
(1989) 09 GAU CK 0011

Gauhati High Court

Case No: Misc. Appeal No's. 13 and 14 of 1989

Nilakantha Pati

APPELLANT

Vs

Ananta Misra and
Another

RESPONDENT

Date of Decision: Sept. 8, 1989

Acts Referred:

- Guardians and Wards Act, 1890 - Section 25, 7

Citation: (1989) 09 GAU CK 0011

Hon'ble Judges: A. Pasayat, J

Bench: Single Bench

Advocate: B.H. Mohanty, B.B. Mohanty, S.C. Mohanty, R.N. Panda, R.K. Nayak and J.K. Bastia, for the Appellant; P.K. Misra, A.K. Nanda and S.K. Swain and B.K. Nayak, for the Respondent No. 1, for the Respondent

Judgement

A. Pasayat, J.

These two appeals directed against a common order relating to custody and guardianship of a minor and disposed of by this judgment which shall govern both. The basic facts necessary for adjudication of the appeals are. that appellant Nilakanta was married to one Sailabala in the year 1981 and respondent Ananta is his father-in-law. According to Ananta, Sailabala committed suicide on 11-12-1986 and on the basis of investigation, a charge-sheet under Sections 498A, 306, 323, Indian Penal Code and under Sections 3 and 4 of the Dowry Prohibition Act has been filed against Nilakantha and the matter is pending trial in the court of Subdivisional Judicial Magistrate, Puri. After the death of Sailabala, Tapas Kumar Pati, the minor son, whose custody and guardianship are the bones of contention in these appeals, stayed with one Bhagaban Das, (respondent No. 2 in Misc. Appeal No. 14 of 1989), another son-in-law of respondent Ananta. Two applications registered as Misc. Case No. 735 of 1987 and 775 of 1987 were filed in the court of District Judge, Puri under Sections 7 and 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as "the Act"). By the first application respondent Ananta

prayed for appointment as legal guardian of minor Tapas, while the other application was filed by the appellant for his custody.

2. The learned District Judge held that respondent No. 1 was entitled to be declared as guardian of the child. He primarily based his conclusions on the assumption that the appellant being a young man was likely to marry again and because of the pendency of the criminal case, there was likelihood of strained relationship between the parties. He further presumed that the step mother is not expected to properly look after the welfare of the child. He accordingly disposed of both the misc. case by a common order with direction that the child who was in the custody of Bhagaban Das was to be handed over to respondent Ananta. Being aggrieved by this order, the appellant has filed the appeals.

3. Mr. B.H. Mohanty, learned counsel appearing for the appellant, submitted that the principles necessary for adjudication of a case of this nature have not been kept in view while disposing of the matter. According to him, the order was passed without any material basis on record to substantiate the conclusions. He placed reliance on a decision of the Madras High Court reported in [S. Abboy Naidu and Others Vs. R. Sundara Rajan](#), in support of his contention that even in a case where suicide is committed by the mother, there is no legal bar and father is to be given the custody of the child. He submitted that the order was based on presumptions, and therefore not sustainable in law. On account of advanced age, respondent Ananta was not a proper person to be appointed as a guardian. He also submitted that the pendency of a criminal case is no ground for denial of custody.

Mr. P.K. Misra, learned counsel for respondent Ananta, submitted that what is really relevant and is of paramount consideration is the welfare of the child. Admittedly, the appellant, who is serving would hardly have any time to look after the child. He further submitted that it is the common knowledge that after the death of a daughter, the parents are emotionally and sentimentally attached to the grand-child, and they make all possible efforts for better future of the grand-child. Therefore, the custody and guardianship has been rightly decided.

The contentions need careful consideration.

4. It is undisputed that welfare and interest of the child is relevant and of paramount consideration in a case of this nature. Materials have to be brought on record to show, where his welfare is assured. In the normal course, the father is entitled to the custody of the child. But there are several circumstances where a departure can be made keeping in view the welfare of the child. As decided by the Supreme Court in the case of [Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka](#), the Court while deciding the custody of the child is to keep all relevant factors in mind and has to find out as to with whom the child would be better off and the matter is to be considered and decided only from that point of view and interest of the minor. In deciding the matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of

the minor and to protect the minor's interest, and has to be guided by the only consideration of welfare of the minor. When the atmosphere in a house is vitiated and rendered surcharged with tension as a result of bitter squabbles between the parties, it causes misery and unhappiness to a child, who has to live in constant psychological strain. The mental and physical growth of the child is bound to be seriously affected under such circumstances. The child should be removed from such unhealthy environment and acrimonious surrounding, so that his/her tender mind is not affected. He/she should be brought up in an atmosphere conducive to proper development of personality, physical and mental health and enjoyment of emotional security and well being. Judged in this background, it is seen that the learned District Judge has not attempted to find out these material aspects. The pendency of a criminal case is not always conducive in deciding the custody of a child. It is one of the factors which can be considered while deciding the issue. As rightly submitted by Mr. Mohanty, the mere possibility of re-marriage should not have weighed with the learned District Judge in the absence of any concrete or positive evidence in that regard. The conclusions are presumptuous. In the circumstances, I direct the learned District Judge to re-consider the matter and decide the custody of the child keeping in view his welfare and interest. He shall permit the parties to lead evidence in support of their respective claims. Mr. Misra, learned counsel for the respondent No. 1, submitted that it would be appropriate if the matter relating to custody of the child is taken up after disposal of the criminal case, as leading evidence in the present matter may prejudice him during the trial of the criminal case. He is free to make such a prayer before the learned District Judge. If such a prayer is made, the same shall be dealt with in accordance with law. Till disposal of the matter by the learned District Judge, the present arrangement with regard to custody of the child shall continue.

5. The appeals are accordingly disposed of, but in the circumstances without any order as to costs.