

A SMT. ANJALI KAPOOR

v.

RAJIV BAIJAL

(Civil Appeal No. 2628 of 2009)

APRIL 17, 2009

B [TARUN CHATTERJEE AND H.L. DATTU, JJ.]

Guardian and Wards Act, 1890 – Custody of minor female child – Mother of the child died at the time of her birth – Since then the child is staying with her maternal grandmother (appellant) – Father (respondent) seeking custody of the child – Both Family Court and High Court held in favour of the father – On appeal, held: Ordinarily, the natural guardian of the child has the right to custody of the child, but that right is not absolute – Welfare of child is the paramount consideration – On facts, the minor child is staying with appellant since birth which has resulted into a strong emotional bonding between the two – She is also studying in a reputed school – Appellant has taken proper care and attention in upbringing of the child and being a woman herself can very well understand the needs of the child – Appellant is also financially sound as she runs her own independent business – On the other hand, respondent has borrowed money from several persons and since he has a meager income, he may not be in a position to give comfortable living for the child – In spite of notices issued to him, he did not appear before Court personally or through counsel which shows his lack of concern in the matter – Also in the meanwhile, he got married for the second time and has a child too from that marriage, and the minor child might have to be in care of the step mother, especially since the father being a businessman, has to be out of the house frequently on account of business – The child has remained with appellant for a long time and is growing up well in an atmosphere which

is conducive to her growth – It may not be proper at this stage for diverting the environment to which the child is used to – Appellant allowed to retain custody of the child till she attains the age of majority.

Dispute arose over custody of a minor female child between her father (respondent) and maternal grandmother (appellant). The mother of the child had died at the time of her birth and since then the child is staying with the appellant.

Respondent filed application under the Guardian and Wards Act, 1890 asserting that he, being the father of the child, was her natural guardian and therefore entitled to her custody. The Family Court held in favour of respondent. On appeal, the High Court also held in favour of the respondent. Hence the present appeal.

Allowing the appeal, the Court

HELD:1.1. Under the Guardian and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [Para 10] [567-C]

1.2. In the present case, the appellant is taking care of 'A', the minor female child, since her birth, when she had to go through intensive care in the hospital, till today. The photographs produced by the appellant along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost her only daughter in tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child

A which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislature on the right of natural guardian for the custody of minor child. [Para 18] [569-E, F]

B 1.3. 'A' is staying with the appellant's family and is also studying in a reputed school. The appellant has taken proper care and attention in upbringing of the child, which is one of the important factors to be considered for the welfare of the child. 'A' is with the appellant right
C from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that appellant, even after her husband's demise, is financially sound as she
D runs her own independent business. [Para 19] [569-H; 570-A]

1.4. Considering the evidence of the respondent, it seems that since he has borrowed money from several
E persons and since he has a meager income he may not be in a position to give comfortable living for the child. In spite of notices issued to him, he has not appeared before the Court personally or through his counsel which shows his lack of concern in the matter. It is also brought
F to the notice of this Court that he has got married for the second time and has a child too, and the minor child might have to be in the care of step mother, specially the father being a businessman, he has to be out of the house frequently on account of his business. [Para 20] [570-C, D]

G 1.5. Ordinarily, under the Guardian and Wards Act, the natural guardian of the child has the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to
H the welfare of the minor child. The child has remained with

the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to her growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child. The appellant is permitted to have the custody of the child till she attains the age of majority. [Paras 21 and 22] [570-E, F, G]

Muthuswami Moopanar AIR 1935 Madras 195, approved

Sumedha Nagpal v. State of Delhi (2009) 9 SCC 745; *Rosy Jacob v. Jacob A. Chakramakkal* (1973) 1 SCC 840 and *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr.* AIR (1987) SC 3, referred to.

Mc.Grath (infants) Re (1893) 1 Ch. 143:62 LJ Ch. 208 (CA) and *Walker v. Walker & Harrison* 1981 New Ze Recent Law 257, referred to.

