AIR 2017 SUPREME COURT 5407

SUPREME COURT
(From : Bombay)*
A. K. SIKRI , J. and ASHOK BHUSHAN , J.

Criminal Appeal No. 1553 of 2017 (arising out of SLP (Cri.) No. 1867 of 2016, **D/- 4 - 9 - 2017**

Purvi Mukesh Gada v. Mukesh Popatlal Gada and Anr.

Criminal P.C. (2 of 1974), S.97 - Hindu Minority and Guardianship Act (32 of 1956), S.13 - Custody of children - Welfare principle - Father voluntarily handing over custody of children to their mother for three days - After children came to mother, they were admitted in school and their academic performance improved significantly - Children aged 17 and 13 years respectively preferring to stay with their mother - Welfare of children lies by allowing mother to retain their custody - Plea that mother took undue advantage of gracious act of father, not tenable. W. P. No. 3558 of 2015, D/- 17-2-2016 (Bom.), Reversed.

(Paras 14 , 15 , 16 , 17)

Ms. Kamini Jaiswal, Ms. Rani Mishra, Jatinderpal Singh, for Appellant; Subhash Jha, Chanchal Kumar Ganguli, for Respondents.

**Writ Petition No. 3558 of 2015, D/- 17-2-2016 (Bom).*

Judgement

1. A. K. SIKRI, J.:-It is an unfortunate case where the parties, who are wife and husband, are having a bitter and acrimonious fight over the custody of their children. Such custody battles are always regrettable, not only for the spouses who resort to this kind of litigation, which is the offshoot of matrimonial discord and results in their separation from each other, but also for their child/children who become the subject-matter of this kind of dispute. Failure of marriage generally leads to disputes of varied nature, either in the form of divorce or enforcement of conjugal rights or maintenance etc. and even criminal cases in the form of proceedings under Section 498-A of the Code of Criminal Procedure, 1973 and so on. However, in those cases where their togetherness as spouses had resulted in procreation of children, the war is extended by laying respective claims on the custody of those children as well. These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father, for financial reasons, security reasons, psychological reasons, etc. They need the love of both their parents. Not only separation of their parents from each other deprives these children 24/7 company of both the parents, when it results in legal battle of custody in the courts, the situation becomes more traumatic for these children because of various obvious reasons. That is why such cases which seriously impact these children are the most unfortunate.

2. In the instant case, marriage between the parties as per Hindu rites and ceremonies was solemnised way back in November, 1997. They lived together for number of years. Their first child, a boy named Taney, was born in the year 2000 and second child, a daughter named Varenya, was born in the year 2004. The appellant herein left the matrimonial home on February 18, 2013. Thus, they were together for more than fifteen years when the desertion took place, though as per the allegations of the appellant she had suffered mental and physical torture at the hands of the respondent since the beginning of the

marriage, but for the sake and well being of the children and also because of her financial dependency on the respondent she continued to live with the respondent. These allegations of maltreatment of the appellant are denied by the respondent. In any case, that is not the crux of the matter.

3. It so happened that when the appellant left her matrimonial home in Pune and came to her parents house in Mumbai, children remained in the custody of the respondent. Tanay was not at home as he was studying in a boarding school at Coimbatore at that time. Insofar as Varenya is concerned, the allegation of the appellant is that it is the respondent who did not allow the appellant to take her along to Mumbai. Some attempts were made thereafter for settlement of their disputes, which did not bear any results. On September 18, 2014, the appellant filed a domestic violence case in the 38th Court of Additional ACMM, Ballard Estate, Mumbai on the ground of gross mental and physical cruelty, including verbal and physical abuse and occult practices. Three months after filing the said case, the appellant moved an application therein praying for access to her minor children during Christmas vacation, which was allowed to be availed of in the respondent's house in Pune.

