

(2008) 05 DEL CK 0169**Delhi High Court****Case No:** Mat Appeal No. 27 of 2006

Dhanesh Kumar Kasturia

APPELLANT

Vs

Sangeeta Kasturia

RESPONDENT

Date of Decision: May 29, 2008**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151
- Guardians and Wards Act, 1890 - Section 25
- Hindu Marriage Act, 1955 - Section 24, 26, 28(2)

Citation: (2008) 104 DRJ 326**Hon'ble Judges:** Vidya Bhushan Gupta, J**Bench:** Single Bench**Advocate:** Kajal Sharma, in perso, for the Appellant; Manjula Gandhi in person, for the Respondent**Judgement**

V.B. Gupta, J.

The present appeal u/s 28(2) of the Hindu Marriage Act, 1955 (for short as the "Act") has been filed by the Appellant/Husband against an order dated 06/07/06 passed by Sh. K.S. Pal, Additional District Magistrate, Delhi whereby the Trial Court dismissed the application of the Appellant u/s 26 of the Act read with Section 151 of the Code of Civil Procedure, 1908 for grant of an interim custody of Appellant's children by appointing him as a natural guardian.

2. The relevant facts for disposal of the present appeal are that the marriage between the Appellant and Respondent was solemnized on 23.01.92 at New Delhi according to Hindu rites and ceremonies and the same was registered with the Registrar of marriage under the Act in Delhi on 18.08.93. Two children were born out of this wedlock. The elder son Master Vaibhav Kasturia was born on 18.11.92 and the younger son Master Vishesh Kasturia was born on 10.01.98. Later on, there started differences between the parties and in Nov. 2001 the appellant shifted to

Germany to work in Brandenburg Technical University, Germany. Respondent and two sons also came to Germany in April 2002. On 27.12.02, a "Separation Agreement" was concluded between the parties with the intentions to get divorce. On the issue of the right to determine the residence of the children, it was decided that this right would remain with both the parents. According to this Agreement, both the parties were supposed to have custody of the children alternatively for a week.

3. It has been stated by the appellant that sometime after the separation, the Respondent with intention to agonize and fetch money from the Appellant filed a case in the Local Courts of Cottbus, Germany. The Local Court of Cottbus, Germany vide order dated 08.05.03, granted the right to determine the place of residence of the children to the Respondent.

4. The Appellant filed an appeal dated 12.09.03 before the Brandenburg Higher Regional Court, Germany challenging the above said order. Higher Court of Germany, vide judgment dated 30.10.03 cancelled Respondent's right to determine the residence of the children to the Local Courts of Cottbus for new Trial.

5. It has been alleged by the Appellant that during the pendency of the above referred case, Respondent stopped compliance of the Separation agreement.

6. Aggrieved as above, Appellant filed an application before the Local Court of Cottbus on 12.09.03 and vide interim order dated 22.10.03, the Court allowed the Appellant to have the custody of the children every alternative Saturday from 10 am to 6 pm till the disposal of the Custody case.

7. On 26.06.04, the parties left Germany and reached India. It is alleged by the Appellant that on return, at the Airport, the Appellant met an accomplice of the Respondent who claimed to be from police. He told the Appellant that Respondent's father had filed a complaint against the appellant before police and this way Respondent forcibly took the children away from the Appellant.

8. It is further stated by the Appellant that he is a Software Engineer by profession and since graduation has been working with highly reputed companies and Multinationals and he is in a much better position to look after and care the children for a bright future while the Respondent is a house wife and had no income of her own and was wholly dependent on the Appellant since the commencement of marriage. It is further alleged that the Respondent along with both the sons has been living with her parents in a two rooms apartment at Mayur Vihar and due to congested environment, the Respondent cannot provide healthy growth and good education to the children. The Trial Court has erred in holding that the Appellant is not entitled for interim custody or any visitation rights with the children though the prayer in the application of the Appellant was only with regard to the interim custody. The Trial court has ignored the fact that the father is the legal guardian of the children and he has full right for visitation with their children as well as for

interim custody. It is alleged by the Appellant that the Respondent has no respect for law and she has violated various agreements and court orders passed by the Germany Court while living in Germany. Hence, it is prayed by the Appellant that the custody of both the sons born out of this wedlock be given to him for their proper environment as well as for good education.

9. In reply affidavit filed on behalf of the Respondent, it is stated that prior to the filing of the appeal, the Appellant with ulterior motives filed two separate petitions against the Respondent, one is for seeking decree of divorce on the ground of cruelty and the second is u/s 26 of the Act for grant of permanent custody of children born out of the wedlock of the parties. Both the said petitions are pending for disposal before the Trial Court. Later on, without withdrawing the said petition u/s 26 of the Act, the Appellant has also filed a petition u/s 25 of the Guardians & Wards Act for seeking permanent custody of the children. Along with it he has also filed an ad-interim application for seeking the custody of the children or the restoration of meeting rights. The said application was dismissed by the Trial Court vide order dated 06.07.06 against which the appellant has filed the present appeal before this Court.

