

(1970) 12 CAL CK 0003**Calcutta High Court****Case No:** Parsi Matrimonial Suit No. 3 of 1970

Jahangir Manaji Mehta

APPELLANT

Vs

Nina Jahangir Mehta

RESPONDENT

Date of Decision: Dec. 24, 1970**Acts Referred:**

- Divorce Act, 1869 - Section 41, 42, 43, 44
- Guardians and Wards Act, 1890 - Section 10, 17, 17(1), 19, 24
- Parsi Marriage and Divorce Act, 1936 - Section 49, 7

Citation: (1971) 2 ILR (Cal) 8**Hon'ble Judges:** Masud, J**Bench:** Single Bench**Advocate:** A.K. Panja, for the Appellant; D.K. De, for the Respondent**Judgement**

Masud, J.

This application was filed on September 10, 1970, on behalf of the father for the legal custody of his two minor sons as against the similar claim of the mother, when the suit on behalf of the husband for judicial separation was pending against the wife. As both the parties wanted expeditious hearing of the suit, the present application and the suit were previously directed to be heard together. On December 4, 1970, the suit was heard and a decree for judicial separation was passed on the basis of a verdict of the delegates of the Parsi community as required under the Parsi Marriage and Divorce Act, 1936. At the time of the hearing, serious allegations were made by the husband and the wife against each other. On the date the said decree was passed the present application was adjourned at the request of the parties. In the present application, interim custody of children was prayed for when the suit was pending. Strictly speaking, there is no application before me for the custody of the children after the final decree. But the Learned Counsel for both the parties have submitted before me that the present application might be treated as an application for the custody of the children after the final decree.

2. The short point to be decided is whether a Parsi father should have the legal custody in preference to a Parsi mother. The meaning of the word "custody", according to the Shorter Oxford Dictionary, is "safe keeping", "protection", "charge" "care", "guardianship". In the Indian statutes, however, the words "custody" and "guardianship" have not been used as identical concepts. In Sections 10, 24, and 25 of the Guardians and Wards Act, 1890, there appears to be a legal nexus between "custody" and "guardianship of the person of the minor" inasmuch as a guardian of the person of the minor appointed under the said Act has the right to have the custody or charge of the minor. In Sections 41, 42, 43 and 44 of the Indian Divorce Act, 1869, and Section 49 of the Parsi Marriage and Divorce Act, 1936, the words "custody maintenance and education" have been separately used conveying the fact that they have different connotations. Mr. Panja, counsel on behalf of the father, the Petitioner, has submitted that the father being the natural guardian of the children has alone the legal right to the custody of the children. According to him, unless the Court is convinced on the material before it that the father is unfit to have the custody of the children the father alone has the absolute legal right to have such custody. Reliance has been placed by him on my judgment in *Zerina Jamshed Kalyanvala v. Jamshed Framroze Kalyanvala* (1969) 74 C.W.N. 51 and also the Appeal Court judgment between the same parties (1969) 74 C.W.N. 261. In my said judgment I have held that a Parsi father has the legal right to educate his children in preference to a Parsi mother. Prior to my said judgment, Dutta J. in that case had already granted legal custody to the father. In that case, the only question before me was whether the legal custody of the children would include the legal right of the father to have the children educated in a particular way in preference to the mother. In the case before me, Mr. Panja has argued as a point of law that father alone has the legal right to have the legal custody of the children. Reference has also been made to *Bommadevaria Satyanarayan Varsprasad Rao v. Venkata Lakhmi Narayannama* AIR 1924 Mad. 45 .

3. Mr. Dey, on behalf of the wife, has drawn my attention to Section 49 of the Parsi Marriage and Divorce Act, 1936, and has submitted that the primary consideration which should guide the Court in allowing legal custody of the children is the welfare of the children. He has, therefore, argued that on the facts of this case the mother should be given the legal custody of the children inasmuch as the father deserted the children and has always been cold and indifferent to the children for the last three years.

4. I have carefully examined the allegations and counter-allegations of the father and the mother and I am satisfied that neither the father nor the mother in the present case is unfit to have the custody of the children. At present, the mother is living with her own mother separately from the father with whom no female relative is staying. In fact, there are correspondences to show that the mother was very anxious to see her children happy and to have the children educated properly and for that reason she even wanted the father to come and see the children whenever

he would think best. Similarly, there are correspondences to show that the father also was always ready and willing to bear the expenses for maintenance and education of the children at all stages only on condition that the children should reside with him. The father has expressed his anxiety to have the custody of the children and. also to incur all expenses that would be required for the maintenance and education of the children. The correspondences between the husband and the wife in the past should be examined in the background of the fact that the relationship between them was very strained. It is pity that on account of this tension between the husband and the wife the children are unfortunately suffering.

5. In this application the father has prayed for legal custody" of the children. "Legal custody" as distinguished from "de facto custody" can only mean custody under orders of the Court or under personal law to which the children are subject. Nothing has been placed before me to show that under Parsi personal law father or mother has the legal right to have the custody of the children ; on the contrary, u/s 49 of the Parsi Marriage and Divorce Act, the Court alone have been given the power to pass order with respect to custody, maintenance and education of the children. The heading of Section 49 has been described as "custody of children" and, under the said heading, the Court has been given the power to pass order not only for custody but for maintenance and education. It is possible to argue that the Court should give custody to the spouse who would pay for the maintenance and education of the children. But, in my view, no such general law can be laid down in the background of the Court's discretion u/s 49 of the said Act. Section 7 of the said Act also has laid stress on the welfare of the minor in the appointment of a guardian.