4. In February, 2015, Varenya was also admitted in a boarding school by the respondent. The appellant, at that juncture, moved an application for interim custody of the minor children as well as for maintenance. However, custody was not allowed on the ground that children were studying and it would not be proper to give custody during the midst of their academic year. At the same time, interim maintenance @ Rs.30,000/- per month was directed to be given to the appellant. In May 2015, when the summer vacations were approaching, the appellant filed an application praying for custody of children for half of the vacations. Though this application was still pending and no orders passed thereon, the respondent himself handed over the custody of the children to the appellant on June 17, 2015. There are divergent stands of the parties behind such a move on the part of respondent in voluntarily giving custody of the children to the appellant. As per the respondent, even when there was no order of the Court, as a goodwill gesture, he gave custody of the children to the mother for a period of three days with clear understanding that custody of the children would be handed back to the appellant after three days. On the other hand, the appellant claims that the respondent entrusted the children to her even when without any order of the Court, compelled by the circumstance inasmuch as Tanay had miserably failed in his Grade IX examinations while studying in the boarding school at Coimbatore and the respondent wanted the appellant to give coaching to him so that he could reappear and pass the examination in order to get promoted to Grade X without wasting an academic year.

5. The children were not given back to the respondent after the expiry of three days. Here again both the parties have their own version. According to the appellant, the children

themselves refused to go back to the respondent. On the other hand, the respondent maintains that it is the appellant whose intentions became bad and, thereby, she refused to handover the custody of the children to him. Be that as it may, the respondent filed an application before the Court of Additional ACMM for restoration of custody of the children. The learned Additional ACMM called both the children in his Chambers and interacted with them. Thereafter, he passed the orders dated July 01, 2015 vide which custody of the children was given to the appellant, rejecting the request for restoration of their custody to the respondent. Appeal was filed against this order in the Sessions Court, which was also dismissed vide judgment dated August 06, 2016. Orders of the learned ACMM dated July 01, 2015 and that of the Sessions Court dated August 06, 2015, were challenged by the respondent in the form of writ petition filed in the High Court of Bombay. Disposing of this writ petition vide judgment

dated February 17, 2016, the High Court has directed that custody of the children be restored with the respondent. It is this order which is the subject-matter of challenge in the instant appeal.

6. Before stating the reasons which prevailed with the High Court in directing the custody of the children to the respondent, it is imperative to take note of certain proceedings before the High Court during the pendency of the writ petition.

7. Vide order dated January 29, 2015, the High Court directed day access on September 21 and 24, 2015. Again vide order dated November 11, 2015, overnight access for the coming weekend was accorded to the respondent. Identical overnight access was given by the High Court vide order dated November 23, 2015. However, the respondent could not avail the benefit of these orders. According to the respondent, the appellant had violated these orders, whereas the appellant has pleaded that on September 24, 2015 the respondent himself did not come to have the access of the children and insofar as order granting overnight access during weekends is concerned, the explanation of the appellant is that it is the children who refused to go to their father as they were petrified and, therefore, themselves took such a decision.

8. On December 11, 2015, the respondent was given seven days access during Christmas vacation with Counsellor's help. For carrying out this order, the trial court called the children on December 23, 2015 where the respondent was also called. Again, as per the appellant's version, the children, after remaining with the respondent for forty five minutes alone, ultimately told him that they did not wish to go with him. The respondent was to come to pick the children on December 25, 2015 and as per the appellant, he did not come to pick the children.

9. The respondent maintained that on all the aforesaid occasions it is the appellant who had refused to handover the custody to him and had, thus, violated the orders of the High Court. Accordingly, he filed an affidavit in the High Court for initiating contempt proceedings against the appellant. The appellant filed reply affidavit thereto refuting the allegations. Matter was finally heard and culminated in the judgment dated February 17, 2016.

10. With this, we come to the reasons which have weighed with the High Court in directing the custody of the children to be given to their father, namely, the respondent. After perusing the impugned judgment, these are summarised as below:

(i) Orders dated December 28, 2014 and March 04, 2015 were passed by the Additional ACMM, confirming the custody of the children with the respondent-father inasmuch

as by these orders prayer for giving interim custody of children to the appellant-wife was rejected. Instead, the appellant was only given limited access during vacation to meet the children in the school at Pune whenever she desired.

(ii) Even though the appellant had moved application dated May 27, 2015 seeking access to the children during vacation, which was from June 13, 2015 to August 09, 2015, and no orders were passed in the said application, as per the respondent, as a humanitarian gesture and without there being any legal obligation or court directions, he went to the appellant's residence at Mumbai on June 17, 2015 and left the children with the appellant with a clear understanding that he would pick them up by June 19, 2015. The High Court has noted the stand of the appellant as well, but has mentioned that as per the respondent's case when he went to take the custody of the children on June 19, 2015,

the appellant refused to restore the custody. The High Court has given weightage to the fact that on June 17, 2015, the respondent had placed the children in the custody of the appellant even when there was no court order or legal obligation.

