

(2007) 12 CAL CK 0043

Calcutta High Court

Case No: F.M.A.T. No. 3185 of 2006 and C.A.N. No. 6230 of 2006

Nilratan Kundu and Another

APPELLANT

Vs

Abhijit Kundu

RESPONDENT

Date of Decision: Dec. 7, 2007**Acts Referred:**

- Guardians and Wards Act, 1890 - Section 10, 7
- Hindu Minority and Guardianship Act, 1956 - Section 6

Citation: (2008) 2 CHN 479**Hon'ble Judges:** Pranab Kumar Chattopadhyay, J; Kalidas Mukherjee, J**Bench:** Division Bench**Advocate:** Santi Das and Sanjukta Roy, for the Appellant; Subrata Banerjee, Purnasish Gupta, Jayanta Mukherjee and Bidisha Basu Roy Chowdhury, for the Respondent

Judgement

Kalidas Mukherjee, J.

This appeal is directed against the order No. 24 dated 15.7.2006 passed by the learned Additional District and Sessions Judge, Fast Track, 1st Court, Barasat in Act VIII 48/2004 allowing the case under Sections 7 and 10 of the Guardians and Wards Act (Act VIII of 1890). The said case was filed before the learned Court below by Abhijit Kundu, the father of the child Antariksh Kundu, claiming custody of the child from the O.Ps. It was the case of the petitioner/father before the learned Court below that he married Mithu Kundu, the mother of Antariksh, on 8.8.1995 and out of the said wedlock Antariksh was born on 18.11.99. Mithu Kundu who had been suffering from hyper-tension and other ailments died following severe pain on her chest. She died before she could be taken to a local Government Hospital. The parents-in-law of the present O.P. being terribly shocked due to sudden demise of their daughter, lodged a complaint with the local PS alleging torture and murder of their daughter by their son-in-law. During the pendency of the said case, the O.P. herein was taken into custody and under that circumstance, the parents-in-law of O.P. herein expressed their desire to meet their grandson Antariksh and keep him

with them for some days. On such request made by the maternal grand parents of the child, the mother of the O.P. herein sent Antariksh to his maternal grand-parents through a common relative named Niranjan Kundu. After being released on bail the O.P. herein wanted to take back his son from his in-laws, but the present appellants i.e. the in-laws of the O.P. herein refused to hand over Antariksh to the O.P. Under such circumstances, the O.P. herein filed a case under Sections 7 & 10 of the Guardians and Wards Act (Act VIII of 1890) praying for his appointment as the guardian of his son Antariksh and for permanent custody of his son.

2. The present appellants i.e. the maternal grandparents of the child contested the case. It was contended by the appellants before the learned Court below that Antariksh was handed over to them in sick condition from the house of the O.P. herein.

3. The learned Court below considering the respective contentions of the parties allowed the petition under Sections 7 & 10 of the Guardians and Wards Act (Act VIII of 1890) holding that the maternal grandparents had not obtained custody of their grandson by any unlawful means. It has also been observed by the learned Judge of the Court below that the petitioner/father wanted to take back his son from the custody of his parents-in-law which was refused by them. The learned Court below further held that the maternal grand parents of the child did not apply before any Court for their appointment as the legal guardians of Antariksh and it was their legal duty to return the child to his father immediately after Antariksh's father wanted the custody of the child. It was further held that keeping Antariksh in their custody ignoring the claim of Antariksh's father was not legal. It was held that the O.Ps. wanted to wipe out the existence and identity of father from the mind of the petitioner's son and if it is so, then it may be disastrous for the future of the petitioner's son.

4. The learned Court below further held that under the proviso to Section 6 of the Hindu Minority and Guardianship Act, 1956 nothing has been alleged against the father of the child, and, therefore, the petitioner/father had every right under the law to act as the guardian of his minor son and to keep him in his custody. The learned Court below however, held that legal right was not always the ultimate criteria to choose the custodian of a minor and having regard to the facts and circumstances of the case, the learned Court below held that the present and future of Antariksh would be better secured in the custody of his father and that the father is the best guardian of the child in absence of his mother. The learned Court below further held that the petitioner/father being the natural guardian of his minor son and having not been disqualified for any reason under the Act, it was not required to declare him as the legal guardian of his son, especially when nobody else has claimed to be the legal guardian of the minor child. Learned Court below held that the maternal grandfather will retire from service on 2010 and on the contrary, the petitioner is an Engineer/Technician in the Indian Airlines having sufficient financial

