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GAYTRI BAJAJ

v.

JITEN BHALLA

(Civil Appeal Nos. 7232-7233 of 2012)

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OCTOBER 5, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

CHILD AND FAMILY WELFARE:

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Custody of children – Held: An order of custody of minor children is required to be made by the court treating the interest and welfare of the minor to be of paramount importance – It is not the better right of either of the parent to custody, but the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court – In the instant case, the children, two minor girls, one of whom is on the verge of attaining majority, do not want to go with their mother and appear to be happy in the company of their father, who is in a position to look after them, provide them with adequate educational facilities and also to maintain them in a proper and congenial manner – The children having expressed their reluctance to go with the mother, even for a short duration of time or to meet her, any visitation right to the mother would be adverse to the interest of the children – In the circumstances, visitation cannot be made possible by an order of the court – The children would continue to remain in the custody of their father until they attain the age of majority – Hindu Marriage Act, 1955 – s.13-B – Code of Civil Procedure, 1908 – s.151 – Guardian and Wards Act, 1890 – Hindu Minority and Guardianship Act, 1956.

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The instant appeals arose out of an application filed by the appellant-wife u/s 151 CPC seeking to recall/set aside the decree of divorce by mutual consent passed u/

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s 13-B of the Hindu Marriage Act, 1955. The application was filed despite the institution of a separate suit, seeking the same/similar relief, on the ground of fraud and deceit committed by the respondent-husband. In the joint petition u/s 13 B it was specifically stated under the terms of agreement between the parties that the respondent-husband would have the custody of the two minor daughters and, keeping in view their best interest and welfare, the appellant-wife had agreed to forgo her rights of visitation.

In the instant appeals, the parties agitated the question with regard to the custody of the children and if such custody was to remain with the husband, whether visitation rights should be granted to the appellant-wife. On 16.12.2011, the Court recorded that the two children who were aged about 17 and 11 years, were very clear and categorical that they wanted to "continue to live with their father and they do not want to go with their mother," and made arrangements through Supreme Court Mediation Centre for the mother to interact with the children and also to take them for overnight stay with her as specified in the order. Subsequently, the husband filed an application seeking vacation/ modification of the order dated 16.12.2011, mentioning details about the reluctance of the children to go with their mother or even to meet her; and efforts of mediator failed in persuading the children. The children even declined to visit the Mediation Centre any further. This was not controverted by the appellant-wife.

Dismissing the appeals, the Court

HELD: 1.1. In *Mousmi Moitra Ganguli's case** it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. Further, the

A question of welfare of the child has to be considered in the context of the facts of each case and decided cases, on the issue may not be appropriate to be considered as binding precedents. [para 13] [1152-C-E]

B **Mousmi Moitra Ganguli v. Jayant Ganguli* 2008 (8) SCR 260 = (2008) 7 SCC 673; *Sheila B. Das v. P. R. Sugasree* 2006 (2) SCR 342 = (2006) 3 SCC 62; *Gaurav Nagpal v. Sumedha Nagpal* 2009(1) SCC 142; *Rosy Jacob v. Jacob A. Chakramakkat* 1973 (3) SCR 918 = (1973) 1 SCC 840; *Thirty Hoshie dolikuka v. Hoshiam Shavdaksha Dolikuka* 1983 (1) SCR 49 = (1982) 2 SCC 544 – relied on

C *Sarasvati Bai Shripad Ved v. Shripad Vasanji Ved* AIR 1941 (Bom.) 103 – referred to.

D 1.2. An order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court. [para 14] [1152-F-G; 1153-A]

H 1.3. In the instant case, irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her,

as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion.. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, this Court holds that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, visitation can not be made possible by an order of the court. Therefore, in the facts and circumstances, the impugned orders passed by the High Court are affirmed, visitation rights to the appellant-wife are denied, and the children would continue to remain in custody of their father until they attain the age of majority. [para 15-16] [1153-B-G]

Case Law Reference

2008 (8) SCR 260	relied on	para 12
AIR 1941 (Bom.) 103	referred to	para 12
1973 (3) SCR 918	relied on	para 12
1983 (1) SCR 49	relied on	para 12
2009(1) SCC 142	relied on	para 13
2006 (2) SCR 342	relied on	para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7232-7233 of 2012.

A From the Judgment and Order of the High Court of Delhi at New Delhi dated 10.7.2009 in Review Petition No. 371 of 2008 and dated 8.9.2008 in Matrimonial Appeal No. 72 of 2007.

B Indu Malhotra, Arun K. Sinha, N.S. Bajwa, Rakesh Singh, Sumit Sinha, ADN Rao, Atul Sharma, Abhishek Agarwal, Neelam Jain for the Appellant.

Pinaki Mishra, Sunil Kumar Jain, Aneesh Mittal for the Respondent.

C The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

D 2. These appeals are directed against the judgment and order dated 08.09.2008 passed by the High Court of Delhi in Matrimonial Appeal No. 72/2007 and the order dated 10.7.2009 declining review of the aforesaid order dated 08.09.2008.

E 3. The facts lies in a short compass and may be usefully recapitulated at this stage.