(iii) The High Court wanted to interact with the children in order to ascertain their wishes as well as to determine as to which course of action is appropriate in the welfare of the children. However, before doing so, the High Court deemed it appropriate to grant weekend access to the respondent. For this, directions were given (which have already been taken note of). As per the High Court, prima facie it appeared that the appellant was responsible for non-compliance of those orders and even if it is to be believed that the children did not show their unwillingness to go to their father, it indicates the extent of influence exerted by the mother upon her minor children.

(iv) As per the High Court, in the face of two detailed orders dated December 28, 2014 and March 04, 2015 passed by the Additional ACMM declining custody of minor children to the appellant and allowing the respondent to retain their custody, there was no reason not to restore the custody to the respondent on June 19, 2015. It has observed that subsequent orders of Additional ACMM declining to give the custody, which is upheld by the Sessions Court, are without application of mind.

(v) The High Court has discussed the law on custody of children and explained the 'welfare principle', which is the paramount consideration while deciding custody matters is to see where the welfare of children lies. Applying this principle, the direction is given to restore the custody of the children to the respondent after the end of academic term in April or May, 2016.

11. We may say at the outset that though the 'welfare principle' is correctly enunciated and explained in the impugned judgment, no reasons are given as to how this principle weighed, on the facts and circumstances of this case, in favour of the respondent. Instead two main reasons which have influenced the High Court are: (i) earlier detailed orders are passed by the Additional ACMM allowing the respondent to retain the custody; and (ii) the appellant here had not given access of children to the respondent even during weekend, in spite of orders passed by the High Court.

12. After hearing the counsel for the parties at length, we are of the opinion that the matter is not dealt with by the High Court in right perspective. Before supporting these comments with our reasons, it would be apposite to take note of certain developments from June 17, 2015, the date on which the respondent had himself handed over the children to the appellant, till the passing of the

orders by the High Court. It is also necessary to state the events which took place during the pendency of these proceedings.

13. Whether the respondent had handed over the custody of the children to the appellant on a humanitarian gesture or not, fact which is not in dispute is that Tanay had failed in his Grade IX examinations and he was to reappear for the same. It is also a fact that it is the guidance and tuition of the appellant that Tanay passed the examinations on reappearance and could be promoted to Grade X. Another fact which needs to be noted here is that when the appellant left the matrimonial home, Tanay was not residing with the parties. He was admitted in a boarding school in Coimbatore, a far-away place from Pune. No doubt, the respondent claims that intention in admitting Tanay in a boarding school in Coimbatore was that he should get best education as the school in which he was admitted is a prestigious educational institution. At the same time, it is also a fact that Tanay was not in the physical company of his father on day-to-day basis. It is also a harsh reality that he was not doing well in studies

during the period his legal custody was entrusted to the respondent. His overall performance in most of the subjects was dismal and he had even failed in Grade IX. At that stage when, within few days, there was a re-examination, handing over Tanay, along with Varenya, to the appellant, without even any court order, lends credence to the version of the appellant that the purpose was to give appropriate tuition to Tanay by the appellant so that his academic year is not wasted. Another fact which needs to be emphasised at this stage is that though the custody of Varenya was also with the respondent and request of the appellant to hand over interim custody of the children did not prevail with the Additional ACMM who rejected this request vide orders dated December 28, 2014 and March 04, 2015, even Varenya was admitted in a boarding school by the respondent thereafter. This fact also gives some credence to the version of the appellant that because of his pre-occupation in the business or otherwise, the respondent was not in a position to take personal care of the children and, therefore, he put both of the children in the boarding schools.

14. After the children came to the appellant, they were admitted in a school in Mumbai. It is pertinent to note that Tanay's academic performance has improved significantly. He is getting very high grades in the examinations. In fact, academic performance of Varenya has also gone up. This factor, though noted by the High Court, has been lightly brushed aside with the observations that if the children were not doing well earlier, blame cannot be put on the respondent as it could be the result of disputes between the parents. In the process what is ignored is that in spite of the said dispute still subsisting, the academic performance of the children, while in the custody of their mother, has gone up tremendously.

