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HIGH COURT OF DELHI AT NEW DELHI

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MAT APP. 38/2009

Date of decision : 27th July, 2009

VIKRAM VIR VOHRA

..... Appellant

Through : Mr. B.D. Kaushik, Advocate
Mr. Deepak Thakur, Advocate

Versus

SHALINI BHALLA

.....Respondent

Through : Mr. Sudhir Nandrajog, Senior
Advocate with
Mr. Siddharth Shankar Ray,
Mr. Pramod Kumar Sharma,
Advocates.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

1. This appeal has been preferred by the appellant assailing the order of the Additional District Judge (ADJ) dated 6th April, 2009 whereby the applications of the respondent dated 7.11.2006 and 13.5.2008

filed under Section 26 of the Hindu Marriage Act (hereinafter referred to as 'Act') were allowed and the applications of the appellant dated 30.11.2007 and 16.2.2009 under the same provision of law seeking permanent custody of the child Master Shivam were dismissed.

2. Parties to the appeal were married according to Hindu rites on 10.12.2000. A male child namely Master Shivam was born out of the wedlock of the parties. Due to disputes and differences parties mutually agreed to divorce each other. Accordingly petition under Section 13-B (1) as first motion petition and another under Section 13-B (2) of the Act as second motion petition were filed. A decree of divorce by way of mutual consent was granted in favour of the parties vide judgment dated 5.9.2006.
3. As regards custody and visitation rights in respect of the minor child, the parties had arrived at a settlement, besides claim of the respondent for dowry articles, stridhan etc. were settled. The terms of settlement have been incorporated in para 7, 8 &

9 of the petition filed under Section 13-B (2) of the

Act which reads as under:-

“7. The parties have agreed that the custody of the minor son Master Shivam shall remain with the mother, Petitioner No.1 who being the natural mother is also the guardian of the son Master Shivam as per law laid down by the Supreme Court of India. It is, however, agreed that the father petitioner shall have right of visitation only to the extent that the child Master Shivam shall be with the father Petitioner No.2, once in a fortnight from 10 A.M. to 6.30 P.M. on a Saturday Petitioner No.2 shall collect the child Master Shivam from WZ-64, IInd Floor, Shiv Nagar, Lane No.4, New Delhi -110058 at 10 A.M. on a Saturday where the child is with his mother. And on the same day at by 6.30 P.M. the Petitioner No.2 would leave the child back at the same place with the mother i.e. Petitioner No.1 and in case he does not do so Petitioner No.1 the mother shall collect the child from Petitioner No.2 on the same day. Both parties undertake before this Hon’ble Court that they would not create any obstruction in implementation of this agreement.

8. The petitioner No.1 shall take adequate care of the child in respect of health, education etc. at her own cost. In case the petitioner No.1 changes her address or takes the child outside Delhi, she shall keep petitioner No.2 informed one week in advance about the address and telephone Nos. and the place where

the child would be staying with the mother, to enable the petitioner No.2 to remain in touch with the child.

9. The petitioner No.1 has received all her Stridhan and other valuables, articles and other possessions, and nothing remains due to her from the petitioner No.2. The petitioner No.1 and the child Shivam has no claim to any property or financial commitment from petitioner No.2 and all her claims are settled fully and finally.”

4. Parties adhered to the terms and conditions of their settlement including custody and visitation rights of the child. These applications have been filed by the parties seeking modification of the said terms and conditions. Respondent has sought permission to take Master Shivam with her to Australia where she is presently employed for gain with a request to revoke the visitation rights granted to the appellant for meeting Master Shivam in the paramount interest and welfare of the child.
5. Appellant sought permanent custody of the child under the changed circumstances alleging that it is not in the interest of the child to leave India permanently.

