

Reserved

Court No. - 24

Case :- FIRST APPEAL FROM ORDER DEFECTIVE No. - 1072 of 2012

Appellant :- Poonam Gahlaut

Respondent :- Col. Sandeep Nain

Counsel for Appellant :- V.K.Shahi

Counsel for Respondent :- Arvind Kumar, Bhupendra Mishra, Nishant Shukla

Hon'ble Rajiv Sharma, J.

Hon'ble Zaki Ullah Khan, J.

(Delivered by Hon'ble Mr. Justice Zaki Ullah Khan)

1. The appellant has preferred the instant appeal against the judgement and order dated 14.9.2014 passed by Principal Judge, Family Court, Lucknow, allowing the application of the respondent under Section 25 Guardians and Wards Act, 1890 directing the appellant to handover custody of both the children to him.

2. Brief facts giving rise to the appeal are that appellant and respondent married on 3.3.1996 as per Hindu rites and traditions at Rohtak, Haryana, and out of their wedlock two children were born. The first child is Miss. Roop, her date of birth being 11.01.1997 and the second child Master Param, his date of birth being 16.7.2002. The respondent filed a petition under Section 13 of the Hindu Marriage Act before the Additional District Judge, Haryana for dissolution of marriage. The appellant without any permission deserted the company of respondent and moved away along with the children. She left her marital home on 10.8.2006 and did not return despite several requests made by the respondent. The respondent-applicant being the natural guardian, i.e. father, moved a petition for having the custody of the children before the Principal Judge, Family Court on the ground of welfare and for good upbringing of the children. The appellant-opposite party moved an application for maintenance before the G.O.C., Central

Command, Lucknow on 16.8.2006 for maintenance and the authorities were pleased to direct to pay the maintenance of Rs.8000/- per month on her application. The appellant-opposite party since was of flickering attitude and by nature short tempered did not adhere to the advice of respondent-applicant for a job in army school, and despite his best efforts left the service of teaching without any plausible explanation on the ground that teaching profession is against her mental aptitude and by nature exhaustive. Apart from other grounds respondent in his petition before the Family Court alleged that the appellant-respondent is under depression and is not capable of handling the custody of children and more interested in enjoying the company of male persons. She has shown special interest in neighbour whom she subsequently married.

3. The Principal Judge, Family Court, after evaluating the comparative status and looking into the welfare of the children allowed the application mainly adjudging the position and status of the respondent-applicant. It was held that he is equipped with all the facilities being Lt. Colonel in Indian Army and can look after the welfare of the children in a more adequate manner. The girl child is mature and likely to be married in near future and the respondent is capable of looking after the children welfare being their natural father. Aggrieved by the aforesaid order, the instant appeal has been preferred assailing the judgement and order dated 14.9.2012 passed in favour of the respondent.

4. Heard learned Counsel for the appellant, learned Counsel for the respondent and perused the record.

5. The Court also summoned appellant Poonam Gahlaut, who has stated before the Court on 19.2.2013 that at present she is residing with her second husband Sri Sanjay Jain along with both the children. The court with the consent of the parties directed that the case be listed before the Mediation & Conciliation Centre on 27.2.2013. On the intervening date i.e. 18.3.2013, while admitting the appeal, which was earlier

defective, with a view to safeguard the interest of the children and for building their future career, this Court directed that both the children be admitted in a Boarding School where they can get congenial atmosphere for studies, but the appellant opposed it and the case was listed again.

6. Learned counsel for the respondent, however, informed the Court during hearing of the appeal that the girl child has been admitted in the Army Law School and she will be attaining 18 years of age in coming January i.e. after about six months, therefore, there is hardly any dispute of custody of child because when she will attain the age of majority, she will be at liberty to take decision of her own for future life. Both the Counsel agreed that custody is now regarding Master Param who is still too young. Both the Counsel informed that mediation between the parties has failed and it is not possible to have any settlement regarding custody of Master Param. During the arguments, learned Counsel for the appellant has also informed that though the appellant had earlier married with Sri Sanjai Jain but she has now separated and now has no connection with him and is living alone.

