

Avinash Devi Vs. Khazan Singh Aneja

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Court : Punjab and Haryana

Decided On : Jan-07-1960

Reported in : AIR1960P& H326

Judge : A.N. Grover, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 10 and 26; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6; [Guardians and Wards Act, 1890](#)

Appeal No. : First Appeal No. 13-D of 1958

Appellant : Avinash Devi

Respondent : Khazan Singh Aneja

Judgement :

(1) This appellant was married to the respondent in November, 1950. In January 1952 a daughter who was named Neeta was born to her. The respondent who is a medical practitioner was practicing in Delhi till May 1953. He then joined the service of the Himachal Pradesh Government and was posted at Dhami. The relations between the two spouses became quite strained, the apparent reason which is suggested being that the respondent started paying special attention to a hill girl of the name of Laj. It may be mentioned that the respondent actually married this girl at Simla in April 1954 and took her with him to Chini to which place he had been transferred. According to the learned District Judge the matter was kept a secret from the appellant who was informed of it by a letter in the

month of June 1954. The respondent wrote to the appellant saying that he had remarried and asking her to remarry if she wanted to. The appellant had come away to Delhi in January 1954 along with her daughter Neeta and started living with the parents of the respondent. According to her she was not treated properly and was later on turned out. In January 1955 she found employment as a teacher in a local school. On 18-7-1956 a petition under S. 10 of the Hindu Marriage Act was instituted by the appellant for Judicial separation on various allegations which it is not necessary to mention.

(2) The learned District Judge came to the conclusion that since the year 1953 the respondent had treated the appellant with what he called legal cruelty. He also found that she had been sent down to Delhi by the husband in January 1954 and had been deserted thereafter. A decree for judicial separation was, therefore, granted. He further made certain orders with regard to the maintenance of the appellant and the child as also about the custody of the child and the present appeal is directed mainly against that part of the order.

(3) Mr. B. C. Misra, the learned counsel for the appellant contends that the order of the learned District Judge that the child should remain in the custody of the mother till she is about 7 years of age and thereafter it would be open to either party to seek the directions of the Court with regard to her custody was not a proper order in the circumstances of the case. It is submitted that the mother should have been given the custody of the child and no such limit should have been put with regard to the period during which the custody would remain with her. It is pointed out that actually in view of the order of the learned District Judge a petition is already pending in the District Court which has been filed by the respondent praying for custody of the child.

The learned counsel for the respondent, however, contends that the father is the natural guardian of the child and according to the relevant provisions contained in the [Hindu Minority and Guardianship Act, 1956](#), read with the [Guardians and Wards Act, 1890](#), the custody of the child must be with the father. It is further submitted that even if the Court has a discretion in the matter, it will be more in the interest of the child if she stays with the father. Reliance has been placed by the

learned counsel for the respondent on the provisions of S. 6 of the Act 1956 by which it is provided that the natural guardians of a Hindu minor, in respect of his person as well as his property, would be 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.

There is also a proviso to the effect that no person shall be entitled to Act as the natural guardian of a minor if he has ceased to be a Hindu or if he has completely and finally renounced the world by becoming a hermit. As regards S. 13 it is contended that sub-section (1) which provides for the appointment or declaration of a guardian cannot relate to natural guardians because there is no question of appointment or declaration in their case. Sub-section (2), however, which lays down that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor, is sought to be explained by the learned counsel for the respondent by saying that this has to be read in continuation of sub-section (1) and refers to the appointment or declaration of any person as a guardian as mentioned in sub-section (1).

It is further submitted that under S. 2 of the Act of 1956 its provisions are in addition to and not, save as otherwise expressly provided, in derogation of the Act of 1890. The provisions of the Act 1890 have thus to be looked at and it is urged that it is only S. 19 of the earlier Act which lays down that the father is not to be appointed a guardian if in the opinion of the Court he is unfit to Act as such. In other words, according to the learned counsel for the respondent the father if he is alive must be appointed a guardian and must be given the custody of the minor unless the Court finds that he is unfit in any manner to be a guardian or to be entitled to the minor's custody. The argument raised on behalf of the respondent is wholly devoid of force. In the first place what has to be considered in the present case is not so much what the provisions of the aforesaid enactment's are but S. 26 of the Hindu Marriage Act 1955. The jurisdiction which the District Court was exercising was under the Hindu Marriage Act and not under any other Act, and, therefore, the substantive provisions which has been looked at is S. 26 which runs

as follows:

'In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible.'

x x x x x x x x'

The aforesaid section gives a complete discretion to the Court to make such orders as it may deem just and proper and whenever a marriage is dissolved or an order for judicial separation is made it becomes the duty of the Court to take into consideration the welfare of the children which is of paramount importance as owing to the natural conflict and controversy between the parents it often, becomes difficult to apply any other test for deciding as to who should have the custody.

Even under the Act of 1890 there is a large volume of authority for holding that it is the welfare of the minor that is of paramount importance and even if a view prevailed at a certain time that irrespective of every consideration the father is entitled to the guardianship and custody of the minor, it should be considered to be outmoded and should be treated only as a matter of ancient history. When cases came up before the Courts in which the question of custody was raised it has consistently been laid down that in deciding the question of custody the welfare of the minor is the paramount factor for consideration and the fact that the father is the natural guardian would not ipso facto entitle him to custody. See in this connection *Manjit Singh v. Bakhshish Singh*, AIR 1952 Punj 129, *Maya Devi v. Amolak Ram* (1956) 58 Pun LR 557, *Samuel Stephen Richard v. Stella Richard*, AIR 1955 Mad 451, *Munibai v. Dhanush*, AIR 1959 Bom 243 and *Baddi Reddi Buliraju v. Kedam Surya Rajasthan*, AIR 1959 Andh Pra 670.

