
(1991) 02 DEL CK 0092

Delhi High Court

Case No: C.M. (M) No. 401 of 1989

Renu Kathuria

APPELLANT

Vs

H.K.L. Kathuria

RESPONDENT

Date of Decision: Feb. 22, 1991

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 127, 151
- Guardians and Wards Act, 1890 - Section 12, 19, 7, 8

Citation: (1991) 1 DMC 511

Hon'ble Judges: C.L. Choudhary, J

Bench: Single Bench

Advocate: B.R. Sharma, for the Appellant; Kamlesh Kumar, for the Respondent

Final Decision: Allowed

Judgement

C.L. Chaudhry, J.

This civil miscellaneous main petition filed by Smt. Renu Kathuria is directed against the order dated 21-12-1989 passed by the Guardian Judge, Delhi, by which the minor was required to continue meeting the respondent till the disposal of the petition. On 19-9-1987 Shri H.K.L. Kathuria, the respondent in this petition filed a petition under Sections 7 and 8 of the Guardian and Wards Act, 1890 before the District Judge, Delhi against Smt. Renu Kathuria, praying therein that he may be appointed as guardian of the minor child, Master Anshul. It is alleged in the petition that the petitioner is the grand father of the minor male child Anshul Kathuria, whose custody is with Smt. Renu Kathuria, respondent in that petition. It is stated that the respondent was married to the son of the petitioner, Ashok Kumar Kathuria on 16-6-1983 at Delhi. Out of the wedlock Anshul was born on 25-5-1984. Unfortunately on 5-10-1986 Ashok Kumar Kathuria died in an accident. The respondent lived at the house of the petitioner thereafter for 20 days when she left the house and started living with her parents at Mansarovar Garden, New Delhi. She also took Along with her the minor child Anshul. The child was studying in Lahore

Montessory School, Kirti Nagar, New Delhi Along with another grandson of the petitioner. He used to live with his mother from Monday morning to Saturday evening and from Saturday evening to Sunday evening he used to live with the petitioner and other members of the family at E-79, Kirti Nagar, New Delhi. The school fee and other charges of the minor child were being paid by the petitioner. The respondent got admission in Janki Devi College, Pusa Road, New Delhi. Her parents started planning to get the respondent married. The respondent finally decided to break all relations with the petitioner's family. The petitioner was very much upset on this attitude of the respondent and he wanted to have the custody of the child Anshul and started negotiations with the respondent and her parents through the intervention of some common relations and family friends. The father of the respondent Mr. Arora clearly made out that they would not discuss the matter relating to the custody of the child unless all the jewellery items belonging to the respondent were given to her. It was agreed to by the petitioner. Accordingly all the jewellery items brought by the respondent in her dowry and given to her at the time of her marriage by the petitioner were given to the respondent on 19-1-1987. It is further stated that despite receipt of all the jewellery items the respondent and her parents had been delaying handing over the custody of the minor child Anshul to the petitioner. In the first week of April, 1987 the father of the respondent informed the petitioner on telephone that the respondent was leaving for Gauhati where she was going to be married and that they were prepared to give the custody of the minor child to the petitioner on the condition that the petitioner would pay a sum of Rs. 2,00,000/-. Since the demand of the respondent was illegal and as being on the higher side the petitioner did not agree to it. Though no settlement between the parties could be arrived at but the minor child used to come and live with the petitioner at his house on Saturdays and Sundays. During his stay with the petitioner the child was very happy. The respondent Along with the child left for Gauhati on 28/29th April, 1987 without intimating the petitioner. However, out of love and affection and with a view to see that the child was being looked after properly, the petitioner left for Gauhati on 27-4-1987. There the child was allowed to remain with the petitioner for a little time. The petitioner wanted to bring back the child to Delhi but the respondent refused to cooperate. The respondent had the idea of getting married and settling down at Gauhati and with the above end in view she had got the name of the minor child removed from Lahore Montessory School. It is further stated that it would be in the welfare and interest of the minor that the minor should continue his studies at Lahore Montessory School, Kirti Nagar, Delhi which has modern facilities and amenities as such amenities are not available at Gauhati. The petitioner is a professional photographer and was carrying on his business in Palika Bazar, New Delhi, where his other sons are also carrying on the business of photography. He and his wife are assessed to Income Tax and they are sufficiently solvent and command reputation in the Society. The petitioner will be able to look after the welfare of the minor child. It is further alleged that the respondent has no independent source of income and she is dependant upon her

