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Sunil Kapoor Vs Parul Kapoor

FAO 337 of 2012

Court: Delhi High Court

Date of Decision: Aug. 13, 2012

Acts Referred:
Guardians and Wards Act, 1890 â€" Section 25

Hon'ble Judges: Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench: Division Bench

Advocate: Priya Hingorani, for the Appellant;

Final Decision: Dismissed

Judgement

Vipin Sanghi, J.

Caveat No. 838/2012

The caveator has not entered appearance. The caveat is accordingly discharged.

C.M. No. 13747/2012 (for exemption)

Exemption allowed, subject to all just exceptions.

C.M. No. 13750/2012 (for delay).

For the reasons mentioned in the application, delay of 8 days in re-filing the appeal is condoned.

The application is accordingly disposed of.

FAO 337/2012

1. The appellant assails the order dated 03.05.2012 passed by the learned Additional Principal Judge, Family Courts, Rohini, New Delhi

(hereinafter referred to as the APJ) in G.P. No. 50/2010 preferred by the appellant u/s 25 of the Guardians & Wards Act, 1890 (hereinafter

referred to as the Act). The appellant is the husband of the respondent - his estranged wife. Out of their wedlock, a girl child was begotten, namely

Ms. Kavya Kapoor, who is in the custody of the respondent. The marriage between the parties took place on 26.07.2004 according to the Hindu

rites & ceremonies in Delhi. The baby girl was born on 19.02.2005. The parties in their respective pleadings made various allegations and counter-

allegations with regard to the each other''s conduct, all of which are not relevant for the present purpose, for the reason that the issue required to

be considered and, in fact, considered by the learned APJ while passing the impugned order was whether it would be in the interest and welfare of

child Kavya Kapoor that her permanent custody is granted to the appellant father. We are, therefore, taking note of only those facts disclosed,

averments made, and evidence led by the parties, which are relevant for determination of the said issue.

2. The appellant claimed that after the marriage of the parties, the behaviour of the respondent towards him and his family members was not good,

which led to shut down of his business which he was carrying on with his brother-in-law. Consequently, he suffered losses. His financial condition

got worse with each passing day and he had to take loans from the market for his survival.

3. The appellant claimed that the respondent was living separately from him since 24.08.2008. She had taken the minor daughter with her and,

consequently, the minor daughter has been deprived of his love and affection and vice versa. He claims that the respondent changed the school of

the minor daughter from Meera Bagh (Paschim Vihar) to Sector-3, Rohini and even deleted his name as her father. His efforts to meet the minor

daughter were staved of by the respondent and her parents. The appellant claimed that the respondent could not look after the welfare of the minor

child since the respondent is a working lady and she has left the minor child in the care of a maid. The appellant claimed that the respondent does

not maintain a good moral character as she is involved with her employer/Director Mr. Atul Sinha, who gives her costly gifts such as computers,

mobile phone, perfumes, watches, and even drops her to her house. He claimed that the respondent has taken custody of the minor child forcibly

from him with police aid.

4. On the other hand, the respondent alleged that the appellant was a vagabond and an alcoholic. He did not disclose that he had married twice

earlier before marrying the respondent. He also did not disclose that he was engaged to another girl named Pooja, who broke the engagement

when she came to know of his antecedents. She claimed that the appellant was the owner of a valuable property, wherefrom he was deriving a

handsome monthly rent of Rs. 65,000/-. She claimed that the appellant was very aggressive, violent and abusive and he beat her up after

consuming liquor. He was abusive even with the neighbours, broke windscreens of two cars in his colony, and created a scene. The respondent

claimed that she is taking utmost care of the minor daughter by providing her best of education and upbringing. She has employed a full-time

Nanny to attend to the minor daughter after she returns from school. She is well-educated having obtained the degrees B.Com, B.I.T. and

M.B.A., whereas the appellant is not even a graduate. She was residing with her parents who were well educated and were working in a bank.

The appellant was living alone in a single room accommodation in Kanpur. She claimed that it was not in the interest of the minor daughter to live

with the appellant, whom she claimed is an alcoholic, aggressive, violent and irresponsible person.

