

Jot Ram Vs. Taru Ram

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Court : Rajasthan

Decided On : Aug-26-1969

Reported in : 1969WLN395

Judge : L.S. Mehta, J.

Appeal No. : S.B. Civil Misc. Appeal No. 1 of 1968

Appellant : Jot Ram

Respondent : Taru Ram

Disposition : Appeal allowed

Judgement :

L.S. Mehta, J.

1. This is a miscellaneous appeal against the order of learned Senior Civil Judge. Ganganagar, dated December 23, 1967, in civil miscellaneous case No. 41 of 1967, by which he ordered that the wards, Mahendra and Kamla, minor children of Taru Ram, be returned to the custody of their natural guardian.

2. The facts of this case can be ranged within a narrow compass. Taru-Ram, it appears, filed an application under Section 25 of the Guardians and Wards Act, 1890, in the court of learned Senior Civil Judge, Ganganagar, on June 2, 1967, alleging that Jot Ram had been forcibly keeping both his minor children, Mahendra

and Kamla, for sometime. The applicant being their natural guardian, the custody of his children should, therefore, be ordered to be delivered to him. The non-applicant Jot Ram submitted a reply, on September 22, 1967, to the effect that the mother of the two children had expired. After the death of their mother Taru Ram contracted a second marriage. The step-mother ill-treated the minors. Taru Ram was under the influence of bad characters and was squandering away the ancestral property to the detriment of the minors' interest. He further stated that Taru-Ram had executed a document Ex. A. 1, dated August 24, 1966, in the presence of the Panchayat by which he agreed to give 21 1/2 Bighas of land to his minor son Mahendra. It was also agreed by Taru Ram that his minor children would be brought up by Mst. Amri, who was the real sister of the minors' deceased mother, vide Ex. A. 2, dated March 6, 1967. It was further stated that Mu. Kalawati, the second wife of Taru Ram, wanted to grab the entire ancestral property. The non-petitioner wanted to bring up the children in their own interest and welfare. He had no personal interest in their property. It was, in the end, prayed that the application filed by Taru Ram should be dismissed.

3. The court below recorded the evidence of the two parties. It also summoned the minors on 20-10-1967 and on an inquiry by the court both the children expressed their desire that they wanted to live with Mst. Amri and not with their real father. In support of his application, Taru Ram, besides himself, examined 3 other witnesses, namely, Rajaram, P.W. 2, Satyanarayan, P.W 3, and Sheokaran, P.W. 4. Jot Ram produced himself as D.W. 1 and examined 5 other witnesses including Ram Pratap, D.W. 6, the maternal uncle of the minors. Eventually the Learned Senior Civil Judge held that the children should be delivered to the custody of their father, who is their natural guardian.

4. Aggrieved against that judgement, Jot Ram has filed this, appeal. Contention of learned Counsel for the appellant is that paramount consideration in a matter like this is the welfare of the children. Since Taru Ram has contracted another marriage and Mst. Kalawati is not treating the children loving and affectionately, the application filed by Taru Ram, under Section 25 of the Guardians and Wards Act, 1890, should have been dismissed and no order should have been passed that the minors should be made over to Taru Ram. Learned Counsel for the

opposite side supported the impugned order of the court below.

5. It is an admitted position that Mst. Kamla has already been married. Under Section 6 of the Hindu Minority and Guardianship Act, 1956, her husband became the lawful guardian of his minor wife. There remains, therefore, no question of the delivery of the custody of Mst. Kamala to the applicant Taru Ram. The only point that needs consideration is whether or not the minor boy, Mahendra, should be removed from the custody of Mst. Amri, wife of Jot Ram, and be returned to Taru Ram.