American Jurisprudence, 2nd Edn., Vol. 39, referred to.

Case Law Reference:

(2009) 9 SCC 745 referred to Para 10

(1973) 1 SCC 840 referred to Para 11

AIR (1987) SC 3 referred to Para 12

AIR 1935 Madras 195 approved Para 13

(1893) 1 Ch. 143 referred to Para 15

1981 New Ze Recent Law 257 referred to Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2628 of 2009.

From the Judgment & Order dated 03.08.2007 of the High

A Court of Madhya Pradesh Bench at Indore in Misc. Appeal No. 750 of 2004.

Vivek K. Tankha, B.K. Satija, Harsh Pathak, Anusha Singh, Ratna Kaul and Sidhartha Gupta for the Appellant(s).

B The Judgment of the Court was delivered by

H.L. DATTU, J. Leave granted.

C 1. This appeal is directed against the judgment and order passed by the High Court of Judicature at Indore in Miscellaneous Appeal No. 750 of 2004 dated 03.08.2007. By the impugned judgment, the High Court has directed that the custody of the child be handed over to the respondent/father.

D 2. The facts of case in brief are: - the respondent/Rajiv Baijal, had got married to the appellant's daughter/Meghana on 16.01.1998 and lived together in Pune (Maharashtra). Smt. Meghana went to Indore to the appellant's residence for delivery of the child. She was admitted in Noble Hospital, Indore and gave birth to a female child on 20.05.2001, but she did not survive to see the new born baby. As the child was born premature, she was kept in incubator in the hospital for nearly 45 days. After discharge from the hospital, the infant was brought to the residence of the appellant, and she was named Anagh. Add to the agony, just in a span of two months, F appellant lost her husband also on 29.07.2001.

G 3. The Respondent herein filed an application under Guardian and Wards Act before the Family Court, inter-alia asserting that being the father of the child Anagh, he is her natural guardian and therefore, entitled to the custody of the child. In support of the claim made, the respondent had asserted before the Family Court that Anagh was not properly looked after by the appellant and it was perilous for the child to continue in the custody of the appellant. The respondent had also contended that after the child was brought to the residence H

of the appellant he was repeatedly requesting the appellant and her family members to hand over the custody of the child to him, since the appellant is unable to take care of the welfare of the minor child.

4. In the reply filed, the appellant had contended, that, the respondent had not come to see his daughter even once when the child was in the intensive care unit in the hospital. She had further contended that the respondent is living separately from his parents and he has to be away from his home town most of the time in a month in view of the nature of the job he is involved in. It was also contended that the financial position of the respondent is not good and he had taken loans from several persons, and in order to repay the same, on many occasions, he had asked for financial help from the appellant and her family members. In a nutshell, her claim before the Family Court was that it is not conducive for the welfare of the child to be in the company of the respondent.

5. The Family Court, Indore in its order dated 18.3.2004, has observed that, it cannot be concluded that the respondent although has borrowed money from several persons, will not be in a position to bring up her daughter and bear her educational expense. The Court has also taken note of the fact that the child/ Anagh is taken care of by appellant's brother-in-law, who has two grown-up children, and therefore, it cannot be said that the respondent will not be in a position to take care of the welfare of the child. Therefore, giving priority to the welfare of minor child, it is advisable to give custody of minor child - Anagh to the respondent, where she will be looked after well by respondent and his family members. Aggrieved by the said order, the appellant had carried the matter to the High Court, by filing Misc. Appeal No.750 of 2004.

6. The High Court in its judgment has held, that there are no compelling reasons on the basis whereof the custody of the child should be denied to her father/respondent. Respondent has been making efforts right from the infancy of the child for

- A guardianship of the child which was strongly resisted by his mother-in-law. The Court has also taken note of the fact that, the appellant has lost her husband and has, therefore, suffered a great financial set back. Therefore, for better upbringing and welfare of the child, her custody should be entrusted to her father. Aggrieved by the said judgment, appellant is before us.