6. The trial court modified the terms and conditions of the settlement as regards custody and visitation rights of the child vide the impugned order in the following terms:-

“i) Ms. Shalini Bhalla – the natural mother shall bring the child to India for visitation with his father twice in a year i.e. for two terms – between 18th of December to 26th of January and then from 26th of June to 11th of July;

ii) Total travelling expenses for visits of the child from Australia to India and return journey, during the period December-January, shall be borne by Ms. Shalini Bhalla, in addition to her own traveling expenses.

iii) Half of the travelling expenses for visits of Ms. Shalini Bhalla and the child from Australia to India and return journey, during June-July, shall be borne by Ms. Shalini Bhalla – the mother whereas the other half shall be borne by the father Sh. Vikram Vir Vohra.

iv) Ms. Shalini Bhalla shall, on arrival from Australia to India during the aforesaid periods, hand over the child to Sh. Vikram Vir Vohra in the next morning of their arrival in India.

v) Ms. Shalini Bhalla shall give prior intimation to Sh. Vikram Vir Vohra about the schedule of her arrival along with the child to India from Australia, during the aforesaid periods.

vi) During the aforesaid periods, Master Shivam-child shall stay exclusive with his father Sh. Vikram Vir Vohra and his family members as per choice of the father. However, during this period of his stay with the father, the child shall be free to contact or be in touch with his mother telephonically.

vii) At the time of stay of the child with his father Shri Vikram Vir Vohra, all expenses of the child during the said periods shall be exclusively borne by him (father) and he shall look after and take proper care of the child in all respects. In case the child during his stay with his father, during these periods, falls ill, Sh. Vikram Vir Vohra-father shall inform the natural mother of the child without delay so that the child has the moral support of the mother during his illness/treatment.

viii) On completion of the aforesaid term of stay, Shri Vikram Vir Vohra-father shall hand over the child without delay to the mother, so that she is able to take him along for return journey to Australia.

ix) In case Ms. Shalini Bhalla is ever personally unable to visit India during aforesaid period, she shall ensure visit of the child to India during the said period in the company of her mother or any other attendant, whom she deems proper, and in such eventuality Shri Vikram Vir Vohra shall bear half of the expenses, as mentioned above for the attendant/maternal grandmother of the child and that of the child."

7. Aggrieved by the said order of the trial court, the present appeal has been filed.
8. Mr. B.D. Kaushik, learned counsel for the appellant has made three-fold submissions.
9. It is argued that provision of Section 26 of the Act could not have been invoked by the respondent seeking modification of the terms and conditions of the custody and visitation rights of the child as the terms of settlement were not incorporated in the decree and since there is no decree passed by the court, an application under Section 26 of the Act does not lie and in the absence of specific provision in the decree regarding the custody and visitation rights of the child, the court has no jurisdiction to entertain the petition afresh after passing of the decree. It is argued that the impugned order is manifestly illegal and erroneous besides being without jurisdiction.
10. Second limb of argument is that it will not be in the welfare and interest of the minor child to send him to Australia as he would be left alone in the company of the respondent who would be occupied

in her job and the child would be left at the mercy of Crutches or the paid boarding houses and would be cut from the roots of the family and he would be a neglected child devoid of love, care and affection of his parents.

11. Third limb of argument is that the child is growing up and has been brought up according to Hindu cultural values, traditions and usages. He is familiar with the Hindu civilization and if exposed to the foreign culture, it would be detrimental to the ethical and moral development of the child besides the child would find it difficult to adopt the cultural values of Australia and therefore it is in the interest of the child that his permanent custody is given to the appellant.

12. Mr. Sudhir Nandrajog learned Senior counsel for the respondent argued that the child is attached to his mother and it is in his interest that he is allowed to go to Australia with his mother. Respondent has no objection if the child visits his father; the appellant twice in a year and stays with him during the said visits. Since the child is being brought up in Indian

culture by his mother, there is no likelihood of his being exposed to the Australian culture which might be against his welfare.