5. The appellant examined himself as PW-1; his sister Smt. Kanchan Seth as PW-2; his brother-in-law Sh. Kamal Kohi as PW-3. The respondent

examined herself as RW-1 and her father Sh.Raj Kumar as RW-2. The appellant testified that he was not working before his separation from the

respondent. He testified that he owned a building bearing No. 24/5, Tilak Nagar, Delhi and had rental income therefrom. He testified that the

shop/building was earlier leased to M/s City Mega Mart on monthly rent of Rs. 28,000/- and thereafter, was leased out to M/s Priknit at a monthly

rent of Rs. 65,000/-. He claimed that he had sold the said property for Rs. 23 Lakhs, even though the market value of the same was assessed at

Rs. 2.69 Crores. After initially denying the fact, he admitted that he had sold his property to his own sister, namely Meena Mahana vide sale deed

dated 26.02.2009 Ex. PW-1/D1. He stated that he is residing in a rented accommodation in Kanpur at a monthly rent of Rs. 1,800/- comprising

of one room with a common bathroom. He stated that the accommodation does not have a separate kitchen. He disclosed that he had taken loans

from Satpal Babbar, Rajiv Dutta, Vinod Chopra and Harvinder Kohli, etc. on interest @ 2 to 21/2 per cent per annum, whereas a part of the loan

is interest free. He did not have any documentary evidence to show that he was carrying on business such as sales tax number, license, TIN, or any

other account books. He stated that he is residing alone at Kanpur and working as Supervisor with M/s Dhanna Enterprises at a salary of Rs.

5,500/- per month. The firm has given him a scooter make LML Vespa, as he has to do field work. He testified that he spends Rs. 12/- per day

on transportation to his office and takes food once a day spending Rs. 15-20 for the same. He stated that he is leading a hand to mouth life and

can hardly save any amount out of his salary. When the respondent and his daughter were staying with him, the school fees of the child was Rs.

10,000/- (approximately) annually in the year 2008. He stated that he was spending Rs. 4,000/- to Rs. 5,000/- per month on his minor daughter''s

expenses such as food, clothing, etc. He admitted that the quarterly fees of the minor daughter including transportation is Rs. 15,000/-. He

admitted that the child is studying in Laurel High School, Pitampura and a Nanny has been hired to look after her at a salary of Rs. 5,000/- per

month. He admitted that the daughter is attending dance classes and her expenses are to the tune of Rs. 2,000/- per month. Maintenance @ Rs.

5,000/- per month for the minor daughter and Rs. 5,000/- per month for the alternative accommodation had been granted by Ms. Jyoti Kler,

Metropolitan Magistrate, Tis Hazari Courts, payable w.e.f. January 2009, against him, which has been challenged by him without success.

However, he has paid Rs. 18,000/- only till the date of his statement, which was recorded on 14.09.2011 and that too, when he set meeting rights

with her minor daughter on the occasion of her birthday.

6. PW-2 Smt. Kanchan Sethi, sister of the appellant admitted that the appellant used to take liquor earlier but he had stopped taking drinks now.

She supported the appellant''s case that he lives alone in the house at Kanpur. She admitted that the appellant had never tried to meet the minor

child Kavya, except in the Court on the occasion of her birthday. She admitted that the minor daughter Kavya has been looked after by the

respondent very well and she is being well-groomed.

7. PW-3 Sh. Kamal Kohli, brother-in-law of the appellant admitted that there is none to look after the child, if she is given in custody to the

appellant.

8. In the backdrop of the aforesaid pleadings and evidence of the parties, the learned APJ came to the conclusion that it was not in the interest of

the child Ms. Kavya Kapoor that she should permanently remain in the custody of the appellant. The learned APJ observed that it had emerged

from the testimony of the appellant, his sister PW-2 and brother-in-law PW-3 that the appellant was not working at the time the respondent left or

was made to leave her matrimonial home. His only source of income was the property which earned rent. Even this property had been sold for a

consideration of Rs. 23 Lakhs to one of his sisters, namely Ms. Meena Mahana by the appellant though the value of the property was assessed at

