

Awadhoot Vs. Mohini

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Court : Madhya Pradesh

Decided On : Nov-17-1994

Reported in : I(1995)DMC621

Judge : J.G. Chitre, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 26

Appeal No. : Civil Revision No. 1091 of 1994

Appellant : Awadhoot

Respondent : Mohini

Advocate for Def. : D.M. Kulkarni, Adv.

Advocate for Pet/Ap. : B.M. Rege, Adv.

Judgement :

J.G. Chitre, J.

1. He filed an application for divorce against the non-applicant which was registered as Case No. 534/1991. The parties have one son who at the date of the presentation of the application was very young and this boy Gaurang is now aged about 7-8 years. The non-applicant has been living separately and keeping the child with her since about 1988 and during this period since then the applicant has

not been permitted to visit or meet his son. The applicant was avoided then that he had no right to custody of the child until attaining of the age of over six years by the child and in order not to exasperate the already tense feeling between the parties did not seek custody. His attempts to visit his son or meet him were frustrated by the non-applicant, who even instructed the Principal of the School where Gaurang was entered not to permit the applicant to meet the child. Ultimately the applicant moved an application to the Court Under Section 25 of the H.M. Act for custody of his male child on the ground that apart from being legal guardian of his child and entitled to custody as such he was in a such better position to bring up the child and give him better education inasmuch as he was financially very well placed. The application was resisted by the non-resisted applicant on the ground inter alia that the application had been considered the impugned order.

2. Section 28 of the Hindu Marriage Act 1955 (hereinafter referred to as Act) provides :

'Spouse not heard of for seven years : Under this Sub-clause if one spouse has not been heard of as being alive for a period of 7 years or more by those persons who would have naturally heard of it, had that party been alive, the other spouse is given a right to obtain divorce. Thus, clause is based of the rule of evidence contained in Sections 107 and 108 of the Indian Evidence Act.'

Section 26 of the Act reads :

'This clause states that if the respondent has been suffering from venereal disease in a communicable form a decree of divorce can be granted. Prior to the amendment in 1976, it was necessary to prove that the respondent has been suffering from that diseased for a period of not less than 3 years immediately preceding the presentation of the petition. The period fixed in the old section is now deleted and it is now sufficient if one proves that the respondent has been suffering from the disease on the date of the petition.'

3. Both the learned counsel admitted that the matrimonial petition has not been decided finally by the Court. The final order would be passed only after the

matrimonial petition stands decided, in respect of custody of the child of the spouses who are parties to the matrimonial petition. Therefore, this petition is maintainable. The objection on behalf of the non-applicant in this context is hereby dismissed.

4. While deciding the custody of children pending the decision of matrimonial petition, the Court has to be circumspective and has to consider the human feelings, emotions and most importantly the welfare of the child who is the subject matter of the claim for the custody. He is not the commodity. His tender mind has to be considered and his welfare should be given paramount consideration. The spouses engaged in matrimonial petition are both coming from better level of the society and both are serving in Government and semi-Government offices. Both are educated and are able to take proper care of the child. Child Gaurang is aged about 7 years. Keeping in view his tender age, he cannot be separated for a longer period from the mother till he is able to take care of himself. However, his father cannot be refused a permission to meet him, keeping in view the affection of a father towards the son. Both the learned Counsel have agreed that the petitioner should be permitted to meet the child Gaurang on holidays of every month.

5. Shri D.M. Kulkarni has generously accepted to be the host in this context. He is ready to permit the petitioner to meet his son Gaurang on every Sunday of every month between 10 00 a.m. to 2.00 noon. The petitioner is permitted to give some dresses to his son under supervision of Shri D.M. Kulkarni, Advocate. Shri Kulkarni has expressed his readiness to give expenses at his expenses, to Gaurang which is a matter deserving compliments. Both the Counsel expect for an amicable settlement. The petition stands disposed of C.C. today.