed from father to the mother? A

14. 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. 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. B C D E F G

15. In *Rosy Jacob Vs. Jacob A. Chakramakkal*, a three-Judge Bench of this Court in a rather curt language had ob- H

served that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

16. In *Halsbury's Laws of England (Fourth Edition, Vol. 13)*, the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

> **"809. Principles as to custody and upbringing of minors.** Where in any proceedings before any court. the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

17. Having bestowed our anxious consideration to the material on record and the observations made by the courts below, we are of the view that in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands of the father. In our opinion, the

stability and security of the child is also an essential ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had shifted from Chandigarh some time back. Earlier she was teaching in some school at Calcutta. Admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad. Having interviewed Satyajeet in our chambers for some time, we find it difficult to accept the stand of the appellant that the father does not have sufficient time or resources to look after the welfare of the child. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him. It is also significant to note that during the course of hearing on one of the dates, when we had not yet interviewed Satyajeet, we had suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing us, he started crying and whining and, showed reluctance to go with the mother. Watching his reaction, we dropped the proposal. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the afore-extracted directions given by the High Court. It will,

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A however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.

B 18. In the result, the appeal fails and is dismissed accordingly. However, having regard to the nature of the case, we leave the parties to bear their own costs.

B.B.B. Appeal dismissed.