Rs. 2.69 Crores at the time of sale. The appellant had stated that a part of the sale consideration of Rs. 23 Lakhs was utilized to repay the

outstanding loans. He was residing in a single room accommodation in Kanpur with no kitchen and using a common bathroom. He was drawing a

monthly salary of Rs. 5,500/- per month from M/s Dhanna Enterprises, where he worked in the field as Supervisor. He was practically hand to

mouth and had no savings. It had also come on record that the appellant had twice earlier got married. It was admitted by the appellant''s sister

that he used to consume liquor. Whereas the appellant was not even a Graduate, the respondent had acquired higher education by completing

B.Com., B.I.T. and M.B.A. She was working and drawing a handsome salary of Rs. 25,000/- a month. She was sending the child to a good

school and had employed a full time Nanny on a monthly salary of Rs. 5,000/- to take care of the child when she and her parents were not at

home and are out for work. The girl child had also joined dancing classes on a monthly fee of Rs. 2,000/-. The appellant''s lack of concern for the

child was demonstrated by the fact that despite an order of the learned Metropolitan Magistrate awarding maintenance @ Rs. 5,000/- per month

and a further sum of Rs. 5,000/- for alternate accommodation w.e.f. January 2009, the appellant had paid only an amount of Rs. 18,000/- till

September 2011 (when his statement was recorded on 14.09.2011), and that too, when he wanted to celebrate the minor daughter''s birthday.

The financial condition of the appellant and his circumstances, namely the fact that he was residing all alone in Kanpur in a one room

accommodation with no kitchen and a common bathroom and drawing a monthly salary of Rs. 5,500/- was also taken note of. Even according to

the appellant''s witness PW-3 Sh. Kamal Kohli, there was no one else to take care of the minor child in case her custody is given to the appellant.

On the other hand, the respondent had not only employed a full time Nanny but the child''s maternal grandparents were also there to take care of

her and they were holding respectable positions in banks.

9. The submission of learned counsel for the appellant is that the learned APJ has dealt with the evidence in a one-sided manner by ignoring the

evidence led by the appellant, particularly to demonstrate her immoral character. As rightly observed by the learned APJ, the appellant could not

take advantage of the fact that the respondent established physical relationship with him even prior to their marriage. The appellant was held to be

more responsible for the said conduct as he had already been married twice and divorced. According to the respondent, she was not conscious

when the appellant established physical relationship with her.

10. So far as the relationship between the respondent and Sh.Navin Dhamija, her college time friend is concerned, the learned APJ has referred to

the evidence of the respondent''s father Sh. Raj Kumar RW-2. Since Sh. Navin Dhamija is in the business of sale & purchase of properties and an

Interior Designer by profession, the respondent was in touch with him regarding the renovation of her father''s house. The fact that she was in touch

with Sh. Dhamija was even known to her father and there is nothing clandestine about it.

11. Learned counsel for the appellant has sought to place reliance on Annexures A-3 & A-4, the transaction enquiry regarding the bank account of

the respondent and the details of the phone calls and SMS record of the respondent''s mobile phone and that of Sh. Navin Dhamija. These

documents have not been duly proved on record and it appears that the learned APJ has, therefore, not relied upon the same and, in our view as

well, these documents not having been duly proved on record could not be looked into. In any event, as aforesaid, they do not cast any doubt on

the character of the respondent.

12. Lastly, it is argued that the appellant is being denied visitation rights qua the child. Visitation and custody normally stand on a different footing.

The issue decided by the learned APJ is qua custody and not visitation. If the appellant has any issues with regard to visitation rights qua the child,

it is for him to pursue the same before an appropriate forum. In our view, the learned APJ has correctly applied the principles applicable to

determine the issue with regard to the custody of the minor child by taking note of the views of various authors as well as the decisions of the

Hon"ble Supreme Court in Nil Ratan Kundu and Another Vs. Abhijit Kundu, , and Gaurav Nagpal Vs. Sumedha Nagpal, . In our view, no other

conclusion could have been drawn by the learned APJ in the light of the evidence which was brought on record of this case. Accordingly, we find

no merit in this appeal and dismiss the same, leaving the appellant to bear his own Costs.

C.M. Nos. 13748-49/2012

In view of the aforesaid orders, the present applications are dismissed.