Section 13 of the Act of 1956 puts the matter beyond all doubt even when the question of guardianship of the minor arises. Sub-section (2) employs language which is general and according to its provisions no person shall be entitled to the guardianship if the Court is of the opinion that it will not be for the welfare of the

minor to appoint such person as a guardian. Even if the matter were to be considered under the Act 1956 and the Act of 1890, the consideration that must prevail with the Court in a matter of custody of a minor is the one of welfare of the minor. Under the Hindu Marriage Act 1955, there can be no doubt that that would be the only consideration and that no other consideration shall prevail with the Court.

(4) It has now to be seen what would be in the welfare of the minor in this case so far as the question of custody is concerned. The father has remarried and he has got children from his second wife. He is employed in Himachal Pradesh and is stated to be tuberculosis specialist. He is not likely to have that much attachment and affection for this child as the mother would have because for the mother it is this child alone who will be the center of her affection and love. There are also the findings of the learned District Judge that the father had been guilty of legal cruelty and desertion so far as the mother is concerned. Furthermore there is nothing to indicate that he has shown any particular attachment towards the child or has taken any special interest in her even since the child came to live in Delhi in the year 1954 with her mother.

The mother is a school mistress and she is earning a fair amount of salary herself in Delhi. The child has been put in a school here and is being properly educated. Taking all these factors into consideration there can be no doubt that for the time being the custody of the child must remain with the mother. Courts have in such circumstances allowed the custody of the minor female to remain with the mother without any limitation as to time when the matter might be reviewed. This was done in AIR 1955 Mad 451. In AIR 1959 Bom 243, it has been observed that in a proper case the Court can appoint the mother as a guardian and the Court should not ignore that the father after separation has remarried and that there was a probability of the child being neglected by the step-mother and the family.

In AIR 1959 Andh Pra 670 also the custody was given to the mother in preference to the father who had married a second wife and had three children. It is true that it cannot be laid down as a general rule that whenever a father has a second wife the custody of the minor child from the first wife should not remain with the father

but then each case has to be considered on its own facts and I have no doubt that for the time being there should be no question of handing over the custody of the child to the father. Before the learned District Judge a proposal was made that the child might be put in some residential institution of repute where both the mother and the father and the grandparents of the child could have easy access to her. That proposal appears to be a sound one but the child is only 7 years' old at the moment and is too young for being put in such an institution. This matter may be considered when the child attains the age of 11 years if either party moves the District Court for that purpose when the question of her custody can also be reviewed and re-examined by that Court.

(5) The learned District Judge has made certain directions with regard to the parents of the respondent and the respondent himself being allowed to meet the child. The learned counsel for the appellant has pointed out that pursuant to that arrangement they have been allowed to meet the child but there has been a lot of bickering and certain applications have been made in the District Court in that behalf. The conduct of the parties in this matter does not deserve any commendation. On the contrary it must be strongly deprecated. It will be in the interest of the child if the parties as well as the parties of the respondent take a more practical view of the situation and do not allow the mind of the child to be influenced by their mutual bickerings.

It is agreed before me by the appellant as well as the learned counsel for the respondent and the father of the respondent who is present in Court that the child may be brought to a Dharmshala known as 'Ramrup Dharmshala' in Subzi Mandi once a fortnight on alternate Sundays from 3 to 5 P.M. in winter and 4 to 6 p.m. in summer. Moreover if there is a festive occasion in the family of the respondent like a wedding etc, the appellant on invitation will take the child herself to attend the function. This arrangement, of course, is subject to such change and modification as the circumstances may require under orders to be passed by the District Court.

(6) The next question is about the maintenance which has been allowed to the appellant for herself and for the child. She is getting a salary of about Rs. 140/- per month herself and the learned District Judge has awarded a total amount of Rs.

60/- so that she has an income of about Rs. 200/- for herself and the child. The salary which the respondent was drawing at the time when the order was made by the District Judge was Rs. 250/- basic and Rs. 70/- allowances, in addition to his private practice which was estimated at Rs. 25/- to Rs. 30/- per month. The estimate with regard to his private practice, however, seems to be not quite accurate and possibly he is making more.

It is urged on behalf of the appellant that although the fees in the year 1956 were Rs. 20/-, they are now Rs. 25/- per month and that the amount of Rs. 30/- which was taken into account for the purposes of food etc, of the child was not adequate because the amount required for the books, stationery etc, had not been taken into consideration. In view of the rising cost of living and the fact that the child requires a proper and good diet as also expenses for stationer books, etc., I am of the opinion that total amount of maintenance which the respondent should pay for the time being is Rs. 80/- per moth.

(7) No other point has been urged before me. The appeal is, therefore, allowed only to the extent indicated above and the order of the learned District Judge shall stand accordingly modified. Parties are left to bear their own costs.

CD/K.S.B.

(8) Appeal partly allowed.