7. Notice was ordered to be issued to the respondent on 28.09.2007 to appear before the court on 16.10.2007. Since the same was returned unserved, a fresh notice came to be ordered. Dasti, in addition was also permitted for effecting service of the special leave petition on the sole respondent. In view of the affidavit of dasti notice filed by learned counsel for petitioner, he was permitted to take out notice of the special leave petition by publishing the same in two newspapers which has wide circulation in Pune (Maharashtra). Even this was carried out by the petitioner by publishing the notice of special leave petition in "Sandhyand" and "Free Press" which has wide circulation in Pune (Maharashtra). In spite of such publication, the respondent has not appeared before this court either in person or through his learned counsel. Therefore, while deciding this appeal, we did not have the assistance of either the respondent nor his learned counsel.

8. The learned counsel for the appellant would contend, that, the appellant is financially sound as she has a flourishing garment business and is residing in a joint family. Presently Anagh is being looked after by the appellant's family, and she is studying in a well known public school and is leading a happy life. The counsel would further contend, that, the respondent has meager income of Rs. 5,500 p.m. and will not be able to take good care of Anagh. It is further submitted that the respondent's mother is not well and also his father is suffering from High Blood Pressure and Asthama and they will also not be in a position to help the respondent to take care of the daily needs of the minor child. The counsel would further contend that respondent and any of his family members or relative, after

passing of the impugned order till date never contacted the appellant to enquire about the welfare of Anagh. It is further submitted that the respondent has lost interest not only in the case but also in his daughter, since he has contracted second marriage sometime during the year 2007.

9. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child/Anagh to the respondent.

10. Under the Guardian and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law (See *Sumedha Nagpal v. State of Delhi*, (2000) 9 SCC 745).

11. In the case of *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840, this Court has observed that, the principle on which the Court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors. This Court considering the welfare of the child also stated that, the children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children have, 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."

12. In *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr.* (AIR 1987 SC 3), this Court has observed that whenever a question arises before Court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of

A the child.

13. At this stage, it may be useful to refer to the decision of Madras High Court, to which reference is made by the High Court in the case of Muthuswami Moopanar (AIR 1935 Madras 195), wherein the Court has observed, that, if a minor has for many years from a tender age lived with grand parents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the *banafide* of the petition by the father for their custody.

14. In our view, the observations made by the Madras High Court cannot be taken exception by us. In fact those observations are tailored made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

15. In McGrath (infants), Re (1893) 1 Ch 143: 62 LJ Ch 208 (CA), it was observed that, "... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

16. In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that an application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient

judgment.”

17. In *Walker v. Walker & Harrison*, 1981 New Ze Recent Law 257, The New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that “welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. *However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.*”

18. Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of this case. In the present case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost only daughter in a tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child.

19. Anagh is staying with the appellant's family and is also studying in one of the reputed school in Indore. It must be stated that the appellant has taken proper care and attention in upbringing of the child, which is one of the important factor to be considered for the welfare of the child. Anagh is with the

- A appellant right from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that appellant, even after her husband's demise, is financially sound as she runs her own independent business.
- B

20. On the other hand, considering the evidence of the respondent, it seems to us that since he has borrowed money from several persons and since he has a meager income he may not be in a position to give comfortable living for the child

- C In spite of notices issued to him, he has not appeared before the Court personally or through his counsel which shows his lack of concern in the matter. It is also brought to our notice that he has got married for the second time and has a child too, and the minor child might have to be in the care of step mother,
- D specially the father being a businessman, he has to be out of the house frequently on account of his business.

21. Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child.

22. In view of the above discussion, we allow this appeal and set aside the impugned order. We permit the appellant to have the custody of the child till she attains the age of majority. No order as to costs.
- G

B.B.B.

Appeal allowed.