

Gopalan Vs. Rajan

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Court : Kerala

Decided On : Sep-28-1994

Reported in : I(1995)DMC175

Judge : M.M. Pareed Pillay and; V.V. Kumar, JJ.

Acts : [Guardians and Wards Act, 1890](#) - Sections 17, 17(3), 17(5) and 25

Appeal No. : M.F.A. 455 of 1994

Appellant : Gopalan

Respondent : Rajan

Advocate for Def. : T.G. Rajendran, Adv.

Advocate for Pet/Ap. : K.M. Stalin, Adv.

Disposition : Appeal allowed

Judgement :

M.M. Pareed Pillay, J.

1. Maternal grand-father of two minor children, Raghul aged five years and Rahana aged three years is the appellant. Respondent who is their father filed the Original Petition under Section 25 of the Guardians and Wards Act for the custody of the minor children from their mother's father. Mother of the minors (wife of the

respondent) committed suicide by consuming poison. She died on 10-12-1990. Respondent issued notice dated 19-10-1992 to the appellant for the custody of the minor children. The Family Judge allowed the Original Petition and directed the appellant to hand over custody of the minors to the respondent.

2. Appellant's contention is that the impugned order cannot be sustained as the Judge obviously overlooked the welfare of the minor children. Respondent examined as P.W. 1 deposed that at the time of his wife's death eldest child was aged 21/2 years. The evidence in the case would show that the minor children were all along with their maternal grand father. It is also the admitted evidence that the eldest child is studying in Government Ganapathi English Medium School and that the second one is admitted in a Nursery School. Though P.W. 1 stated that if the children are allowed to be with the appellant it would adversely affect their future, he could not substantiate it by any cogent evidence. P.W. 1 admitted that his wife died by consuming poison and that he was tried in Sessions Case 132 of 1992 in the Sessions Court, Kozhikode on the allegation that he was responsible for her death. It is also admitted by him that Crl. A. 527 of 1993 which is the appeal against his acquittal by the Sessions Judge, is pending before this Court. Appellant examined as R.W. 1 testified that prior to sending Ext. A-1 notice respondent never cared to enquire about the welfare of his children and he never demanded their custody. His evidence would also show that only after issuing Ext. A-1 notice respondent had sent Rs. 100/- and Rs. 200/- by money orders. The evidence in the case categorically shows that the minor children are residing along with the appellant, their grand-father ever since their mother's death.

3. In a petition under Section 25 of the Guardians and Wards Act, the paramount concern of the Court is nothing but the welfare of the minor children. Court cannot start with a presumption that interest of the minor would always be safe with the legal guardians under all circumstances. Merely on the basis that the respondent who seeks the custody of his children is their legal guardian, Court cannot jump to the conclusion that their welfare would be safe with him. While deciding as to whom the custody of the minor has to be given in a particular case, Court has necessarily to consider mental or emotional feelings of the children, their upbringing and also their tender age. Though father is the natural guardian of the

minor, on that count alone he cannot have any preferential claim. Fact of legal guardianship cannot be decisive in a petition under Section 25 of the Act. Totality of considerations should weigh with the Court while deciding the matter in issue.

4. Both the children were produced before us. They expressed their fervent desire to be with the appellant.

5. Section 17(3) of the Act postulates that if the minor is old enough to form an intelligent preference the Court may consider that preference. Minor's preference can certainly be taken into consideration when the Court is satisfied that they are capable of forming an intelligent preference. Section 17(5) mandates that the Court shall not appoint or declare any person to be a guardian against his will.

6. In *Chandrakala Menon v. Vipin Menon*, (1993) 2 SCC 6 the Supreme Court held that though father is the natural guardian of the minor, question of the custody of the child has to be decided not on the basis of legal rights of the parties but on the sole criterion of interest and welfare of the minor. In *Kirtikumar M. Joshi v. Pradipkumar K. Joshi* (1992) 3 SCC 573 the Supreme Court held that in a case where mother of the minor children had unnatural death and children were living with their maternal uncle and father is facing charge under Section 498-A, welfare of the minor children lies with their maternal uncle. In the case in hand, respondent is facing criminal charge under Section 304-B IPC and CrI.A. 527 of 1993 is pending before this Court. This certainly is a circumstance which has to be taken into consideration for denying the custody of the minors to the respondent. That apart, the minor children expressed their desire to be with their maternal grandfather. As they are intelligent enough to understand their well-being, their preference cannot be ignored.

7. Respondent's evidence is that he had not seen the children after obsequial ceremony of their mother was over. As the evidence in the case shows that the children are well-looked after by their maternal grandfather (appellant), it is indeed cruel to sever them from their present atmosphere and surroundings and give custody to the respondent.

8. Though we see no reason to allow the original petition, we hold that opportunity should be afforded to the respondent to see the minor children on every Saturday or Sunday in the house of the appellant. Appellant shall afford sufficient opportunity to the respondent to do so. In the interest of the minor children it should be stated that the respondent should not create any unruly or disorderly scene in the house of the appellant when he goes there to see the children.

On a consideration of the entire evidence we hold that welfare of the minor children demands rejection of the original petition. The order of the Family Judge is set aside. The Original Petition stands dismissed. M.F.A. is allowed.

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