6. Taru Ram, P.W. 1, admits in his statement that his first wife Mst Badi had died. After her death he contracted second marriage with Mst. Kalawati. He further admits that the two documents Ex. A. 1 and A. 2 bear his thumb impressions. The witness deposes that he being the natural guardian is entitled to the custody of his children. The other witnesses simply make omnibus statements that it is in the interest of the children that they should be returned to their natural guardians, i.e., their father. All the witnesses no doubt admit that the children have been living with their mother's sister, Mst. Amri. These witnesses do not throw sufficient light as to how and in what manner it will be in the interest of the children to live with their father and step-mother, Jot Ram, D.W. 1, on the other hand, says that Taru Ram made a complaint to him that his children had been beaten by his second wife and that the village Panchayat decided that the children should be brought up by his wife Mst. Amri, who is the sister of the minors' deceased mother. A suit has also been filed for the partition of the ancestral property with a view to safeguard the interests of the minors and to prevent alienation of ancestral property by Taru Ram. The witness further adds that the children did not like to live with their father. He has also categorically stated that it is not his intention to grab the minor's property. Ex. A. 1 is a document, dated 24-8-1966, written by Taru Ram in favour of his minor son. A perusal of this document shows that the mother of the children having been dead the father wanted to earmark certain portion of the ancestral land in favour of his son and that the income of that land would be deposited with some reliable firm and the minor would be entitled to get it after his marriage, i.e. after he becomes major. Ex. A. 2 is another declaration made by Taru Ram on March 6, 1967, where in he has stated that 25 Beghas of land has been set apart

for the minor son. It is also mentioned in the deed that Mahendra and Kamla were being brought up by Mst. Amri and they would continue living with her.

7. From the above evidence it is clear that Taru Ram foresaw trouble for the children after contracting second marriage with Mst. Kalawanti. He, therefore arranged that his children should be brought up by his deceased wife's sister Mst. Amri, w/o. Jot Ram. From the statement of Ram Pratap D.W. 6, maternal uncle of the minor, it is further clear that it was for the safety of the minors that they were kept under the custody of Mst. Amri. He has gone to the extent of stating if Amri's guardianship was removed the lives of the minors would be in peril.

8. Section 7 of the Guardians and Wards Act, 1890, deals with the powers of the court to appoint a guardian. Section 17 states matters to be considered by the court in appointing a guardian. Both the sections emphasize that the powers of the court are to be exercised for the welfare of the minors, which should be the paramount consideration in the appointment and declaration of any person as a guardian of a minor. Section 13 of the Hindu Minority and Guardianship Act, 1956, is supplementary to the law relating to the guardians laid down in the Guardians and Wards Act, 1890. The provisions of Section 13 are much more stringent. It reiterates the salutary rule and is evidently intended to emphasise the importance of the welfare of the minor, which is the key-stone of the whole law on the subject. In other words, Section 13, lays down that the primary and the paramount consideration while considering the matter relating to the custody of the minor must be the welfare of the minor.

9. Implication of Ss 17 and 25 of the Guardians and Wards Act, 1890, was considered by a Division Bench of the Bombay High Court in *Saraswatibai Sripad Ved v. Shripad Vasanji Ved* AIR 1941 Bom. 103. In that case Beaumont C.J., observed that the paramount consideration in the matter of custody of the minor is the interest of the child rather than rights of the parents. If the mother is a suitable person to take charge of a child, it is quite impossible to find an adequate substitute for the custody of a child of tender years and consequently in such a case the mother was held preferable to the father as a guardian of the child. There is another judgment reported in *Bhola Nath v. Sharda Devi* AIR 1954 Pat. 489 on