7. Perused Section 7 of the Guardian and Wards Act, 1890, which is reproduced herein below :

7. Power of the Court to make order as to guardianship :-

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made -

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this Section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

8. There is no dispute regarding the fact that the parties are mother and father of the children respectively, therefore, there is no question to appoint guardian from outside, as both are claiming custody.

9. In the case of **Goverdhan Lal v. Gajendra Kumar**, reported in AIR 2002 Raj. 148, in which, it has been held that father being a natural guardian of a minor child has a preferential right to claim custody of his son. However, the paramount consideration is the welfare of the minor and not the legal right of a particular party.

10. Welfare of the minor child is of paramount consideration in the appointment of a guardian. The term guardian has to be taken in its widest possible sense. It has to be measured not only in terms of money and physical comfort but also should include moral and ethical welfare of the child. Welfare of the child depends on facts and circumstances of each particular case. The Court may even go against express willingness of the child. Even if minor children to stay with either parent or grandparent it is the duty of the Court to scrutinized the interest of welfare of minor child. The term custody should not be interpreted in its strict sense as physical custody. Custody means custody in the sense of supervision and control over the child. The father's right to the custody of his minor child is no longer absolute, it is circumscribed by the consideration of the welfare of the minor. The legal right or financial affluence is not decisive but the welfare of the minor which is decisive for the claim of custody. In case of dispute between natural guardian i.e. parents, the Court is expected to strike a just and proper balance between the requirements of welfare of the minor child

and the rights of the parents over the minor child. The Court should also take into account the preference of the minor child to stay with either parent or grandparent if he is old enough to form an opinion. The claim for custody of a child by any person should be for bona fide reasons, i.e, out of genuine love and affection for a healthy upbringing of the child in a congenial atmosphere. The only consideration of the Court should be welfare of the child.

11. Therefore, this Court has to scrutinize regarding the welfare of the child. The paramount consideration of the Court is to handover the child in the custody of the mother or the father, who is not only competent, but who can look the child with care and responsibility.

12. We have gone through the record and findings recorded by learned lower court. The first and foremost question here is that status and future prospect of the parties. The respondent is a person who is capable of discharging the responsibility and can take care of the child in a more ethical and moral manner. Being a Colonel in the army, he has got sufficient means to take care for the upbringing of the child. Although the financial status is not the sole criteria but what is most important is moral and ethical teaching. The status of the appellant is of a divorcee lady who has consummated the second marriage with a person she had previous acquaintance even during subsistence of the first marriage. The second husband is admittedly a neighbour and before the trial court the respondent has shown the call details of mobile phone she used to converse with the second husband even before divorce, and maintained long conversation. She was seen in the company of the second husband without seeking divorce. During the arguments, learned Counsel for the appellant further added a feather in her cap that now at the most she has also got rid of the second husband and is living alone. This shows frickle mindedness of the appellant and also indicates that she cannot keep company of a person for a long period, what to say throughout her life ? Even if it is presumed

that respondent is an indecent man and treated the appellant with cruelty, then what occasioned her to leave the second husband ? That means she herself is not certain as to how to live and behave with husband.

13. Under these circumstances, it is very apparent that what impression one can gather from her attitude. She is in the habit of changing husband like shedding her cloth. The flickering attitude of her may cause adverse moral and ethical impression on the minds of young children, and especially the girl child, who can follow her steps which will be a problem for her father.

14. The arguments raised by the learned Counsel for the appellant that she can take care of the children and will guard them well and look after their welfare in a better manner than that of her previous husband does not appeal us. We are of the opinion that there is no force in the arguments raised on her behalf that she will prove to be dutiful mother. On the contrary her attitude towards love is not positive for upbringing of the young children.

15. We are, therefore, of the opinion that learned lower court has rightly held that custody be handed over to the respondent instead of the appellant because the court has to observe the family welfare of the young children. The appellant was having a second husband i.e. step father and thus, cannot take care of the children in a better manner in comparison to the natural father. Over and above, now she has also separated from the second husband as per the statement advanced by the learned counsel for the appellant. Therefore, no trust can be imposed on her and her bona fide do not appear to be above board.

16. Under these circumstances, we do not find any merit in the appeal. The appeal is devoid of merit and is dismissed.

No order as to costs.

Order Date :- 15.07.2014

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