means to bear the expenses for the education of the son. It was further held that the father was in a better condition on all aspects to take all cares and for the proper upbringing of his minor son than his parents-in-law. However, having regard to the fact that the maternal grandparents took care of the child for the last two years and since the child developed emotional attachment with his grandparents, the learned Court below held that there would be periodical meeting between the maternal grandparents and the child. The learned Court below thus allowed the case under Sections 7 & 10 of the Act (Act VIII of 1890) directing the O.Ps. to return their grand son Antariksh to the custody of the petitioner within one month and that the O.Ps. after three months from the date of return of Antariksh may take Antariksh to their house from the house of the petitioner in the afternoon of every 4th Saturday of each English calendar month on condition to return Antariksh to the house of the petitioner in the afternoon of the next day and that the O.Ps. may also take and keep Antariksh in their house for seven days during summer vacation or puja vacation of the school and date of such visit of Antariksh to the house of the o.ps would be mutually decided by the parties. The learned Court below further directed that in case of conviction of the petitioner, the O.Ps. would be at liberty to pray before the Court for further appropriate order.

5. Mr. Bikash Ranjan Bhattacharya, learned Senior Counsel appearing on behalf of the appellant/grandparents submits that the guardianship of the child is not in dispute and the welfare of the child is the paramount consideration to decide the question of custody. Mr. Bhattacharya further submits that the father did not pay a single farthing for the education of the child and did not take care for the well being of the son. It is contended that the point for consideration in this appeal is whether the existing custody of the child with the grandparents is for the welfare of the child or not. It is submitted that if the child is placed in the custody of his father that would affect the child's mental equilibrium and the learned Court below did not observe that the existing custody with the grandparents was against the welfare of the child. It is contended that while deciding the question of welfare of the child, the learned Court below ought to have examined the child.

6. Mr. Bhattacharya further submits that the learned Court below also held that the O.Ps. are taking all cares for the well being of the child. It is the contention of Mr. Bhattacharya that the child should remain in the custody of the grandparents i.e. the present appellants for better up-bringing of the child. It is contended that the income certificate of the father was not filed before the learned Court below and for growing the better relationship and understanding with the father, an order should be passed in the appeal for the visit of the child to his father's house every Saturday. Mr. Bhattacharya has referred to and relied on a decision reported to 2000(9) SCC 745, Sumedha Nagpal v. State of Delhi and Ors..

7. Mr. Subrata Banerjee, learned Counsel appearing on behalf of the respondent (father of the child) submits that on the next date of the death of the mother, the

respondent was arrested and the mother of the respondent was absconding as admitted by the grandparent Nil Ratan Kundu in his evidence. Mr. Banerjee contends that the name of the father was not mentioned in the admission register of the child in the school and this shows the ill will nurtured by the grandparents against the respondent. It is contended that the immunization and health card etc. were handed over by the respondent to the appellants after getting bail from the criminal case lodged by the appellants. Mr. Banerjee has produced some photographs showing that as per the interim order passed in this appeal, the child visits his father's house every Saturday and lives there happily with the father and paternal grandmother. Mr. Banerjee submits that the maternal grandparents did not apply to be the guardian of the child. Mr. Banerjee verbally undertakes on behalf of his client in the course of his argument that if the custody is given with the father, in that case the father will not seek change of school of the child since the child has been admitted in St. Xaviers Collegiate School. Mr. Banerjee further submits that as the respondent resides at a distant place, father will arrange for his son's attendance in school by providing his own car. Mr. Banerjee contends that there are several tenants where the appellants reside and there is one common bathroom and the standard of living there is very low. Mr. Banerjee submits that it is the father's interest to grow up the child in a better condition and in this connection Mr. Banerjee has relied on and referred to a decision reported in 1997(1) CLJ 466 : 1997 WBLR (Cal) 126, Pravat Kr. Saha v. Dilip Pramanik.

