

Suchitra Chhotray Vs. Prajeev Kumar Chhotray and anr.

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Court : Orissa

Decided On : Nov-11-1994

Reported in : I(1995)DMC617

Judge : A. Pasayat and ;B.N. Dash, J.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 6

Appeal No. : O.J.C. No. 6636 of 1994

Appellant : Suchitra Chhotray

Respondent : Prajeev Kumar Chhotray and anr.

Advocate for Def. : R.K. Mohapatra and ;B. Routray, Addl. Government Adv.

Advocate for Pet/Ap. : D. Nayak, ;B. Swain, ;D.P. Pradhan and ;J. Pal, Adv.

Judgement :

A. Pasayat, J.

1. Challenge in this application is to the order dated 20.9.1994, passed by learned Judge Family Court, Cuttack in Civil Proceeding No. 178 of 1994, refusing prayer of the present petitioner to advance the date, and to pass an order relating to custody of the child. Learned Judge, Family Court did not accept the prayer to advance the date, because originally the case was posted to 23.11.1994 with the

following reasons and observations :

'The mother of the child is present today, she says that the child was under her and her husband's custody in Bombay in May until 12th June, 1994. Now the child is not with her mother. Due to disputes the young couple are living separately. The lady is Arts Graduate from Utkal University of 1986, and her husband is a Graduate and now working as Regional Sales Manager, Ramington, Cuttack. The petition of the lady opposite party filed today for advancing the case and to pass necessary orders is of not so urgent in nature in view of multiplicity of proceedings in various forums in between the parties.....

To say the least, the order is absolutely confusing and does not convey any sense. Undisputed position is that the child is less than five years of age, and in view of the statutory prescription under the provisions of Clause (a) of Section 6 of the [Hindu Minority and Guardianship Act, 1956](#) (in short, the 'Act'), custody of such a child should be with that of the mother Petitioner, who is the mother, prayed for a direction that the custody of the child is to be given to her. It is also stated that learned Judge, Family Court has no jurisdiction to entertain the petition filed by the present opposite party. Further the impugned order was passed even after this Court in Criminal Misc. Case No. 1861 of 1994 did not interfere with the search warrant issued by learned Chief Judicial Magistrate, Bhubaneswar for production of the child before him. According to Mr. Mohapatra appearing for opposite party No. 1, however, the age of the child is not the only consideration. Paramount consideration is welfare of the child. He relied on a decision of the Kerala High Court in Vasudevan v. R. Viswalakshmi: AIR 1959 Kerala 403. He submitted that for last about three months the child is with the father and the custody should be with him.

2. There is no dispute about the normal rule that a child below five years of age has to be in the custody of the mother. But there may be circumstances for justifying a departure. The person who asserts that departure is warranted has to establish it. Welfare of the child has to be taken into consideration by the Court. But there is no substance in the plea of Mr. Mohapatra that because the child is with the father for last about three months the custody should be with him. In the

Kerala case, on the facts the Court held that conduct of mother showed that she was not interested in the welfare of the child and did not even enquire about welfare of the child for nearly one year. The fact situation is different here. Learned Judge, Family Court has not considered these aspects and has disposed of the matter in a perfunctory manner. He has not considered the effect of Clause (a) of Section 6 of the Act. No material appears to have been placed before him for warranting a departure from the normal rule.

3. In the fitness of this is, therefore, the matter should be heard afresh by the learned Judge, Family Court. It appears that the case has been posted to 23.11.1994. Keeping in view the fact that the child is below five years, and dispute is about its custody, we direct that the matter be taken up on 15.11.1994. Learned Judge, Family Court shall consider the question whether proceeding is maintainable and also shall pass appropriate order relating to interim custody of the child, pending disposal of the main proceeding. The learned Counsel for parties agree that the interim custody matter is to be taken up first, question relating to jurisdiction shall be taken up while taking up the main proceeding, and the passing of order in interim custody matter should not be construed to be expression of opinion about maintainability of the proceeding.

4. In fights over custody, it is ultimately the child which is the worst sufferer. Because of differences of opinion and incompatibility of the parents, normally it is deprived of love of one of them. Even though, welfare of the child is kept in view, and custody is given to one, loss of company of the other has undeniable social and psychological impact Court, therefore, has to impose conditions so that for some time, unable it with the father or mother to whom custody is denied. In the instant case, if learned Judge, Family Court decides that mother (present petitioner) is to have interim custody, he shall fix at least three days on which father (present opposite party No. 1) shall have company of the child for period about two hours of each date fixed, at a place of choice of the father, preferably, at Cuttack or Bhubaneswar. Other appropriate conditions may be fixed by the learned Judge, Family Court.

5. The parties shall appear before the learned Judge, Family Court, Cuttack on 15.11.1994 without any further notice. They have agreed not to seek adjournments, so that interim custody can be decided forthwith by the learned Judge, Family Court. He is directed to decided forthwith by 16.11.1994 in accordance with law. We have not expressed any opinion on merits.

The writ application is disposed of.

Copies of this order be handed over to learned Counsel for petitioner and opposite party No. 1. A copy of this order also be sent to the learned Judge, Family Court, Cuttack for necessary action at his end.

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