father. She has no sufficient means even to look after the minor child Anshul and act in the welfare and looking after the health and education of the child. Moreover, the bringing and breeding of the child in an atmosphere in which the respondent is living, and the minor child does not want to live in, is not congenial. It would thus be in the interest of the minor child if he is permitted to live in such circumstances. The minor has a wish and willingness to stay with the petitioner. The petitioner being the grand-father of the minor child has the right to keep the custody, support the child, look after the welfare and benefit of the minor. The petitioner has no interest adverse to that of the minor and he is a fit and proper person to be declared as guardian of the minor. In these premises it has been prayed that the petitioner be appointed as guardian of the minor.

2. This petition is being resisted on behalf of Smt. Renu Kathuria, the respondent. In her written statement it is stated that the petition has been filed with ulterior motive and malafide intention just to deprive the minor of what he and his mother have legitimately inherited after the death of his father. By filing the present petition the petitioner wants to show that he is interested in the welfare of the child which in fact is not correct but he is only interested to deprive him of the property which under the Hindu Succession Act, he is to inherit after the death of his father. The value of the properties which are to come to the share of the minor and the respondent is more than Rs. 2 lacs. The petitioner has no love and affection for the minor. The petitioner a greedy person and is not interested in the welfare of the minor and the respondent. After the death of her husband every member in the petitioner's family started looking towards the respondent with an eye of contempt. All the members of the family of the petitioner changed their attitude towards the respondent. The respondent started feeling suffocated in such an atmosphere. She was forced to leave the house of the petitioner with her minor child. The School charges of the minor when he was in Lahore Montessory School, were being borne by the respondent. The respondent joined the College in order to settle in life as she could not afford to depend upon her parents for all times to come. The petitioner told the respondent that he would give her only that jewellery which was given to her by her parents, that too, if she would sign documents disclaiming all her rights in the plots of her husband and the business which her husband was carrying on in partnership with the petitioner. This was not agreed to by the respondent. The husband of the respondent was partner in three concerns with a lot of investments. Respondent further stated that if all the business accounts were settled the respondent and the minor would get much more than Rs. 2 lacs besides the other claims. The contention that the child was going to the petitioner on every Saturday evening and coming on Sunday evening was denied. It is pleaded that the respondent has never neglected the child. Rather the minor is being looked after with utmost care and caution. Since the time, she has come from her matrimonial home, she is staying with her father, who is supporting her and the minor. The minor is being brought up in a most congenial atmosphere and is developing properly because of the devotion of the

respondent while there is no proper atmosphere in the house of the petitioner. It would be in the fitness of the things if the guardianship/ custody of the minor is not disturbed. The mother of the minor who happens to be the natural guardian is alive and looking after the child in the best possible way and has no interest adverse to that of the minor, while the petitioner on the other hand has no interest in the minor and has all the interests adverse to him and the petitioner is not a fit person to be appointed as guardian of the minor.

3. On the pleadings of the parties the court framed the following issues :--

(1) Whether it is in the interest and welfare of minor child to handover the custody to the petitioner grandfather as alleged ?

(2) Relief.

4. Along with the petition the petitioner also filed an application u/s 12 of the Guardian and Wards Act praying therein that the petitioner should be allowed to visit the petitioner's house atleast once a week and grant of permission to the petitioner to take the minor child to his house on every Saturday evening and drop him back at the house of the respondent on Sunday evening so that the minor remains in touch with the petitioner and his family members.

5. It appears from the record that on 13-11-1987 the court directed the respondent to appear Along with the child on 27-11-1987. On 27-11-1987 the court observed that the application u/s 12 of the Guardian and Wards Act was still pending. Appropriate orders would follow on the decision of that application. However, it was directed that in view of the allegations made by the petitioner and in the interest of the child the minor be produced on the next date of hearing by the respondent The request of the petitioner to see the child was declined. On 13-1-1988 the court again observed that the application u/s 12 of the Guardian and Wards Act was still pending. It was directed that the petitioner would not try to see the minor either at home or in the School It appears from the record that the parties started negotiations for compromising the matter. The petitioner also deposited Rs. 1,00,000/- in the name of the minor under his guardianship and he deposited the FDR in the court. On 22-11-1988 the court observed that it had been agreed between the parties that the FDR would be kept in the court till it was placed in the Locker. During that period the respondent would give the child to the petitioner twice a month i.e. on the 2nd and 4th Sundays of the month at about 11 A.M. and the petitioner would return the child after lunch at about 2.30 P.M. The child had been meeting the petitioner under the order of the Court. Thereafter the respondent moved application on 4-12-1989 u/s 151 CPC for staying or setting aside of the interim order passed in December, 1988 for access to the minor by the petitioner. This application was disposed of by the trial judge vide order dated 21-12-1989 which has been challenged in this court.

