

Doli Banerjee Vs. Prabir Banerjee

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Court : Kolkata

Decided On : Jun-13-1996

Reported in : II(1997)DMC352

Judge : S.R. Misra and ;S. Narayan, JJ.

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

Appeal No. : F.A. No. 330 of 1995

Appellant : Doli Banerjee

Respondent : Prabir Banerjee

Advocate for Def. : Jagjiban Ghosh and ;Rekha Sarkar, Advs.

Advocate for Pet/Ap. : Jahar Chakraborty and ;S. Samanta, Advs.

Disposition : Appeal allowed

Judgement :

S. Narayan, J.

1. This appeal by the mother-appellant is directed against an order dated 21.8.1995 passed under Section 26 of the Hindu Marriage Act by the Second Additional District and Sessions Judge, Barasat in Matrimonial Case No. 31 of 1994 whereby, the husband-petitioner's prayers for custody of a minor son in his

favour was allowed and the mother-respondent was simply permitted to see the son at the residence of the petitioner. The order was passed in presence of both the parties but after hearing only the learned Lawyer for the husband-petitioner. The mother had filed two separate petitions to defer the hearing on the grounds that fresh copy of the application for custody be made over to her and also that it was not possible for her to file petition until and unless the passing of an order on a petition filed by her under Section 24 of the Hindu Marriage Act then pending. Since both these petitions were rejected, no argument could be advanced on behalf of the mother and the prayer of the father-petitioner was heard almost ex-parte but of course in presence of both the sides and was disposed of by the impugned order.

2. The facts giving rise to the present appeal are these. The marriage between the parties was solemnised on 18.6.1984 according to the Hindu rites and customs. A male child was born, now named, Sriman Raja Banerjee out of the said wedlock on 29.5.1985. Though the petitioner belonged to a place situated under Police Station Belghoria, Distt. South 24 Parganas, Calcutta-56, he was working as a librarian in the Central Government School at Namsai, Arunachal Pradesh. The paternal home of the appellant also situated within the Police Station Belghoria, Distt. 24 Parganas, Calcutta-56. There used to occur some differences between the parties but time to time those were amicably settled. Some time in the early part of the year 1992, the appellant alongwith her son, Raja Banerjee had gone to live with her husband i.e. the respondent at Arunachal Pradesh, but there again occurred some difference between them with the result that she (the appellant) wrote some letters to her mother and, thereupon, a complaint case bearing No. C/431/92 under Sections 342/498A and 506 of the I.P.C. was filed by the appellant's mother. A search warrant was issued in the case; and on the strength of that search warrant, the appellant alongwith her son was recovered at Arunachal Pradesh on 29.3.1992 and, thereupon, by the order of the Magistrate, the child, Raja Banerjee was then handed over to the custody of the appellant's mother upon her executing a bond of Rs. 1,000/-. Since, thereafter, the appellant alongwith her son, Raja Banerjee, was living at her parental home with her mother. The appellant filed a case for maintenance for herself and for her minor son under Section 125 of the Cr. P.C. which was numbered as Case No. M/133/92 and there

was an order passed on 29.4.1995 allowing maintenance of Rs. 500/- per month for the appellant and Rs. 400/-per month for the minor son. During the pendency of the case for the main-tenance, the husband-respondent filed a matrimonial suit bearing No. 356/94 before the District Judge at Barasat under Section 13(l)(i)(ia)(ib) of the Hindu Marriage Act, praying for a decree of divorce. The said suit was ultimately transferred to the Additional District Judge at Barasat and has been re-numbered as Matrimonial Suit No. 31 of 1984. In this suit, the husband-respondent filed an application praying for the custody of the minor son and, accordingly, the impugned order was passed in his favour.

3. Though the appellant did not file any written objection to her husband's petition for custody of the child, it was stated to be as such for the simple reason that her prayer for a fresh copy of the said petition was refused. It was also submitted there on her behalf that for want of no order for maintenance then passed under Section 24 of Hindu Marriage Act, it was not possible to file a written objection. In view of this aspect of the case it was, casually proposed before this Court to direct the Trial Court to pass a fresh order after affording opportunity to the appellant to file written objection and upon hearing the learned Counsel on her behalf, but we have preferred to hear both the parties and to dispose of the matter on merits on the basis of the materials, which we have found to be sufficient to take a decision in the matter.

4. It is obvious on the record that the son, Raja Banerjee, who is at present a little above the age of 11 years, has lived all throughout with his mother i.e. the appellant either when she was living alongwith his father or while living at her paternal home. Be it also recorded that he was presently living with her mother and away from his father, ever since the month of March, 1992 when he alongwith his mother was recovered from Arunachal Pradesh on the strength of a search warrant. The prayer for custody was made by the father at a much later stage some time in the month of May, 1994 i.e. after a lapse of more than 2 years of separation from his son.