6. In my view, it is for the Court to decide whether on the facts and circumstances of a particular case the father or the mother or any other person or institution should have the custody maintenance and education of the children. Neither the father nor the mother has the absolute right to have the legal custody of the children, although the father's right as the natural guardian of the children should be given due consideration in normal circumstances. The reasons why I say so are as follows:

7. The Guardians and Wards Act was passed in 1890 and the said Act is applicable to all the Indian citizens including the Parsis. Section 17(1) and Section 19(b) of the said Act read as follows:

Section 17(1) In appointing or declaring the guardians of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

Section 19(b). Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint-or declare a guardian of the person of. a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of

the person of the minor.

In construing Sections 7, 10, 24, 25, 17 and 9 of the Guardians and Wards Act together it is obvious that in appointing a guardian of the person of a minor, the Court must be satisfied that such appointment is made for the welfare of the minor. But, in selecting such a guardian, the Court should ordinarily appoint a father as the guardian of the children if he is alive and is not in the opinion of the Court unfit to be the guardian of the children. It is true that the present application has not been made for the appointment of the guardian of person of the minor. But, as the members of the Parsi community are also governed by the Guardians and Wards Act, the principles underlying the appointment of the guardian of the person of a minor should not be overlooked in deciding about the custody of the children under the Parsi Marriage and Divorce Act. When a person is appointed a guardian of the person of a minor, naturally he has the right of custody of the ward with respect to his upbringing, care and protection. In this particular case, the father wanted to have the children admitted in Doon School, Dehra Dun, as early as 1966 and for that purpose it was decided to have them educated in a preparatory school in Calcutta. At that time the relationship between the husband and the wife was normal. Thus, it cannot be denied that the mother also did not think that the education of the children in Doon School would be harmful to the children. It may be stated here that in the Doon School the children are admitted after they attain 11 years. There are preparatory schools both in Dehra Dun and in Calcutta where children get an early education in order to enable themselves to be admitted in Doon School in due course. In this case the two sons are already having their education in a preparatory school, known as Moir Hall School in Calcutta, and they are doing well in the said school. In Dehra Dun there is also a preparatory school known as Welham Preparatory School where also the children are taught in such a way that they become eligible to admission in the Doon School at a later stage. In this case, the father has decided to have his two sons admitted in the Welham Preparatory School, Dehra Dun, and for that purpose not only their names have been registered but also the authorities have agreed to get them admitted with effect from January 31, 1971. In fact, the father has paid necessary amount for the purpose of registration and admission and is willing to bear all expenses for the children there. It is the mother's desire, however, that the children should be educated in Calcutta as they are very young; and they should be allowed to stay with their mother. The elder son Diniyor and the second son Noshir were born on October 3, 1963, and October 10, 1964, respectively. Relying upon my judgment in *Zerina Jamshed Kalyanvala v. Jamshed Framroze Kalyanvala* (Supra) and also the Appeal Court judgment between the same parties as stated above (Supra), I hold that the father's wishes should be respected, inasmuch as the father in the present case cannot be said to be unfit to exercise his right of custody over the children with respect to the upbringing or education of the children. The father has agreed to meet all expenses of the children during his stay at Dehra Dun and, as such, the father must be given the legal

custody of the children. But, as the legal custody does not necessarily mean actual physical custody but also the right to control physical custody the Court could consider whether physical custody should also be given to the father.

8. The children, in the present case, are now staying with the mother and the grandmother. There is nothing to show that the children are unhappy with their mother. The two children are about 6 and 7 years old. There is no complaint that children are sick or unhealthy due to neglect of their mother. On the contrary, the school examination results are quite satisfactory. In my view, with regard to actual physical custody, ordinarily a mother should have preference to a father unless the Court comes to the conclusion that the mother is hostile or inimical or cruel or otherwise unfit to have such custody. In the facts of this case, I am satisfied that the mother is not a person to whom the physical custody could not be given nor I am of opinion that if the children live with the mother they will be unhappy or it will be harmful to them. In this particular case, however, as the children would have to be admitted in the Welham School, Dehra Dun, in deference to the wishes of the father the question of their living with the father or the mother most part of the year does not arise, excepting during holidays. For the reasons stated above, I hold that although the father is entitled to have the legal custody of the children, the mother should be given the physical custody of the children until on fresh materials the Court decides otherwise. Section 49 of the Parsi Marriage and Divorce Act, 1936, gives the Court a wide discretion to pass order with respect to custody, maintenance and education, but in the exercise of such discretion the paramount consideration of the Court is the welfare of the children. With that object in view and applying the principles stated above, I make the following directions:

9. The children should remain with the mother for the time being and the mother would continue to have the children educated in Moir Hall School in Calcutta until the children are taken to Dehra Dun in January 1971 for their admission in Welham preparatory school at Dehra Dun. Till then, unless there are special reasons, the mother will send the children every Saturday, Sunday or a public holiday to the father after the breakfast and the father would send the children back to the mother after the dinner. The father is given liberty to complete arrangements for admission of the children to the Welham Preparatory School, Dehra Dun, in the next session which commences from January 30, 1971. The mother is directed to allow the father to take the children to the tailors and other shops for purchasing their dresses and other personal effects. The mother should send the children to the father at least two days before they leave Calcutta with their father for Dehra Dun. Both the mother and the father would be entitled to see the children at Dehra Dun. During the period when the Welham Preparatory School would be closed for vacation the father would arrange to bring the children in Calcutta from Dehra Dun and send them to the mother. The children will reside with the mother during the holidays, but she will ordinarily send the children to the father every Saturday, Sunday and holidays after breakfast and the father would send back the children to the mother

after dinner as stated earlier. As the mother has not prayed for alimony, father should pay for joint maintenance of the two children on the basis of Rs. 20 per day during their stay with the mother: The parties will bear their respective costs. The parties will act on signed copy of the minutes.