(1985) 01 AHC CK 0022

Allahabad High Court

Case No: F.A.F.O. No. 795 of 1980

Mohd. Yunus		APPELLANT
	Vs	
Smt. Shamshad Bano		RESPONDENT

Date of Decision: Jan. 1, 1985

Acts Referred:

- Guardians and Wards Act, 1890 - Section 25

Citation: AIR 1985 All 217 : (1985) AWC 386

Hon'ble Judges: A.N. Verma, J

Bench: Single Bench

Advocate: S.A. Shah, for the Appellant;

Final Decision: Dismissed

Judgement

A.N. Verma, J.

This appeal has been filed by the father against an order dated August 28, 1980 passed by the learned II Additional District and Sessions Judge, Saharanpur rejecting his application u/s 25 of the Guardians and Wards Act for the custody of two minor children; a daughter and a son of the appellant.

2. The appellant was married to the respondent Smt. Shamshad Bano and from this marriage two children were born, a son named Arshad and a daughter named Afghan. The appellant and the respondent were divorced as borne out by the evidence which seems to be of unimpeachable character. In the year 1978 the appellant moved an application for the custody of these two children on the assertion that he as guardian of these two children was entitled to their custody, his wife had left 5--51/2 years ago on the pretext that she was going to attend a marriage in her family and on that pretext she had taken with her all her ornaments and other things as well as the two children. The attempts of the appellant to bring back the children to his house having failed and as the children were not getting proper education, it was necessary in their interest that they be given in his custody.

An application to this effect was filed u/s 25 of the aforesaid Act.

3. The application was contested by the mother. She asserted that she had not left on the ground alleged by the appellant but because she was ill-treated, beaten up and turned out of her husband''s home. She further said that the two children were receiving the best education and were being very well looked after by her. On the contrary, if they are handed over to the appellant, the children will suffer greatly as the appellant was not in a position to look alter the children properly. The court below has dismissed the appellant''s petition on the ground that for the welfare of the children, it is necessary that they be left with the mother. In passing this order, the Court below also ascertained the wishes of the appellant''s son who stated that he will prefer to remain with the mother.

4. Aggrieved by the aforesaid order the father has filed this appeal. For the appellant it is urged that the court below has not correctly understood the true legal position and has ignored the personal law, namely, Mohammedan Law, which was applicable to the case, in disposing of the appellant''s petition.

5. Having heard the learned counsel for the parties at some length, I find no merit in this appeal. The legal position as seems to emerge from the various authorities cited at the Bar, seems to be that in disposing of an application under the Guardians and Wards Act the predominant consideration is the welfare of the child whose custody is claimed by rival parents. Of course, in doing so the personal law applicable to the parties cannot, altogether be ignored Subject to the personal law the paramount consideration in, considering an application u/s 25 of the Guardians and Wards Act seems to be well-being of the child.

6. Several decisions have been cited by both the parties. In my opinion, however, the law has been ably summed up in a decision of this Court reported in 1969 ALJ 799 Sultan Ahmad v. Smt. Sabira Bibi. After referring to several decisions of this Court and of the Privy Council, this Court observed thus : --

"A careful analysis of the personal law relating to guardianship, Section 17 of the Guardians and Wards Act and the relevant authorities thereon appear to lead to the following conclusions :

1. The Court while deciding the question of guardianship of a minor must, as far as possible, do so consistently with the personal law to which the minor is subject,

2. Where the dictates of personal law indicate one course of action and considerations of the welfare of the minor indicate another, the former must be subordinated to the latter, The words that furnish a key to the correct legal position are to be found in Section 17 of the Guardians and Wards Act. Principles of personal law must be applied "subject to the provisions of this section". In other words, if there is a conflict between the personal law to which the minor is subject and considerations of his or her welfare, the latter must prevail.".

In enunciating the law thus, the learned Judge placed reliance on another decision of this Court in the case of Mt. Samiunnissa Vs. Mt. Saida Khatun, in which reliance was placed on a Privy Council decision reported in AIR 1918 PC 11 (Imam Bandi v. Haji Musaddi). The learned Judge observed :

"To my mind if the Court, keeping in view the welfare of the minor, considers that the mother should be appointed a guardian in preference to any other natural guardian under the Mohammedan Law, the order passed cannot be challenged on the ground that the Court had no power to do it. Though, as I have already stated, the Court should make an attempt, so far as possible, to follow the line of guardianship fixed under the personal law of a minor, I am not prepared to hold that they must subordinate the welfare of the minor and must, whatever the consequence, appoint the natural guardian under the person allow.".

The same appears to be the trend of the two later Supreme Court decisions, reported in Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, and Rosy Jacob Vs. Jacob A. Chakramakkal, , in both of which it has been stressed that in matters concerning the custody of the minor children the paramount consideration is welfare of the child and not legal rights of this or that particular party.

