

(1979) 02 BOM CK 0042

Bombay High Court

Case No: Misc. Petition No. 556 of 1978

Manjula D. Boral

APPELLANT

Vs

Dilip Jyoti Prakash Boral

RESPONDENT

Date of Decision: Feb. 1, 1979

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 32 Rule 7
- Guardians and Wards Act, 1890 - Section 7

Citation: AIR 1980 Bom 235 : (1979) MhLj 523

Hon'ble Judges: Manohar, J

Bench: Single Bench

Advocate: G.A. Trivedi, for the Appellant; G.A. Thakkar, S.V. Bhat, S.D. Parekh and L.D. Jaisinghani, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. The petitioner is the mother of two minor children a son Bhriguraj born on 5th Dec. 1975 and another son Nandraj born on 7th Apr. 1977. She has filed this petition under the Guardians and Wards Act, 1890 to obtain custody of these two minor sons who are at present in the custody of their father viz. the Respondent.

2. The petition was argued at length by Mr. Trivedi who appeared for the petitioner and by Mr. Parekh who appeared for the Respondent yesterday. In the course of the hearing, on two or three occasions Mr. Parekh, who appeared for the Respondent, made an offer of settlement to the petitioner. After considering these offers the petitioner rejected them. Ultimately after the arguments were over while I was about to dictate my judgment Mr. Trivedi for the petitioner stated that his client desired to accept the offer which had been made earlier by Mr. Parekh. The parties thereafter took some time and reduced the consent terms to writing in Court. Both the petitioner and the Respondent were present in Court throughout. After the consent terms were reduced to writing and before the parties or their advocates put

their signatures on the consent terms I asked for the consent terms and went through them in order to satisfy myself that the terms would be for the benefit of the two minors. Thereafter I returned the consent terms to the advocates. After making some minor alterations the consent terms were signed both by the petitioner and the Respondent as also by their respective advocates. The signed consent terms were tendered in Court and I have passed an order in terms of the consent terms.

3. This happened Before 2:00 p.m. yesterday. After the recess when the after-noon session commenced At 2:45 p.m. Mr. Parekh appeared before me and stated that his client felt that he had been pressurised into signing these consent terms and that in view of what Jus client felt he would request the Court to cancel the consent terms. When Mr. Parekh made this application. Mr. Trivedi as well as the petitioner were also present in Court. Mr. Trivedi, however, said that he could not consent to the consent terms being cancelled. In these circumstances, I have to consider whether it is within my power to set aside the order which I have passed in terms of the consent terms which were thus handed in.

4. Mr. Thakkar, who appears today for the Respondent, has argued that this is a petition under the Guardians and Wards Act, 1890 for the custody of two minor children. In a case where minor is involved it is not open to the parties to obtain a consent decree or order unless the Court is satisfied that such a consent decree or order will be for the benefit of the minor. In this connection he has drawn my attention to Order 23, Rule 3 and Order 32 and Rule 7 Civil P. C. Order 32 Rule 7 states that in case where a minor is a party to the suit no next friend or guardian can, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor. According to Mr. Thakkar, the same principle should apply in a case where a minor is affected though he may not be a party to the suit. In the absence of an express sanction of the Court to the compromise, the present compromise is not a lawful compromise under Order 23, Rule 3 and hence it should be set aside. There is some substance in what Mr. Thakkar has argued. In a case where a minor is affected, it may be possible for the Court in a given set of circumstance not to pass a decree in terms of the consent terms if the Court came to the conclusion that the consent terms would not be for the welfare of the minor-although the matter is not free from doubt. He has, however, argued that on the analogy of Order 32 Rule 7 in all such cases where custody orders are passed in terms of the consent terms it should be expressly recorded by the Court that the consent order is 77 does provide for such a sanction being expressly recorded. But Order 32 Rule 7 applies only to cases where a minor is party to the suit and his next friend or guardian is seeking to enter into a compromise or agreement on behalf of a minor. By expressly sanctioning the compromise as being for the benefit of minor, the Court protects not merely the minor but also his next friend or guardian as well as the third party who enters into such a compromise with the minor. There is no reason why this particular provision

regarding express sanction of the Court should apply to a case like the present one where the dispute revolves around the custody of two minor children between the two parents who are both majors. It is true that the Court should satisfy itself even in such a case whether the consent order will be for the welfare of the minor or not. But no sanction of the Court is required for entering into a compromise.

5. Mr. Thakkar has also argued that in matters which affect the status of a party such as probate proceedings or matrimonial proceedings the Court cannot go by the wishes of the parties. It must independently apply its mind to the points at issue. He has argued that the present order being an order in rem, the same principle should apply. I do not consider an order for custody as an order in rem. It is an order which is subject to revision and alterations if circumstances affecting the parties change. It does not affect the status either of the parties or of the minor. Hence it is perfectly open to the parties to arrive at consent arrangements regarding custody of their minor children. In fact this is a well-established practice.

6. As the present case bears somewhat unusual aspects, I had seen the consent terms before they were actually signed by the parties and their advocates, and I had satisfied myself that the consent terms would be for the benefit of the minors. It is true that I have not expressly recorded that these consent terms are for the benefit of the minors. But, in my view, it is not necessary to make such a record. I have already passed a decree in terms of the consent terms which have been signed and handed in. And, in my view, it is not open to me to set aside this order unless both sides agree to its being set aside. The only grounds on which consent orders may be set aside are the grounds on which an agreement may be set aside. It is nobody's case that in the present case the consent terms should be set aside for any reasons which would invalidate an agreement. Hence the application of the Respondent to set aside the consent order is rejected.

7. Mr. Thakkar applies for a stay of the operation of the consent order dated 31-1-1979 till 7-2-1979.

P. C. : Operation of the order is accordingly stayed till 7-2-1979.

8. Ordered accordingly.