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(1970) 03 CAL CK 0024

Calcutta High Court

Case No: Application for leave to appeal to the Supreme Court No. 9 of 1970

Santosh Kumar Bose	APPELLANT
Vs	
Sm. Mira Bose	RESPONDENT

Date of Decision: March 12, 1970

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11
- Constitution of India, 1950 - Article 133(1)
- Hindu Marriage Act, 1955 - Section 26
- Hindu Minority and Guardianship Act, 1956 - Section 5(b), 6

Citation: 74 CWN 689

Hon'ble Judges: S.K. Datta, J; S.K. Chakravarti, J

Bench: Division Bench

Advocate: Apurba Dhan Mukherjee and Rathindra Nath Bhaduri, for the Appellant;Hirendra Chandra Ghose and Samindra Chandra Ghose, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Chakravarti, J.

This is an application under Clause (C) of Article 133(1) of the Constitution for a certificate of fitness for appeal to the Supreme Court by the husband. What happened was that the wife filed a suit for judicial separation in the City Civil Court at Calcutta, and during the pendency of that suit the wife filed an application u/s 26 of the Hindu Marriage Act for custody of the two children born of marriage. It is an admitted position that these two male children were born on the 15th February, 1967 and on the 11th April, 1968 respectively. At the time of the institution of the suit and the application u/s 26, the children were in the custody of the father. The learned Judge in the City Civil Court held on a construction of section 6 Clause (A) of the Hindu Minority and Guardianship Act, 1956 that the children being aged less than 5, they should ordinarily be in the custody of their mother. He further

considered and found that the welfare of the children also demanded that the custody should be with the mother. He, therefore, directed the husband to make over the custody of the two children to the wife. Against this interim order an appeal was preferred to this Court and we dismissed that appeal summarily under Order XLI Rule 11 of the CPC and the instant application is in respect of this order.

2. Mr. Apurbadhan Mukherjee, learned Advocate appearing for the husband petitioner states that substantial questions of law are involved and as such it is a fit case for appeal to the Supreme Court. His main contention is that the learned Judge in the City Civil Court had no jurisdiction to travel beyond the confines of the Hindu Marriage Act and rely on section 6 of the Hindu Minority and Guardianship Act to find out in whose custody the children should be. We do not agree with this contention of Mr. Mukherjee. Section 5(b) of the Hindu Minority and Guardianship Act would show that the provisions of this Act shall prevail over "any other law in force immediately before the commencement of this Act....so far as it is inconsistent with any of the provisions contained in this Act." Admittedly, the parties are Hindus and so the learned Judge was perfectly justified in relying on section 6 of the Hindu Minority and Guardianship Act. What is more, it is well settled now that it is the welfare of the children which should be the guiding principle in coming to a finding as to with whom the custody of the children should be and as ordinarily the custody of children aged less than 5 should be with the mother unless it is shown that she has forfeited her right. The learned Judge considered the welfare of the children and as we have pointed out, he has come to a definite finding that the children should be in the custody of the mother. It may be that all the grounds which he had mentioned in his order may not be very substantial but still he has applied the law to the facts correctly and we do not find any substantial questions of law involved in this case which would induce us to take a different view and to grant the certificate prayed for. In the second place, Mr. Ghosh appearing on behalf of the wife has pointed out that the order in question is not a final order and as such no such certificate can be or should be granted. Section 26 would show that the court may pass such interim order during the pendency of the case and may also make provisions in the decree and even after the decree. The suit in question is still pending and the order passed by the learned Judge would show that he considered this application to be an application for ad-interim custody of the two minor children. It will be open to the learned Judge to pass the final order at the time of final disposal of the suit and in this view of the matter also, the present application would not lie.
The result, therefore, is that this application is dismissed.

There will be no order as to costs in this court.

S.K. Datta, J.

I agree.