6. I have heard the learned counsel for the parties and have bestowed my thoughtful consideration upon the matter at issue.

7. It was contended that the petition filed by the respondent under the Guardian and Wards Act was not maintainable because the mother, who in the absence of the father is the natural guardian is alive and is capable of looking after the minor. It was further contended that the petition as filed before the Guardian Judge does not contain any averments to the effect that the widow mother of the minor child is not fit to retain the custody of the minor child.

8. On behalf of the respondent it was contended that a guardian can be appointed of a minor having natural guardian if in the opinion of the court the natural guardian is unfit to be the guardian of the person of the minor. I have considered the relevant contentions of the parties. Section 19(b) of the Guardian and Wards Act reads as under :--

19(b)--Guardian not to be appointed by the Court in certain cases.

Nothing in this Chapter shall authorise the court to appoint 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--

(a) xx xx xx xx

(b) of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of minor, or.

Section 19(b) makes it clear that it shall not authorise the Court 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. Ordinarily the custody should go to the natural guardian. But in case the court is of the opinion that the natural guardian is unfit to be the guardian of the person of the minor the court has the power to appoint guardian of the minor.

9. I have perused the petition filed under Sections 7 and 8 of the Guardian and Wards Act. It is stated in the petition that the mother has no independent source of income and she is dependent upon her father and she has no sufficient means to look after the minor child Anshul and not in the welfare and looking after the health and education of the child. Moreover the bringing and breeding of the child in an atmosphere in which the respondent is living, and the minor child does not want to live in, is not congenial to the morals, safety, mind and health of the minor child. It would thus be not in the interest of the minor child if he is permitted to live in such circumstances.

10. In reply to these allegations it has been stated on behalf of the mother in the written statement that the minor is being brought up in a most congenial atmosphere and is developing, properly because of the devotion of the respondent

while there is no proper atmosphere in the house of the petitioner. It would be in the fitness of things if the guardianship/ custody of the minor is not disturbed. The mother of the minor who happens to be the natural guardian is alive and looking after the child in the best possible way and has no interest adverse to that of the minor, while the petitioner on the other hand has no interest in the minor and has all the interests adverse to him and the petitioner is not a fit person to be appointed as guardian of the minor. The court had framed an issue which has been reproduced earlier. The matter is being investigated by the court. I am not expressing any opinion on the merits of the case because I am remanding the case to the Guardian Judge for a decision afresh.

11. However, I find from the record that the impugned order has been passed without deciding the application u/s 12 of the Guardian and Wards Act filed by the grandfather Along with the main petition under Sections 7 and 8 of the Guardian and Wards Act. This application has not so far been disposed of. Section 12 of the Guardian and Wards Act empowers the court to make interlocutory order for production of the minor and for interim protection of person and property. The trial court while disposing of the applications of the mother filed for variation of the orders passed by the court from time to time about the interim custody of the child, made the order that it was in the interest and welfare of the minor to continue the meetings of the minor with the petitioner/grandfather by way of interim meetings till the disposal of the petition on merits. I have already observed above that no orders were passed by the court on the application u/s 12 of the Guardian and Wards Act filed by the grandfather. It appears that the orders for the interim custody of the minor were being passed by the court from time to time at the instance of the grandfather and some times with the consent of the parties by which the grandfather was allowed to see and keep the minor child. The court had not decided the application of the petitioner/grandfather u/s 12 and it remained pending.

12. In view of this I am of the opinion that the impugned order should be set aside and the trial court be directed to dispose of the application filed by the petitioner u/s 12 of the Guardian and Wards Act after hearing the parties.

13. In the result this petition is a/lowed, and the impugned order is set aside with the direction that the trial court should dispose of the application filed by the respondent u/s 12 of the Guardian and Wards Act. In the circumstances of the case I leave the parties to bear their own costs.