

(2013) 10 DEL CK 0114

Delhi High Court

Case No: Matrimonial App. (F.C.) No's. 30 of 2013 and CM 13301 of 2013

Smt. Vibha

APPELLANT

Vs

Sh. Rama Nand

RESPONDENT

Date of Decision: Oct. 29, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Guardians and Wards Act, 1890 - Section 25, 7, 8

Citation: (2013) 10 AD 399

Hon'ble Judges: S. Ravindra Bhat, J; Najmi Waziri, J

Bench: Division Bench

Advocate: Maninder Singh, Mr. Vivek Chaudhary, Mr. Ajay Pipaniya, Mr. Rohit Arora, Ms. Ekta Vats and Mr. Mandeep Singh, for the Appellant; Manoj Lohat and Mr. Y.P. Luckaria, for the Respondent

Final Decision: Allowed

Judgement

S. Ravindra Bhat, J.

The present appeal is directed against the order dated 9th May, 2013 of the Family Court, disposing off GP no. 12/2010. Those proceedings have been initiated by the respondent (hereinafter referred to as "grandfather"), for the custody of the minor child named Lakshay. The brief facts of the case are that marriage between Late Anipal and the present appellant/Vibha (hereinafter referred by her name) solemnized on 07.12.1996. Out of the said wedlock, one male child Lakshay was born on 14th August, 1998. Unfortunately, on the night intervening 27th/28th August, 1999, Anipal committed suicide by hanging himself. Lakshay is now 15 years of age.

2. Concededly, Vibha had exclusive custody of Lakshay till the grandfather initiated the present proceedings under sections 7, 8 and 25 of the Guardianship and Wards Act, 1890 on 6th January, 2005. This move was apparently triggered by Vibha's

re-marriage on 23.12.2004.

3. In the petition, the grandfather alleged that since Vibha was a full time employee working as a Teacher, she had no time to take sufficient care for the welfare and benefit of her child-Lakshay. The grandfather was of the opinion that Vibha's remarriage was likely to affect the physical and emotional health of the child.

4. Vibha contested the proceedings. She is a post graduate Teacher working with St. Anthony Girls Senior Secondary School, where she continues to be employed. She denied the allegations about her inability to take care of her minor son Lakshay and stated that her conduct as a mother was beyond reproach and that Lakshay was hale and hearty and happy child and that if any relief as sought for by the grandfather, would be granted, its impact would not be in the larger benefit and welfare of Lakshay.

5. After considering the submissions, the trial court took note of the decision of the Supreme Court in [Shyamrao Maroti Korwate Vs. Deepak Kisanrao Tekam](#), and summarized the legal position which the Guardianship Court had to take into consideration in the following manner:

17. From the judicial precedents, for determining the welfare of the minor child, it need to be addressed the following guiding ingredients which are in brief enumerated herein below:-

(i) Where the child will be more happy.

(ii) Who is in a better position to look after the physical and mental development of the minor.

(iii) Who can give more comfort.

(iv) In whose care the welfare of the minor is more secure.

(v) Who has the capacity to provide for a better education and round the clock look after the child.

(vi) Who would be available by the side of the child when in need.

(vii) Who would look after the emotional aspect, social setup, good education, career building and nurturing of the child as a good human being.

(viii) Where the child will have congenial atmosphere, healthy for his growth and overall development.

(ix) Where the child can be developed well, keeping in mind the ethos and as a better Indian citizen.

(x) Where he will develop as a proper human being having progressive attitude and not having constricted thoughts and outlook towards life.

6. The Family Court, thereafter, observed that the relevant circumstances including the grandfather's allegations that he was better suited to be the guardian and take care of the minor child. The Court rejected the allegations about the unsuitability of Vibha on the ground that she was facing criminal charges, noticing that the entire criminal proceedings had been quashed by an order of the High Court u/s 482 Cr.P.C. on 25th October, 2010. The Court rejected the second submission of the grandfather i.e. of Vibha's remarriage, observing that marrying again is no anathema as long as the Court is satisfied that the welfare and interest of Lakshya are subserved by keeping him with the parent who has the custody of the minor child. The Court observed in this respect that nothing at all has come on record that either he is not treating the minor child properly or he is ill-treating him or not taking care of him or not devoting time to him or not accepted him as his son or is not looking after his welfare. The natural corollary is that he must be taking care of the minor child properly and without any kind of complaint. Thus by marrying again, it cannot be said that respondent is incapable of taking care of the minor child due to which the custody could be shifted.

7. The trial court similarly rejected the unsuitability of Vibha on the ground that she was financially unsound, observing that she was drawing Rs. 45,000/- per month as salary as against the grandfather's monthly income i.e. Rs. 36,000/-. The Court most importantly stated that the other sons of the respondent had separated from him and there was hardly any other member who can look after Lakshay. The Court took note of the progress reports of the child which were produced as Ex. DW1/A. The learned Judge observed that Lakshay was healthy-mentally and physically-and was excellent in academics. It was accordingly concluded that disturbing the custody of the child at this stage could do more harm than good and it would not be helpful for his overall development and growth. When the Family Court had interacted with the child, the child had shown total disinterest in meeting with the petitioner. This, the Court noted however, would not suffice, as far as overall development and growth is concerned. The Court observed that it would be reasonably justified that he should have some meetings with his grandfather.