8. After hearing arguments advanced by the learned Counsels of both sides, we have heard the child in chamber.

9. Admittedly, the father is the natural guardian of the child and under the proviso to Section 6 of the Hindu Minority and Guardianship Act, 1956, the disqualifications provided thereunder are not attracted in the present case. It is also an admitted fact that the maternal grand parents did not apply for their appointment as guardian of the child. From the facts of the case it is also clear that the mother of the child died for which the grandparents lodged a criminal case against the respondent herein. Immediately after the lodging of the said case, the respondent herein was arrested and his mother absconded as stated by maternal grandparent Nil Ratan Kundu in his evidence. Under such circumstances, on the request made by the present appellants, the child was handed over to the present appellants and the respondent on being released, demanded the custody of the child which the appellants herein denied. Thereafter the respondent herein i.e. the father of the child filed the case under Sections 7 & 10 of the Guardians and Wards Act (Act VIII of 1890) and learned Court below after considering the materials on record and hearing both sides passed the order under appeal.

10. It is the settled principle of law that while deciding the question of custody of the child, the paramount consideration is the welfare of the child. In order to decide the question of welfare of the child, the surrounding facts and circumstances are to be

taken into consideration. The learned Court below while considering the question of welfare of the child, took into consideration the factual aspects of the case as urged by the learned Counsels of respective parties. But, however, the learned Court below did not examine the child because of his tender age and it was not urged by either party.

11. During the pendency of the appeal, an interim order was passed directing the appellants herein to retain the custody of the child with the further direction that the child will visit his father's house every Saturday and return to the house of maternal grandparents on the following Sunday, The photographs as shown by Mr. Banerjee also show that the child during his periodical visit lives in the house of his father happily. From the photographs there is no indication of any lack of love or affection from the side of the father or paternal grandmother. The photographs clearly show that the father has been taking proper care and extending natural love and affection to the child. Needless to mention that the child was initially in the custody of the parents and after the death of the mother he has been residing with his maternal grandparents. This growing relationship with the father pursuant to the interim order, is a circumstance which speaks in favour of giving the custody of the child with the father.

12. The child has been admitted in a renowned school in Kolkata. As to the objection regarding the distance of school from the house of the respondent, Mr. Banerjee the learned Counsel appearing on behalf of the respondent has verbally given the undertaking on behalf of his client in course of advancing his argument that the respondent will not seek change of school in case the child is given to the custody of the father and the respondent, who owns a car, will send his son to the school by his own car.

13. We have gone through the evidence adduced by both sides and also heard the child in order to decide the question of the welfare of the said child. During our conversation with the child we have observed with great anxiety that the child has been tutored to make him hostile towards his father. In this connection it is worth mentioning here that the learned Court below also held that the O.P.s wanted to wipe out the existence and identity of father from the mind of the petitioner's son and if it is so, then it may be disastrous for the future of the petitioner's son.

14. We are of the view that the child should not be deprived of the love and affection of the father which is required for the proper development of the mental health of the child. Similarly he should also get the love and affection of the maternal grandparents. The child should grow up with the love and affection of the father as well as the maternal grandparents. We are satisfied after having conversation with the child and viewing the photographs that the said child during his periodical visit to his father's house spent the time merrily. Having regard to the totality of the circumstances, we are of the considered view that it is the interest and responsibility of the father for the proper up-bringing of the son and having regard to the

question of the welfare of the child, we find that the learned Court below was justified in deciding the question of custody of the child in favour of the father. The learned Court below also rightly held that if the petitioner is convicted and sentenced, the O.P.s will be at liberty to pray before the Court for modification of the order. We also approve the directions of the learned Judge of the Court below as regards the visit of the child to the house of the maternal grand-parents on every 4th Saturday of each English calendar month and return on the next Sunday and for seven days during summer or puja vacation of the school. We are, however, unable to agree with the finding of the learned Court below regarding the commencement of such visit after three months from the change of custody. We, therefore, direct that such visit will commence from the next 4th Saturday of this month after the change of custody having regard to the love and affection received by the child during the last two years. The child will remain in the custody of the father and will visit the house of his maternal grandparents on every 4th Saturday of the month as directed by the learned Court below. The appellants are directed to hand over the child Antariksh to the custody of the father on 8th December, 2007 at 6.00 p.m. positively. The order under appeal is, therefore, modified to the extent as stated above.

Both the appeal and the application are thus disposed of with no order as to costs. Interim order passed earlier stands vacated.

Urgent xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be supplied to the learned Advocates of the respective parties on the undertaking to apply for the certified copy of the same.

Pranab Kr. Chattopadhyay, J.

15. I agree.