5. The main thrust of the claim of custody as put-forward by the father was that he, being the natural guardian, was entitled to the custody of the child, who was much

above the age of 5 years. It would be relevant to point out here the settled principle of law that in matters concerning the custody of minor child, the paramount consideration is the welfare of the minor and not the legal right of one or the other party. It may not also be relevant as to whether the father or the mother is liable to be accused to the matrimonial imbalance leading to the dispute as regards custody of the child. The welfare of the child depending upon time factors like physical and mental upkeep and the education of the child is time paramount consideration for a Court to take a decision in the matter. This is time accepted legal proposition as already established by the Apex Court in *Rosy Jacob v. Jacob A . Chakramakkal*, reported in : [1973]3SCR918 , and also followed by a Division Bench of this Court in *Rajkumar Gupta v. Barbara Gupta*, reported in : AIR1989 Cal165 . This being the legal position it is not open for a father-claimant to move for a disfavour to the mother only on the score that the mother was not legal guardian and that she was not entitled to claim custody of her child beyond the age of 5 years. From time impugned order, it would be derived that the Trial Court took a decision in favour of the father for one of time reasons that the father was a natural guardian. In our considered opinion, this alone can't be a valid ground to give custody of a child to the father and to deprive time mother on the said score.

6. What has further weighed with the Trial Court for allowing custody of the son in favour of the father was that the son had been receiving education and medical treatment at the father's place of posting at Arunachal Pradesh. It was quite natural that for some time when the son was living with his parents together at Arunachal Pradesh, he would receive his education and medical treatment there. Now the parents are living separately from each other and so time question which arises on this situation is in a changed context. After a lapse of about two years of the separation it is not open for the father to raise the issue of continuing education or medical treatment of Arunachal Pradesh. The question now is of preference. What is relevant is only this much whether the custody of the minor son would be more beneficial with the father or with the mother.

7. In order to find out an answer to the above question some admitted facts were available on the record, such as that if the son is permitted to live with his father at

Arunachal Pradesh, there would be no female member to take care of him there. Further more, the father submitted in para-9 of his divorce petition that his son, Raja Banerjee, was suffering from Chronic Bronchitis and was being treated by several doctors at Arunachal Pradesh and at Assam where the wife- appellant used to accompany him there and to live in hotels in those places. It is a matter of common knowledge that Arunachal Pradesh has a climate of extreme cold, whereas, Calcutta where the son is presently residing with his mother is better that way because of its tropical climate where the suffering from a disease like, Chronic Bronchitis, is not that prone as it is at Arunachal Pradesh. No where in his petition for custody, the father-respondent has asserted that there was any female member of his family available to live with him at Arunachal Pradesh so as to look after the minor son there or to give company to him during the period when the ppellant will be out on duty in his school. There are schools and also the medical, facilities available at Calcutta, which could be in no way inferior to those available at Arunachal Pradesh. Learned Counsel for the respondent has, of course, urged that the mother-appellant had no means of her own to meet the expenses of education and medical facilities for the son at Calcutta. In this regard, it was noticeable that there was already an order passed by a competent Court towards maintenance of the son in a proceeding under Section 125 of the Cr. P.C. as per which a sum of Rs. 400/- was being paid by the father towards the maintenance of the son. That being as such the incapacity of the mother to maintain the son of her own income is immaterial for the present. Thus, on a comparative view of the matter, one would surely feel inclined that the son can be better looked after while living with his mother. Moreover, it is not only the physical care and the educational facilities of a child which would be the sole criteria for determining his welfare. Taking together with those facilities, there is yet another aspect which matters a lot for a growing child and that relates to the psychological and mental growth of a child. In the instant case, it was deemed necessary by this Court during the course of the argument to record the wish of the minor son inasmuch as he had already attained the age of 11 years. On being asked by this Court, he was very much emphatic to continue living wit h his mother and definitely not with his father and he expressed himself to be happy with his mother. Of course, the wish of a child is not the only decisive factor but it is one of the vital and important

considerations which must weigh with the Court while considering the question of welfare. If a child is in a position to express his wish free from any coercion and if that wish does not run counter to any other vital consideration of welfare, we are of the considered opinion, that such wish must be given an effect to for an overall satisfaction of the child and a healthy growth of mind and body both. Therefore, this appears to be an additional ground to decide the issue of custody in favour of the mother-appellant.

8. Much emphasis was given on behalf of the father-respondent to an event of recovery of the son from Arunachal Pradesh on the basis of a search warrant issued by Criminal Court and, thereupon, giving him in custody of the appellant's mother on her executing a bond. This was an incident happening about more than 2 years prior to the claim of custody put forward by the father. It was on the allegation of the mother-appellant of being tortured at the hand of her husband at Arunachal Pradesh that her mother instituted a case for the offences under Sections 342/498A and 506 of the I.P.C. and, in that course, she was recovered alongwith his son and was permitted to go with her son to her paternal home on executing a bond by her mother. We do not propose to enter into the merits of such allegations because that has little to do with the dispute of custody between the father and the mother. Admittedly, the son was living for the present with his mother and the question remains only whether the welfare of the child can be protected with the custody of his father or of his mother. As to whether the mother of the appellant was entitled to custody on the basis of her executing a bond is not a question to be determined here. So on this score as well, it is not deemed necessary that the custody of the child be shifted from his mother to his father.

9. For the reasons, aforesaid, the impugned order passed by the Trial Court in the matrimonial suit as regards the custody of the minor son does not appear to be sustainable and, accordingly, the same is liable to be set aside. The appeal, therefore, must succeed and, accordingly, we set aside the impugned order and direct that the custody of the minor son would continue with his mother. The father-respondent would, however, be entitled to see the son at the place of residence of the appellant as and when it would be convenient for him and the mother would allow such meetings.

10. There shall be no order as to costs.

S.R. Misra, J.

11. I agree

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