Mrs. Zerina Jamshed Kalyanvala Vs Jamshed Framroze Kalyanvala

Court: Calcutta High Court

Date of Decision: Dec. 16, 1969

Acts Referred: Guardians and Wards Act, 1890 â€" Section 19(b), 24
Parsi Marriage and Divorce Act, 1936 â€" Section 49

Citation: 74 CWN 261

Hon'ble Judges: S.K. Mukherjea, J; B.C. Mitra, J

Bench: Division Bench

Advocate: B.K. Ghosh and G. Chakravarty, for the Appellant;S.D. Banerjee and D.K. De, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Mukherjea, J.
This appeal is directed against an order by which Masud, J. dismissed an application made by a mother u/s 49 of the

Parsi Marriage and Divorce Act for a direction that her minor son be educated at Larwence School, Lovedale in the Nilgiris. By the said order, the

learned Judge in effect refused to interfere with the decision of the boy''s father to educate him at Bishop Cotton School, Simla. The mother is the

appellant before us. In a matrimonial action brought by her against her husband for a decree for dissolution of marriage or judicial separation, S.K.

Datta, J. passed a decree for judicial separation and granted the custody of issues of the marriage to the father. There are two issues, a boy and a

girl. By an earlier order his Lordship had directed that during school terms the boy should reside four days and a half in the week with his mother

and two days and a half with his father. The decree was passed on November 15, 1967. By a letter dated April 2, 1969 the father''s solicitor

intimated to the mother''s solicitor that the son had been admitted into the Bishop Cotton School, Simla and his fees had been paid. He was to join

the school in March 1970. On July 3, 1969 the mother''s solicitor promptly replied to the letter and alleged that in 1966, after a discussion with the

boy''s maternal grandfather, the father had agreed that if the boy could be admitted to Lawrence School nothing could be better; that arrangements

have been made for his admission into the school, thanks to the exertions of the grandfather; that Lawrence School is a better school than Bishop

Cotton School; it is also a co-educational school and therefore if the boy''s sister passes the Entrance Examination in 1971 she may also go to the

same school; in that event, the brother and the sister could be together which would strengthen family ties between the two; and last but not the

least, the boy''s grandparents have a home at Coonoor, only a few miles from Lovedale where he can spend his summer holidays under the care of

his grandparents, avoid the heat of Calcutta and not be compelled to live in any empty school or go elsewhere on excursion. The boy, it was said,

will be lonely at Simla throughout his school years and will have no home to go to; at Coonoor he will have the hospitality of a home during the

holidays; a child likes going to a school as a boarder and not as one who has been banished from home.

2. I have given a synopsis of the letter only because it sums up the arguments advanced on behalf of the appellant. The appellant did not wait long

for a reply. On the fifth day her solicitors took out a notice of motion and asked for the direction I have spoken of. Her other prayers were:- (i)

directions be given for the custody of the boy during the school vacations of the Coonoor School and (ii) his sister be also permitted to go to the

Coonoor School when she is eligible to do so. As the learned Judge could not persuade himself to give any direction for the boy''s admission into

the Coonoor School he did not find it necessary to make any order for custody of the boy during the holidays. As for the other prayer the learned

Judge found it unnecessary to give any direction for the girl''s education because she is yet to complete her course at Loreto School, Calcutta and it

will be sometime yet before a school will have to be chosen for her.

3. The parties are members of the Parsi community. The glitter of a polish strongly modern in its characteristics, and the manners and ways of living

which many have imbibed from other shores do not detract from the fact that the Parsis profess one of the oldest religions of the world. They have

a code of personal law as authoritarian as any to be found elsewhere. In common with all Aryan societies, the Parsi society is a patriarchal society.

The position of the father, his status, his rights and obligations as the head of the family are much the same as among the Hindus.