15. When the special leave petition had come up for hearing, on the first day itself the respondent had appeared through his counsel as a caveator. Children were also brought to the Court and this Court interacted with them. While issuing the notice, based on the interaction with the children, who desired to remain with their mother, directions contained in the impugned judgment were stayed. At the same time, the respondent was given access to these children as well as visitation rights. Notice was issued on March 04, 2016. During the period of pendency of these proceedings for more than a year, the respondent has met the children regularly with the grant of visitation rights. This Court, just before final hearing, again met the children. Tanay is seventeen years of age and Varenya

is thirteen years old. At this age, they are capable of understanding where their welfare lies. This Court has found that both the children are very comfortable in the company of their mother. They have expressed their desire to stay with their mother. This Court also feels that welfare of the children lies by allowing the appellant to retain the custody of the children. Circumstances explained above provide adequate reasons for taking this course of action. Children at discernible age of seventeen and thirteen years respectively, are better equipped, mentally as well as psychologically, to take a decision in this behalf. It would be worthwhile to mention that during our interaction with these children, they never spoke ill of their father. In fact, they want to be with the respondent as well and expressed their desire to remain in touch with him and to meet him regularly. They never showed any reluctance in this behalf. At the same time, when it came to choosing a particular parent for the purposes of custody, they preferred their mother. In fact, these were the reasons because of which the Additional ACMM had passed orders dated July 01, 2015 (after interviewing the children and ascertaining their wishes as well as welfare) rejecting the request of the respondent to restore custody to him. Same course of action was adopted by the learned Sessions Court while dismissing the appeal of the respondent on August 06, 2015 and affirming the order of Additional ACMM dated July 01, 2015. The High Court has discarded these orders without giving any cogent reasons and on the spacious and tenuous ground that such orders could not have been passed in view of the earlier detailed orders of the Additional

ACMM dated December 28, 2015 and March 04, 2015, thereby refusing the custody of the children to the appellant. In this process, what is ignored by the High Court was that even those were interim orders and the custody was refused at that juncture because of the reason that children were in the mid-term of the academic session. Be that as it may, it was incumbent upon the High Court to find out the welfare of the children as on that time when it was passing the order. As pointed out above, apart from discussing the 'welfare principle', the High Court has not done any exercise in weighing the pros and cons for determining as to which of the two alternatives, namely, giving custody to the appellant or to the respondent, is better and more feasible.

16. Learned counsel for the respondent had made a fervent plea to the effect that if custody is retained by the appellant, it would amount to giving her advantage of her own wrong as she took undue advantage of the gracious act of the respondent in voluntarily handing over the custody of the children, but only for three days. He also highlighted the conduct of the appellant, as discussed by the High Court, which has castigated the appellant in this behalf in not obeying the interim directions of giving access to the respondent.

17. In view of our aforesaid discussion, we do not find these arguments to be meritorious. It also needs to be emphasised that the Court, in these proceedings, is not concerned with the dispute between the husband and the wife inter se but about the custody of children and their welfare. A holistic approach in this behalf is to be undertaken. Scales tilt in favour of the appellant when the matter is examined from that point of view.

18. As a result, this appeal is allowed, resulting in setting aside of the impugned order dated February 17, 2016 passed by the High Court in the writ petition and restoring the order dated August 06, 2015 passed by the Court of Session, Greater Mumbai, which affirmed the order dated July 01, 2015 passed by the Court of 38th Court of Additional ACMM, Ballard Estate, Mumbai. At the same time, weekend access given to the

respondent by interim directions of this Court shall continue to prevail. Moreover, during Dussehra, Diwali, Christmas or summer vacations etc., the respondent shall be entitled to avail the custody for half of the durations of those vacations. However, while effecting this arrangement, it shall be ensured that studies of the children are not affected. In case of any difficulty in working out the aforesaid modalities, the parties shall be at liberty to approach the trial court. Since the custody of the children is allowed to be retained by the appellant-mother, domicile certificates of the children as well as their passports which are with the respondent, shall be handed over to the appellant.

No costs.

Appeal Allowed