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Tarun Pullani vs.shilpa Pullani

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Court : Delhi

Decided On : Aug-27-2018

Appellant : Tarun Pullani

Respondent : Shilpa Pullani

Judgement :

$~53 * % IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Judgment:

27. h August, 2018 + MAT.APP.(F.C.) 217/2018 TARUN PULLANI ..... Appellant Through: Mr. Chirag Babbar, Adv versus SHILPA PULLANI ..... Respondent CORAM: Through: Ms Anjali Sharma, Adv HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL G.S.SISTANI, J.

(ORAL) CM No.34437/2018 (exemption) The exemption is allowed subject to all just exceptions. The application stands disposed of. MAT.APP.(F.C.) 217/2018 1. This is an appeal under Section 19 of the Family Court Act against the order dated 07.06.2018 and order dated 23.07.2018 seeks review passed by the family court. The appellant is aggrieved by the interim order vide which the custody of the minor girl child (4 years old) born on 16.09.2014 has been handed over to the mother. MAT APP (FC) 217/2018 Page 1 of 9 2. The learned counsel for the appellant submits that the Family Court has failed to take into account the fact that the respondent is not physically and mentally fit to look after the child. It is submitted that the respondent is mentally sick and sometimes behaves in an abnormal manner. It is further submitted that the violent behavior of the respondent may

have an adverse impact on the well being of the child. Additionally, learned counsel for the appellant contends that the mother had left the matrimonial home on 12.09.2016 and thereafter did not bother about her daughter.

3. We have heard the learned counsel for the appellant and carefully examined the order dated 07.06.2018 passed by the Family Court and the order dated 23.07.2018 passed in the review petition.

4. In this case, the marriage between the parties was solemnized on 12.12.2013. A girl child was born from this wedlock on 16.09.2014. As per the submissions made, the parties separated on 12.09.2016 when the child was with the father. Allegations and counter allegations have been made. According to the appellant, the mother is not a fit person to look after the minor as she suffers from a psychological problem and she is under treatment. Copy of the prescription has been annexed with the appeal. It is also contended MAT APP (FC) 217/2018 Page 2 of 9 that the wife behaves in a violent manner and thus is unfit to look after the child. The order shows that the wife has alleged that the husband is a habitual drunkard and uses abusive language. She has also alleged that she was often beaten by her husband and she was forced to call the police on 25.05.2015 when she was thrown out of the matrimonial home. Reading of the impugned order would show that the Family Court has carefully analyzed the submissions made. The Family Court has taken into account that the respondent/wife is a B.Com. and has a qualification in Computer Applications. She is working as a senior manager with a private firm, has a monthly income of Rs.25,000/- per month. Family Court has also assessed the income of the husband which is almost the same. The Family Court has correctly taken note of Section 6 of the Hindu Minority and Guardianship Act (HMG), 1956, which we reproduce below wherein it has been provided that custody of a minor who has not completed the age of five year shall ordinarily be with the mother. Section 6 reads as follows:-

"6. Natural guardians of a Hindu minor.-The natural guardian of a Hindu minor, in respect of the minors person as well as in respect of the minors property (excluding his or her undivided interest in joint family property), are- MAT APP (FC) 217/2018 Page 3 of 9 5. (a) in the case of a boy or an unmarried girl-the

father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; (b) in case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father; (c) in the case of a married girl-the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section- (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.-In this section, the expression father and mother do not include a step-father and a step-mother. [emphasis added]. The Honble Supreme Court in Gaytri Bajaj vs. Jiten Bhalla, (2012) 12 SCC471 categorically held that while dealing with an application for custody of a minor child, the interest and welfare of the minor should be of paramount importance. The conducive and appropriate environment along with the desirability of the child are some of the relevant factors that have to be kept in mind while deciding the custody of the child. The Court while explaining the importance of the abovementioned factor held in paragraph 12- 14 as under:-

"12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal MAT APP (FC) 217/2018 Page 4 of 9 2009 (1) SCC142 the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved AIR1941(Bom.) 103; Rosy Jacob v. Jacob A Chakramakkal (1973) 1 SCC840and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka (1982) 2 SCC544this Court eventually concluded in paragraph 50 and 51 that: (Gaurav Nagpal case, SCC p.57) 50. [T].hat when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical

comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases. 13. The views expressed in Para 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC673 would require special notice. In the said case it has been held that it is the welfare and interest of the child and MAT APP (FC) 217/2018 Page 5 of 9 not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree, (2006) 3 SCC62would also require a special mention., 14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court. 6. In Roxann Sharma Vs. Arun Sharma , (2015) 8 SCC318,the Supreme Court held as under:-

"5. We shall consider the import and amplitude of the legal concept of Guardianship on first principles. Black Law Dictionary 5th Edition contains a definition of Guardianship which commends itself to us. It states that- "A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing MAT APP (FC) 217/2018 Page 6 of 9 the property and rights of another person, who, for defect of age, understanding, or self control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate or both, of a child during its minority". Thereafter there are as many twelve classifications of a guardian but we shall reproduce only one of them, which reads-"a general guardian is one who has the general care and control of the person and estate of his ward; while a special guardian is one who has special or limited powers and duties with respect to his ward, e.g., a guardian who has the custody of the estate but not of the person, or vice versa, or a guardian ad litem". Black's Law Dictionary also defines 'Custody' as the care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. .

12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not MAT APP (FC) 217/2018 Page 7 of 9 disqualify the mother to custody of the child even after the latter's crossing the age of five years.

7. The Family Court has rightly placed reliance upon the recent judgment of the this court in W.P. (CRL) 357/2018 titled as Kiran Lohia vs. The State Govt. of Nct of Delhi & Ors., observed as follows:-

"44.A perusal of Section 6(a) of the HMG Act shows that the legislature has considered it appropriate, that in respect of a minor child, who has not completed the age of five years, the custody should normally be with the mother. The reason for the same is not difficult to fathom. The reason, simply put, is that normally, a mother is biologically and psychologically attuned to look after and protect the child. It comes naturally to the mother to be sensitive to the needs of the minor child - be it food, hygiene, clothing, comfort and protection. This is not to say that the father of a minor child cannot have the same level of concern or sensitivity. 8. The law is clear that in case of the custody, the willingness and the interest of the child is of the utmost importance. The child in this case is a four years old. It has been established fact that the child is comfortable around the respondent and recognized the respondent as her mother.

9. Furthermore, a bare reading of Section 6 (a) of the HMG explicitly states that the custody in case of the minor child, below the age of five years vests with the mother and this case is no exception. The question MAT APP (FC) 217/2018 Page 8 of 9 of custody can be reconsidered in case, where the father is able to disclose any cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised, if the custody is retained by the mother. Moreover, the appellant has failed to convince this court that the mother is not fit to retain custody of the child.

10. Additionally, the reasoning so adduced by the Family Court is that in case of a girl, a mother is in a better position to look after her as she would require special attention and guidance during her childhood and also be able to look after her psychological and biological needs.

11. We do not find any infirmity in the reasoning or orders passed by the Family Court.

12. Resultantly, we find no ground to interfere with the orders passed by the Family Court. The appeal is dismissed. G.S.SISTANI, J.

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