10. The Appellant has also filed an application u/s 151 of Code of Civil Procedure, 1908 before the Guardian Court, thereby seeking restoration of meeting rights with the children. To the said application, the Respondent filed her reply dated 15.01.07 to which no rejoinder has been filed by the Appellant. The said application is still pending for disposal before the Guardian Court. After the dismissal of the said application u/s 26 of the Act in terms of order dated 06.07.06, the Appellant cannot be permitted to agitate the same issues by filing the present appeal under reply and that too when another application filed by him is still pending disposal before the Guardianship Judge.

11. It is further stated that when the Respondent filed an application u/s 24 of the Act for seeking maintenance for herself and for the children, then the appellant in reply to the above said application, has refused to pay maintenance. Despite being a man of means having substantial amount available at his disposal, the appellant in the said reply alleged that since Nov. 2005, he has been working as a free-lance programmer/Software Engineer earning a monthly income of Rs. 15,000/-; his income is not fixed but flexible; has suffered huge litigation cost; has the responsibility of his old parents and suffered of loss of about Rs. 40,000/- in June,2004.

12. By praying for dismissal of maintenance application of respondent for her maintenance and for the maintenance of children, the Appellant has proved beyond any reasonable doubt that neither he had nor he has any love, affection and/or attachment for the children and it is the respondent who is looking after them.

13. It is further stated that when the Respondent was in Germany, she filed an application on 3.2.03 with District Court of Cottbus, Germany for sole custody of children also declaring therein that after the separation, she would like to return to India. On 12.6.03, the Court while accepting the said petition of the respondent, directed the appellant to hand over the passports, school and health certificates of children to her. While coming to the said conclusion that the right to decide the place of residence of children was assigned to the respondent, the Court also took into consideration the recommendation and judgments of Youth Welfare Office in Cottbus.

14. Against the said order, the appellant filed an appeal before the Brandenburg Higher Regional Court, however, the said appeal was disposed off vide order dated 30.10.03 on technical grounds.

15. Ultimately it was decided that the parties will leave Germany for India on 21.6.04. After coming back to India, the parties are living separately from each other since 27.12.02 i.e. ever since the agreement of separation was executed between the parties.

16. The Respondent did B.Sc. (Physics Hons.) from Delhi University in the year 1986 and thereafter successfully completed two years Diploma in Computer Applications from BRC Institute of Computer Sciences, Chandigarh. After completing her education, she joined the service but resigned from the job as the appellant was not interested that the Respondent should continue with the job after marriage as the parties were getting married on 23.1.92 and after coming back to India, she joined Max Muller Bhavan for learning the German language.

17. It is further stated by the Respondent that she is educated, gainfully employed and taking full care of her children. Both the children born out of the wedlock of parties are studying in Ryan International School, Mayur Vihar Phase III, Delhi which is one of the best schools of Delhi and respondent is taking full care of the children and providing them with the best education within her limited means. Both the children are deeply attached to their mother and maternal grandparents. The respondent is living with her parents in their own house. After coming back to India, it is the father of Respondent who took full care of Respondent and children and provided them all the basic necessities of life and also got the children admitted in the best school of the area.

18. From August, 2003, both the children started living permanently with their mother. Even while staying at Germany, the appellant stopped paying any maintenance charges for respondent and paid the same only for the children, for which he himself was getting the aid from the German Government.

19. Therefore, it is prayed that it is in the welfare of the children that their custody should remain with the Respondent. By giving any meeting rights and/or the custody of the children to the Appellant, the same will adversely affect their

up-bringing, growth, education etc. Thus, the appeal filed by the Appellant should be dismissed.

20. In rejoinder filed by the Appellant, he had controverted the averments made by the Respondent.

21. I have heard the Ld. Counsel for the parties and have perused the record.

22. Although under the provisions of Hindu Law by which the parties are governed, the father is accepted as the natural guardian of a minor, but there are several instances, where the courts had accepted the mother as the natural guardian of a minor in preference to the father even when he was available.

23. The question regarding the custody of a minor child cannot be decided on the basis of the legal rights of the parties. The custody of a child has to be decided on the sole and predominant criterion of what would best serve the interest and welfare of the child.

24. Having regard to the complexities of the situation in which this Court has been called upon to balance the emotional confrontation of the parents of the children and the welfare of the minors, I have given anxious thought as to what would be in the best interest of the minors. I have myself spoken to children, without either of the parents being present, in order to ascertain their preference in the matter.

25. Although the children had expressed before this Court that they were not willing to stay with their father, keeping in mind the fact that the welfare of the children is of paramount importance, the Court seriously consider whether the children should be deprived of their father's company or not?

26. The children are living with their mother permanently since Aug.2003. Thus, under these circumstances the interim custody of the children cannot be given to the Appellant.

27. Without going into the allegation and misapprehensions expressed, on the paramount consideration of best safeguarding the interest of the children, in my opinion, order for visitation rights of the Appellant deserves to be passed.

28. I, therefore, feel that the interest of children will be best served if they remain with the Respondent but with sufficient access to the Appellant to visit them at frequent intervals but so as not to disturb and disrupt their normal studies and other activities.

29. Accordingly, I direct that the Appellant will be at liberty to take children out with him and to bring them back to the Respondent's house on alternate Sunday from 3 p.m. to 6 p.m. during the summer vacations and when school remains open, then once in a month from 4p.m. to 6 p.m.

30. The present appeal, stands disposed off in view of above terms.

31. No orders as to costs.
32. Trial Court record be sent back forthwith.
33. Dasti.