F The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as 'the Act') seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated

G by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their

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marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act. A

4. It appears that without waiting for the period prescribed under Section 13B (2) of the Act, a second Motion was moved by the parties before the learned Court on 26.05.2003 seeking divorce by mutual consent. By order dated 3.6.2003 the learned trial court, after recording its satisfaction in the matter, granted a decree of divorce under the aforesaid provision of the Act. It may be specifically noticed, at this stage, that in the joint petition filed before the learned trial court it was specifically stated that, under the terms of the agreement between the parties, the respondent-husband was to have sole custody of the two minor daughters and the appellant-wife had agreed to forego her rights of visitation keeping in view the best interest and welfare of the children. B
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5. After the expiry of a period of almost three years from the date of decree of the divorce granted by the learned trial court, the appellant-wife instituted a suit seeking a declaration that the decree of divorce dated 3.6.2003 is null and void on the ground that her consent was obtained by acts of fraud and deceit committed by the respondent – husband. A further declaration that the marriage between the parties is subsisting and for a decree of perpetual injunction restraining the husband from marrying again was also prayed for in the suit. The respondent-husband filed written statement in the suit denying the statements made and contesting the challenge to the decree of divorce. While the aforesaid suit was pending, the appellant-wife filed an application under Section 151 of the Code of Civil Procedure to recall/set aside the judgment and decree dated 03.06.2003 passed in the divorce proceeding between the parties. The aforesaid application under section 151 of the Code was filed despite the institution of the separate suit seeking the same/similar reliefs. On the basis of the aforesaid application filed by the appellant-wife the learned trial court by order dated 25.09.2007 recalled the decree of divorce dated E
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- A 3.6.2003. Aggrieved, an appeal i.e. Matrimonial appeal No. 72/2007, was filed by the respondent-husband in the High Court of Delhi which was allowed by the order dated 08.09.2008. The application seeking review of the aforesaid order dated 08.09.2008 was dismissed by the High Court on 10.07.2009.
- B Both the aforesaid orders dated 08.09.2008 and 10.07.2009 have been assailed before us in the present appeals.

C 6. In so far as the validity of the decree of divorce dated 03.06.2003 is concerned we do not propose and also do not consider it necessary to go into the merits of the said decree inasmuch as the High Court, while setting aside the order of the learned trial court dated 25.09.2007 recalling the decree of divorce, had clearly observed that it is open for the appellant-wife to establish the challenge to the said decree made in the suit already instituted by her. Thus, while taking the view that

D the order of the learned trial court dated 25.09.2007 recalling the decree of divorce was not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.

E 7. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties

F we propose to deal only with the same and refrain from entering into any other question.

G 8. We have already noticed that in the joint petition filed by the parties seeking a decree of divorce by mutual consent it was clearly and categorically stated that the husband would have custody of the children and the wife will not insist on any visitation rights. It was also stated that the wife had agreed to do so in the interest and welfare of the children.

H 9. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such

consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant – wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to “*continue to live with their father and they do not want to go with their mother*”. This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children. However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

“(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over both of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent-husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

(ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing

A we were informed that she is having separate mobile
phone) and also landline number to enable the petitioner-
wife to interact with the children.”

B 10. What happened thereafter has been stated in an
application filed by the respondent-husband before this Court
(Interlocutory Application No.4/2012) seeking vacation/
modification of the interim arrangement made by the order
dated 16.12.2011. In the said application, it has been stated
C that pursuant to the order dated 16.12.2011 the respondent-
father along with both the children had come to the Supreme
Court Mediation Centre at about 10 a.m. on 17.12.2011.
However, the children refused to go with their mother and the
appointed Mediator, inspite of all efforts, did not succeed in
D persuading the children. At about 1.30 p.m. the respondent, who
had left the children in the Mediation Centre, received a call that
he should come and take the children back with him. In the
aforesaid I.A. it has been further stated that on 30.12.2011
when the children were due to visit the Mediation Centre once
again, both the children started behaving abnormally since the
E morning and had even refused to take any food. After reaching
the Mediation Centre, the children once again refused to go with
their mother and the mediator had also failed to convince the
children. Eventually, at about 12.00 p.m., the respondent took
F both the children home. Thereafter, both the children have
declined to visit the Mediation Centre any further. Before the
next date for appearance in the Mediation Centre, i.e.,
14.01.2012 the said fact was informed to the learned counsel
for the appellant by the respondent through his counsel by letter
dated 13.01.2012.

G 11. Though the above facts stated in the aforesaid I.A. are
not mentioned in the report of the Mediator submitted to this
Court, what is stated in the aforesaid report dated 14.01.2012
is that on 14.01.2012 the respondent and the children were not
present and that a letter dated 13.01.2012 from the counsel for
H the respondent had been placed before the Mediator wherein

it has been stated that though the children had earlier attended the Mediation Centre they are now refusing to come to the Centre and all efforts in this regard made by their father have failed. It will also be significant to note that the statements made in the I.A. have not been controverted by the appellant - wife in any manner.

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12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In *Gaurav Nagpal v. Sumedha Nagpal*¹ the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in *Saraswati Bai Shripad Ved v. Shripad Vasanji Ved*²; *Rosy Jacob v. Jacob A Chakramakka*³ and *Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka*⁴ this Court eventually concluded in paragraph 50 and 51 that:

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“50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in *Mousmi Moitra Ganguli's* case the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

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1. 2009 (1) SCC 142.

2. AIR 1941 (Bom.)103.

3. (1973) 1 SCC 840.

4. (1982) 2 SCC 544.

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A 51. The word “welfare” used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases.”

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C 13. The views expressed in Para 19 and 20 of the report in *Mousmi Moitra Ganguli v. Jayant Ganguli*⁵ would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in *Sheila B. Das v. P.R. Sugasree*⁶ would also require a special mention.

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F 14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody

5. (2008) 7 SCC 673.

H 6. (2006) 3 SCC 62.

of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

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15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court.

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16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority.

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R.P.

Appeals dismissed.