7. I entirely agree with the decisions of this Court referred to above, supported as they are by pronouncements of the Supreme Court mentioned above. In my opinion, the personal law applicable has to be read harmoniously with the provisions of the Guardians and Wards Act, and in the final analysis the Court has to strike a balance between the two, the dominant consideration being the welfare of the ward

7A. The learned counsel for the appellant, however, placed reliance on Sections 352 and 357 of the Mulla''s Commentary on Mohammedan Law in support of his contention that the appellant was entitled to have the custody at least of the son because he was more than seven years old In my opinion, there is nothing in the principles enunciated in these sections which might militate against the view expressed in the decisions cited above. In Section 352 it has been stated that the mother is entitled to the custody of her male child until he has completed the age of seven years. Section 357 on the other hand provides that the father is entitled to the custody of a boy over seven years of age and of unmarried daughter who has attained puberty. The principles propounded in these sections cannot, however, be read in isolation and divorced from the provisions of the Guardians and Wards Act which vests in the court a discretion to direct the return to the custody of a guardian a ward who leaves or is removed from his custody in appropriate cases where the Court thinks that such a direction is necessary for the well-being of the ward. As already observed, the overriding consideration is the welfare of the child, as has been repeatedly stressed both by this Court and by the Supreme Court. In my opinion, the correct approach in these cases should be that which has been spelled out above in the case of Sultan Ahmad (1969 ALJ 799) (supra).

8. The learned counsel for the appellant next placed reliance on a decision of this Court in the case of Hafiz-ur-Rahman v. Mst. Shakila Khatoon 1983 AWC 572 which lays down that the first and primary guardian is the father and that the court is not authorised to appoint or declare a guardian of the person of a minor unless the father is in the opinion of the Court, unfit to be a guardian of the ward. This decision is of no assistance as we are not concerned here with the appointment of a guardian but with the custody of a child u/s 25 of the Guardians and Wards Act.

9. This being the legal position I now proceed to consider the facts of the present case. The first ground on which I am persuaded to uphold the order of the court below is the circumstances in which the appellant turned out the respondent. The plea of the respondent that she was ill-treated by the appellant, beaten up and turned out from her husband''s home by the appellant is fully substantiated by the evidence on record which has been discussed by the court below at length. I entirely agree with the conclusion reached by the trial court on this controversy. The allegation of the appellant that his wife had left on her own on the pretext of attending some marriage in her family seems entirely unworthy of reliance and has rightly been rejected by the court below. This conduct of the appellant leads me to the conclusion that he would not be the right person to whom the custody of the children might be appropriately entrusted. Secondly, from the evidence on record it is apparent that while in the family of the respondent there are two female members who could look after the children both of whom are of tender age, in the appellant''s family there is only one female member, i.e. the aged mother of the appellant who, having regard to her advancing years, would be hardly able to take proper care of the children. The court below, therefore, has rightly taken into consideration this circumstance in rejecting the appellant''s petition and allowing the children to remain with the mother. Lastly, I find that the appellant''s son himself has expressed a desire before the court below when he was produced after the conclusion of the arguments that he would prefer to stay with his mother and that he would not like to live with the father. The appellant''s son at the time of making of the said statement before the court below was more than 11 years old and was hence, in my opinion, old enough to form an intelligent preference.

10. For these reasons I am clearly of the view that the court below has rightly declined to hand over the custody of the children to the appellant. It may be mentioned here that the learned counsel for the appellant did not challenge the correctness of the various conclusions of fact reached by the court below. The only contention raised by him was that the court below having found that the appellant has the requisite means to educate his children, it should have directed the return of the custody of the children to the appellant. It was urged that even according to the court below the appellant''s monthly income was Rs. 1,500/-which is sufficient to enable the children to have good education.

11. I find no merit in the above contention. The mere fact that the appellant is in a financial position to undertake the education of his son, is not decisive of the issue whether it would be in the best interest of the son to leave him in the custody of the appellant. In my opinion, having regard to the circumstances in which the appellant''s wife was turned out by the appellant and to the fact that the son had himself expressed preference in favour of the mother and has expressed a positive reluctance to go to the father and to the other facts and circumstances referred to in the judgment under appeal the court below has rightly rejected the petition of the appellant.

12. Further, for the proper growth of a child it is not enough that he has formal education in the school. He needs much more than that. The love, affection and care of his parents are equally, if not more, important for the healthy development of a child. Consequently, the mere fact that the appellant has the financial resources to give the same quality of education which his wife is at present giving to the children, cannot entitle the appellant to claim the custody of the child as of right. The other factors pointed out above relevant for the well-being of the children have also to be taken into account.

13. For the reasons stated above, I find no merit in this appeal. It may be noted here that so far as the appellant''s claim for the custody of the daughter is concerned learned counsel for the appellant fairly conceded that having regard to the age of the daughter and the principles enunciated in Sections 352 and 357 of Mulla''s Commentaries on Mohammedan Law the appellant cannot legitimately claim the custody over his daughter, his daughter not yet having attained the age of puberty.

14. In the result, the appeal fails and is dismissed with costs.