4. It is common knowledge that the father, and after him, the mother are by a long series of judicial decisions acknowledged as the natural

guardians of their children. The father, as the natural guardian has the first right to the guardianship and the custody of his children. This position is

recognised in section 19(b) of the Guardian and Wards Act which enjoins that the court will not appoint a guardian of the person of a minor whose

father is living and is not, in the opinion of the court, unfit to be the guardian of the person of the minor. The rights and duties of a natural guardian in

relation to the minor''s person though unwritten are at least as extensive as the rights and duties of a guardian appointed by court. It includes the

right of custody, the duty to support the minor and look after his health and education. In the case of a guardian appointed by the Court these rights

and duties have been given statutory recognition in section 24 of the Guardian and Wards Act which provides: ""A guardian of the person of a ward

is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is

subject requires.

5. In the case before us, the father is not only the natural guardian of his minor son with all the rights and obligations which his position implies but

he has also been expressly given custody of the minor by a competent court. As Lord Hamworth, Master of the Rolls, pointed out in (1) Willis v.

Willis 1928 Probate 10 the term ''custody'' does not mean actual physical custody but the right to control. The right to educate his minor son in the

manner he thinks best is only one aspect of the right of control enjoyed by the father as a natural guardian. This is not to say that the right is an

unqualified or an indefeasible right. On the question of a minor''s education as on similar questions, the welfare of the minor is of the greatest

importance and in a proper case, the court will interfere in the interest of the minor. That does not mean that the Court will be astute to find reasons

for interference, split a straw, raise a tempest in a teacup, weigh the pros and cons of an act or a decision in a fine and sensitive balance and

supersede the discretion exercised by the person in whose hands the law has reposed the welfare of the minor. It is only if an act or a decision of

the guardian or the person having the custody of the minor is patently not in the interests of the minor and is likely to prejudice him that the court

will interfere.

6. In (2) Jiban Krishna v. Sailendra Nath AIR 1946 Cal. 272 a Division Bench of this court observed: ""The natural guardian may function and

perform his duties and exercise his powers unhampered by anybody as long as the matter is not brought before the court and his unfitness

established before it."" In the present case, his unfitness has not been established.

In (3) Hall v. Hall 26 E.R. 1213 the Lord Chancellor held that a guardian is the proper judge of the school where his ward should be placed and

refused to indulge a young gentleman in being put to a private tutor or going to another school. In that case, the minor had been sent to Eton, a

school of great reputation.

7. Many old English cases are concerned with the father''s right to give his children religious education of his choice but the principles on which

those cases were decided are equally applicable to education in general.

8. In re. (4) Algar Ellis 10 Ch. D. 49 James L.J. speaking of a father, said: ""The law trusts to him that he will, rising above all petty feelings, have a

sole regard to what he conscientiously believes to be for the temporal and spiritual welfare of his children; and we, pronouncing what we deem the

law to be, must leave the matter to his sense of parental duty and to his conscience."".... ""No doubt, the law may take away from him this right or

may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient

cause known to the law"".

In re: (5) Algar Ellis 24 Ch. D. 317 in which the legal right of the father to control and direct the education of his children came up for consideration

Bowen L.J. said: ""The father has the natural authority. Except in cases of immorality, or where he is clearly not exercising a discretion at all, but a

wicked or cruel caprice or where he is endeavouring to withdraw from the protection of the court, which is entrusted with such protection by law,

the custody of the infant, as a rule the court does not and cannot interfere, because it cannot do so successfully or I should rather say because it

cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life. I

believe the court has jurisdiction but it must exercise it with sufficient reason.

9. Learned counsel appearing on behalf of the appellant relied on certain observations in Tolstoy''s Law and Practice of Divorce and Matrimonial

Causes, 6th edition at page 200 it is said: ""When deciding on custody or access the court does not generally make special provisions as to

children''s education, leaving it to the party having custody to decide on this. Where it becomes necessary for the court to consider the children''s

education and upbringing, whether on the application of the parties or on the court''s own initiative, it considers this from the point of view of their

career, of their station in life and general upbringing, and of their religious education. Except in special circumstances, the children would follow

their father''s religion but though the father has a right to have his wishes considered unless he has abandoned that right, the children''s welfare is

always the paramount consideration, whether the parents are alive or dead"".