8. After arriving at the above conclusion, the Court even while rejecting all the submissions of the grandfather proceeded to grant visitation rights to him by directing that he should have access to the child at least once in a week preferably on Saturday between 10.00 am to 5.00 pm and that the grandfather should also be allowed to meet the child in one of the major festivals in a year as per the convenience of the parties.

9. The appellant/Vibha argues that after substantially concluding that the grandfather i.e. the respondent did not prove the allegations, the Court should not have exercised its discretion to grant visitation right. It was submitted in this regard that the custody proceedings which culminated in the impugned order in the instant case were initiated more than five years after the death of Anipal and only after

Vibha's re-marriage. It was submitted that there is reason to suspect the proceedings as having been fuelled by some kind of spite against Vibha.

10. The learned counsel also emphasised the fact that the custody proceedings were, along with the criminal proceedings initiated at the behest of the respondent and it was only in 2010 that the High Court quashed the criminal proceedings. It was further submitted that having regard to the acrimonies which existed between the parties, the visitation directions embodied in the impugned order, do not amount to sound exercise of discretion. The learned counsel emphasised that the court itself has recorded in the impugned order that upon interaction, Lakshya had shown total disinterest in meeting his grandfather. In these circumstances, the grant of visitation right was not warranted.

11. The learned counsel for the respondent/grandfather, who moved the petition, argued on the other hand that the impugned judgment does not call for any interference. It is submitted that even though the larger relief of custodial rights was claimed, the Guardianship Court acted well within the limits of its jurisdiction to restrict the relief to visitation rights only. The learned counsel submitted that even though the custody might be with one or the other individual or spouse, the right of the petitioner to claim visitation right cannot be denied. To support this argument, the learned counsel relied upon the judgment cited as [N. Nirmala \(Smt\) Vs. Nelson Jeyakumar](#), .

12. The grounds disclose that as to the essential facts, there is no dispute. The parents of Lakshya, the minor child were married in 1996; he was born in 1998. In 1999, his father (Anipal) committed suicide.

13. The grandfather's relative inaction for the period between 1999 and 2005 is undeniable. Apparently, the proceedings which have led to this appeal were triggered by Vibha's remarriage on 23rd December, 2004; three weeks later, the grandfather on 6th January, 2005 initiated the present proceedings claiming custody of Lakshya.

14. The findings arrived at in the impugned order are clear enough as to where the larger interest and welfare of the minor child lie. The Court recorded that the grandfather apparently did not make any attempt till initiation of the guardianship proceedings even to contact or support his grandson. Furthermore, this Court is also of the view that the relationship between the grandfather and Vibha were acrimonious as is evident by the pendency of criminal proceedings initiated at the behest of the grandfather till they were quashed by this Court in exercise of its power u/s 482, on 25th October, 2010. In addition to this, when the learned Judge of the Family Court interviewed the child, he expressed "total disinterest in meeting with the grandfather". The Court's discretion or jurisdiction to direct visitation right cannot be denied. It is one thing to say that the Court is vested with the power to grant restricted relief when a larger relief is claimed; in the context of the present

case, yet what is an issue is not the power but the appropriateness of the direction, contained in para 34 of the impugned order.

15. As regards the acrimonious relationship between the grandfather and Vibha, evidenced by the criminal proceedings, which lasted well over a decade between 1999 and 2010, it could hardly form any ground for doubting the quality of care that is provided by the latter i.e. the mother of Lakshay. There is no material on record to establish that the grandfather ever stepped forward to show interest in his grandson's safe custody to initiate the proceedings for guardianship. Neither the evidence nor the findings of the learned Judge testified to his willingness to support the grandchild in any manner. Perhaps having regard to the nature of the acrimonious relationship, the trial court thought it fit to condone that lack of initiative. Yet that is a crucial aspect which ought to have been taken into account by the trial court.

16. This Court is aware of the fact that for the healthy development of any child, interaction with his immediate relatives is essential. However, in the facts of this case, after having concluded that the grandfather's claim for custody was lacking in merit, since each of the contentions put forward by him lack substance, and given further the finding of the Trial Court-that minor Lakshay expressed disinterest in meeting his grandfather; this Court finds no doubt that the directions impugned in the present case ought not to have been issued. The findings which have not been disputed by the respondent's grandfather clearly established that the child is now at that crucial age where special care needs to be exercised to safeguard his emotional equilibrium and intellectual growth. Till date, Lakshay has been excellent in academics. The mother who has care and custody in the circumstances has by all accounts been discharging her duties admirably despite the second marriage in taking care of the minor Lakshay. Therefore, having recorded that the grandfather's petition lacked merit, the trial court should not have directed the visitation right to be given to him once a week. Such directions in the opinion of this Court do not amount to a proper exercise of discretion. In view of the forgoing discussion, the appeal has to succeed. The directions contained in para 34 of the impugned order are hereby set aside. The appeal is consequently, allowed.