the subject. Hon'ble Ramaswami J. (as he then was) was a party to the decision of that case. There it was observed that under the Hindu Law father was the legal guardian of the minor child. But the most important consideration which must always weigh with the court in making orders for the appointment of a guardian is the welfare of the minor, and in that view of the matter, the legal right of the father must be understood subject to the provisions of Section 17 of the Act. Under Section 17 court should be guided by the sole consideration of the welfare of the minor and what would be for the welfare of the minor, must necessarily depend upon the facts and circumstances of each case. In *Gulam Hussain and Anr. v. Ida and Anr.* AIR 1937 Lah. 481, the father applied for the custody of his daughter, who was under the custody of her mother's sister since her infancy and since the death of her mother. The court held that it was not in the interest of the minor girl that she should be kept in the custody of her father. There is another later judgment, reported in *Bairam Mandal v. Rajani Mandal* in : AIR1964 Pat505 . In that case, it was pointed out that in appointing a guardian for a minor under the Guardians and Wards Act, 1890, interest and welfare of the minor is the first and main consideration and in such consideration the court should have regard to the age, sex and religion. If the mother is not otherwise unfit to be the guardian and by keeping the boy under the guardianship of the father, the step-mother of the boy, who has been ill-treating him, would for all practical purposes be in control of the boy, the mother of the child should be appointed the guardian of the boy in preference to the father as she would be a much better guardian than the step-mother.

10. Here, as provided in Section 6 of the Hindu Minority and Guardianship Act, 1956, father is certainly natural guardian of the boy. The real mother of the boy is dead, the father of the boy has contracted a second marriage, the father himself will go out of the house for his occupation and will have to entrust the actual upbringing and charge of the boy to the step-mother. From the evidence discussed above, there is not the slightest doubt that the boy is not likely to get as much love as he would get from his real mother's sister in the circumstance of this case. The father is of course, entitled to have access to his child. Probably there will be no difficulty in arranging that. If there is some difficulty, he may apply to the court to arrange the circumstances in which he can see his child. In the case in hand, I

think the learned Judge in the court below went wrong in the exercise of his discretion, as he did not appreciate that a paramount consideration in a case of this sort is the interest of the minor. It is for the welfare of the child that he should be brought up by his mother's sister and uncle's wife.

11. There is another important aspect of the matter. Mst. Amri is bringing up the boy Mahendra. It was necessary for Taru Ram to make her a party in accordance with Section 10(1)(d) as she admittedly is having the actual custody of the child. Omission to make her a party is an irregularity vitiating the whole proceeding and order appointing the guardian: vide *Bhai Suchet Singh v. The Collector of Amritsar* 1910 Punj. L.R. 223 without making Mst. Amri a party in the case, no effective order, removing the custody of the child, could have been passed.

12. There is one more aspect of the matter. The boy Mahendra was called by the court below on October 20, 1967, and he was asked whether he would like to live with his father. The boy declined to do so. Mahendra was also called by this Court on September 30, 1968. A question was put to him as to why he did not like to live with his father Taru Ram. The boy told the court that he would not like to live with him as he used to beat him and he was squandering away his property. Sub-section (3) of Section 17 of the Guardians and Wards Act, 1890, runs as follows:

If the minor is old enough to form an intelligent preference, the Court may consider that preference.

It is true that the preference under Sub-section (3) of Section 17 is not the sole factor to be taken into account in adjudging the power custody of a minor. Nevertheless the fact remains that the paramount and dominant consideration is the welfare and interest of the minor, and every other consideration should yield to it. Here I may refer to the pronouncement of their Lordships of the Judicial Committee of the Privy Council in *Mrs. Annie Besant v. G Narayaniah and Anr.* AIR 1914 P.C. 41 Their Lordships remarked that though the father is the natural guardian of his children during their minority, it is the interest of the infant that should be taken into account while considering the question as to who should be the guardian and, consequently, care should be taken to ascertain the wishes of the minor on all material points. To the like effect is the judgment of the Madras

High Court in *G. Ponniah Asari v. Suppiah Asari and Ors.* AIR 1935 Mad. 363. Here the boy has clearly shown his intelligent preference to live with his mother's sister and not with his father as he was not caring for his welfare. His inclination to live with his mother's sister is a significant factor which merits consideration in accordance with Sub-section (3) of Section 17 of the Guardians and Wards Act, 1890, and a conclusion can be arrived at that the boy would be better looked after under the care of his mother's sister.

13. For the above reasons, the appeal, is allowed and the order of the court be low is set aside. No order as to costs.

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