10. Counsel relied on the above observations and contended that whatever may be the rights of a natural guardian or of a person having the

custody of the minor, once the matter is before the Court, the Court will decide the question before it on the principle that the welfare of the child is

the paramount consideration. It has never been in dispute that the welfare of the minor is what the court must primarily consider. It is not however

the law, at least not in India, as I understand the law to be, that the court will not take into consideration the views and wishes of the natural

guardian. Not only will the court do so, but it will also refuse to interfere with the discretion exercised by him except for good and sufficient reason.

11. There is a difference in this respect between the law in England and the law in India. In England, at common law the father had the

unquestionable right to the custody of his minor children unless there was serious and specific misconduct on his part. The court of Chancery would

however often intervene and decide a question in the light of what it considered to be in the best interests of the minor, subject to the qualification

that as between a father and a mother, the rights of the father should be superseded only if he had conducted himself in such a manner or has been

found to be such a person that it was necessary that his rights should be superseded. The court of Chancery therefore interfered with the father''s

rights on grounds wider than at common law.

12. By section 1 of the Guardianship of Infants Act 1925 a new principle has been introduced. It provides: ""Where in any proceeding before any

court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the

administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in

deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether

from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing,

administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

The welfare of the child has been made the paramount consideration and as between the parents, the claims of the mother and of the father have

been made equal. The statute enjoins that their respective claims have to be judged in the context of the interest of the minor and in that context

alone.

13. No provision analogous to section 1 has been introduced in any Indian statute. One often hears that in these proceedings the welfare of the

minor is the paramount consideration but it is not always remembered that the phrase is an echo from section 1 of the Act of 1925, a section

conspicuous by its absence from the Indian statute. It is perhaps not of much practical importance whether the welfare of the minor is the

paramount consideration or a major consideration. May be, it is very nearly a distinction without a difference but the distinction is there. In any

event, having regard to the absence of any provision analogous to section 1 of the Act of 1925 in any Indian statute, it cannot be validly contended

that in India, the claims of the father and of the mother are equal and neither has rights capable of being superseded by the other. Therefore, if the

course proposed by the father does not patently and substantially prejudice the minor''s welfare his decision ought to prevail and the court will not

interfere.

14. I now propose to go into the merits of the respective schools chosen by the parents in the context of the minor''s welfare. I entirely agree with

the learned Judge that both the schools are good schools. They are both Anglo-Indian Schools founded over a century ago. They are both situate

in hill stations in pleasant surroundings, one in the north and the other in the south. Both Simla and Coonoor enjoy salubrious climate though the

steady and continuous downpour occasioned by the first and the second monsoon in the south need not be lost sight of. They are equally far or

equally near from Calcutta where the parents of the boy live. Communications from Calcutta to Simla or to Coonoor are equally satisfactory or

unsatisfactory. The schools have long winter holidays. The Simla school has two other short holidays of ten days each, one in June and the other in

September. The Coonoor school has only one of five weeks in summer. At Coonoor there is co-education to which the father objects. On

coeducation opinions may reasonably differ. The great public schools of England do not subscribe to co-education. In Indian schools, it is the

exception rather than the rule. I do not say that coeducation is not desirable or that it is. I only say that the father''s views are not patently

unreasonable and they are shared by many.

15. The father also objects to the Coonoor school on the ground that a very large number of places are reserved for children of British Army

Officers and in such an atmosphere the boy may lose his tradition and culture. I am unable to agree. The last British Army officer left India a

quarter of a century ago. Assuming there are some retired Army Officers who have settled in the Nilgiris, I should be very much surprised if they

have many children of school-going age. My feeling is that the quota exists only on paper and is never filled up in the present circumstances. Apart

from that, I do not know that the Avesta is taught either at Simla or at Coonoor. The father''s other objection is that one learns Hindi at the Simla

School but not at Coonoor. It appears that Hindi is taught at cither school. The objection, therefore, is of no substance.