13. It is further argued that the provisions of Section 26 of the Act were rightly invoked by the respondent when she moved an application under Section 26 of the Act seeking modification of the terms and conditions of the agreement regarding the custody and visiting rights of the child as the terms and conditions are contained in the application for mutual divorce filed under Section 13-B (2) of the Act. The court has the power to entertain application under Section 26 of the Act even after passing of the decree and pass appropriate orders. The trial court was within its right and jurisdiction to entertain the application and pass the impugned order.
14. It is also argued that the order of the trial court is a balanced order wherein the visiting rights of the appellant have been taken care of by the court. Therefore, according to him, the appeal is without merits and should be dismissed.

15. Section 26 of the Act provides for custody, maintenance and education of minor children and declares that in any proceedings under the Act, the court has the power to make from time to time such interim orders as it might deem just and proper consistently with their wishes wherever possible. Even after the decree is passed the court has the power of pass such an order. Provided an application by the petitioner for the said purpose is made to the Court.
16. Careful analysis of the provisions of Section 26 of the Act indicate that there are certain stages of action that may be taken by the court under the said Act. They are:-
- (a) At any time before passing of final decree, the court can pass interim orders regarding to the custody, maintenance and education of the child;
 - (b) Such like provision could be made by the court in the decree;
 - (c) Even after decree is passed, an application may be made to the court by way of a petition

for making orders for custody, maintenance and education of the child.

17. Therefore, under Section 26 of the Act passing of a decree under the impugned proceedings does not terminate the courts jurisdiction to pass certain orders in respect of the custody of a child. The intention of the legislature relating to Section 26 of the Act, therefore, is explicit as it provides power to the Court to pass order even after the decree is passed.
18. However, this provision is intended to enable the court to pass a suitable order from time to time to protect the interest of the minor children. At the same time, it does not mean that after the final order is passed in original petition filed for the custody of the minor child, the other party can file any number of fresh original petitions ignoring the earlier order passed by the court. Such a fresh application can only be filed seeking revocation, suspension or variation of the earlier order.
19. Section 26 of the Act does not enable the parties to the earlier petition to ignore orders passed therein

and file a fresh petition for a similar relief, contrary to the one which was passed in the earlier petition.

20. The parties to the appeal filed various applications seeking modification in the terms and conditions of settlement arrived at inter se them which formed part of the petition seeking divorce by mutual consent. As per para 11 of the petition it was made clear by the parties that the terms and conditions as settled (as reproduced above) were binding upon them. In their statement made in the court in the proceedings on the petition under Section 13-B (2) of the Act, they stated that they had settled all their claims and disputes, as observed in the judgment dated 5.9.2006.

21. Thus, even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, but they do form part of the petition seeking divorce by mutual consent. Absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant.

22. Therefore, the trial court was right in holding that Section 26 of the Act empowers the court even after passing of the decree to pass orders and proceedings with respect to custody, maintenance and education of the child from time to time, on an application by petition, as might have been made at the time of passing of the decree. Under the circumstances, the court rightly treated the applications filed by the respective parties as being filed under Section 26 of the Act after passing of the decree of divorce.
23. Hence, I do not find any infirmity and illegality in the observations of the trial court as regards its jurisdiction to entertain applications under Section 26 of the Act seeking revocation/modification of the terms and conditions of the settlement. I conclude that the trial court had the jurisdiction to entertain the applications under Section 26 of the Act.
24. The principles to be kept in mind by the court in relation to custody of a minor child are well settled. While considering the custody of a minor child, paramount consideration of the court is the welfare

of the child and not the rights of the parents under the statute for the time being in force. It is neither the welfare of the father nor the welfare of the mother which the court has to consider but, it is the welfare of the minor and of the minor alone which is of paramount consideration. A child cannot be treated as a chattel. The purpose and object of the Act is not merely the physical custody of the child but also due protection of his rights of health, maintenance and education. Father of course is a natural guardian of a minor son by virtue of Section 6 of the Hindu Minority and Guardianship Act but then, the said provision cannot supersede the paramount consideration as to what is conducive to the welfare of the child. Better financial resources of either of the parents or their love for the child can be considered as one of the relevant consideration but not the sole determining factor for the custody of the child. A heavy duty is cast on the court to exercise its judicial discretion judiciously keeping in consideration the relevant facts and circumstances of the case, bearing in mind the

welfare of the child as the paramount consideration while deciding the custody of the child.