16. As assertion was made in the petition that in 1966, after a discussion with the boy''s maternal grandfather, the father agreed to send the boy to

the school at Coonoor and the maternal grandfather has taken all necessary steps in that behalf. Having taken that decision there is no reason why

the father should now resile from it. The submission was made that his decision to send the boy to the Simla school is malafide and is prompted

solely by his hostility to the mother and her parents who have a home at Coonoor where the boy may spend his holidays. The father, of course

stoutly denied having ever consented to send the boy to Coonoor. It appears from a sheaf of correspondence that he has been trying hard for

years, long before his estrangement with his wife, to have the boy admitted into Bishop Cotton School. He was himself educated at Bishop Cotton

School with which he maintains personal ties. An old teacher of his is now the headmaster. Assuming that at some point of time he was persuaded

to agree to send the boy to Coonoor there is nothing to prevent him from giving the matter a second thought and revise his decision in the interest

of the minor. In (6) Annie Besant v. Narayaniah 41 I.A. 314 Lord Parker of Waddington observed: ""As in this country so among the Hindus, the

father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore

during his life-time substitute another person to be a guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the

custody and education of his children to another, but the authority he thus confers is essentially a revocable authority and if the welfare of his

children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands.

17. It is nobody''s case that the father has entrusted the custody and education of his minor son to another. What is alleged is that the father agreed

to adopt a particular course in relation to his son''s education. If he did, he has reconsidered the matter and decided on some other course. In my

judgment, his mala fides have not been established. Assuming that he has changed his mind largely because of his hostility to his wife, that by itself,

in my opinion will not be a good ground for interference because what has to be considered is his conduct in relation to the minor and not in

relation to his wife and what is in issue is not his bona fides or mala fides but whether his decision is in the interest of the minor.

18. A reasonable decision taken in the interest of the minor must be regarded as a decision taken bona fide even though other factors might have

coloured the decision taken for wrong reasons may be a good decision. The question involved is the choice of a school. If it is a good school, it is

a good choice, no matter why the choice is made.

19. It now remains for me to consider the possibility of the sister joining her brother at school to relieve his loneliness and the prospect of the boy

spending his summer holidays with his grandparents at Coonoor. A normal child of the boy''s age is not likely to feel lonely, at least not for long, in

a residential school. Whether the sister will at all go to Coonoor is less than certain. It will depend on how well she does in her studies and whether

she passes the Entrance Examination to be held by the school. It may also depend on the result of another legal battle between the parents on the

question of her admission. The father does not wish it, the mother does. Be that as it may, if she goes to Coonoor she will go there after a couple

of years. The learned judge did not find it necessary to give any direction at present as regards her education nor do we.

The prospect of the boy spending his summer holidays with his grandparents may be alluring; after all he has been living mostly with his

grandparents because his mother is living with them. If he goes to Coonoor he will be living there for the greater part of the year. Whether in those

circumstances he will enjoy spending his holidays also at Coonoor or whether he will have too much of a good thing, is anybody''s guess. Under

the order of Datta J., he has to spend his holidays more or less equally with his parents. That shortens the prospect of his stay with his

grandparents by half. From Simla he can always come to Coonoor during the summer break to live with his grandparents if his mother also

happens to be there. Under the order of court he is to live with his parents, not with his grandparents.

In the view I have taken, I do not see any reason, far less any substantial reason, why in an appeal we should interfere with the father''s choice of a

school for his son, a choice with which the learned judge in his discretion has thought fit not to interfere.

The appeal therefore fails and is dismissed. Parties will bear their own costs. Certified for two counsel.

B.C. Mitra, J.

I agree.