25. In '**Rosy Jacob vs. Jacob A. Chakramakkal, (1973) 1 SCC 840**', it was observed:-

“.....The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father love his children and is not shown to be otherwise undesirable the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changes social conditions, yielded to

the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.....”

26. The principles governing the custody of the minor child as laid down in this judgment have been persistently followed by the Supreme Court in its various judgment.
27. In ***‘Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673’*** referred to by both the parties, it was observed:-

“19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In

fact, no statue, on the subject, can ignore, eschew or obliterate the vital fact of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is there that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”

This judgment has been followed in ***‘Nilratan Kundu & Anr. vs. Abhijit Kundu, (2008) 9 SCC 413.***

28. Having given anxious thoughtful consideration to the facts of the present case and keeping in mind

the well settled principles as referred above, I am of the view that the approach of the trial court while disposing of the applications was right. The trial court rightly did not revoke the visitation rights of the appellant. It dealt with the submission of the appellant in the right perspective keeping in mind the paramount consideration and the welfare of the child regarding his custody, education, etc. and passed a balanced order.

29. Master Shivam was born on 5th August, 2002. Parties started living separately from 10th April, 2004. Since thereafter Master Shivam is in the custody of his mother, the respondent. When the parties could not reconcile their dispute they obtained divorce by mutual consent. Before parties moved the court seeking divorce by mutual consent they settled terms and conditions regarding the custody, the visitation rights as well as claim of the respondent for maintenance for herself and that of Master Shivam besides her claim towards stridhan, permanent alimony, etc. Parties adhered to these terms and conditions as settled between them.

Soon after the divorce, respondent filed an application on 7.11.2006 seeking permanent custody of the child also seeking revocation of the visitation rights of the appellant on the plea that it was in the paramount interest and welfare of the child that the visitation rights were revoked.

30. I had the occasion to interview the child who is aged about 7 years in the chamber to ascertain his wishes. The child in categorical terms expressed his wish to be in the custody and guardianship of his mother, the respondent. The child appeared to be quite intelligent when questioned. It was specifically asked to him if he wanted to go to his father and stay with him in India but he unequivocally refused to go with him or stay with him. He made it clear in his expression that he was happy with his mother and maternal grandmother and desired only to live with his mother. Significantly, the trial court had also talked to the child in the chamber before passing the impugned order. ***‘Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, (1982) S SCC 544’*** has no

application to the facts and circumstances of the case.

31. Appellant has not revealed any circumstance which would jeopardize the welfare and interest of the child if he is allowed to remain in custody of his mother.
32. Much has been said regarding the Indian cultural environment in which the child is brought up in India to discard the claim of the respondent to take the child with her to Australia where she is employed for gain. It is not highlighted as to how the health, education or intellectual development as well as physical comfort and moral values of the child would be affected if he is allowed to live with his mother in Australia. Rather, I am of the view that bringing up of the child in favourable surroundings as well as in physical comfort and protection of his mother, his education and intellectual development is likely to be more conducive for the welfare of the child.
33. The trial court at the same time had also kept in mind child's cordial relationship with his father,

whom he had been visiting twice a month while in Delhi while directing the respondent to bring the child twice in a year during the period as specified to meet his father, the appellant and stay with him. Respondent is not averse to the child visiting his father in India and staying with him during the period as scheduled in the order. Rather, it has been made clear to the court during the course of arguments that respondent shall ensure that the impugned order of the court shall be duly complied with.

34. Keeping in mind the welfare of the child being the paramount consideration and not statutory rights of the parents, I concur with the findings of the trial court when he permitted the respondent to take the child with her to Australia on directions contained in last but one paragraph of the impugned judgment.
35. Hence, I find no merits in the appeal, the same is accordingly dismissed.
36. Also pending application stands disposed of.

37. Attested copy of the order be given to the respondent under the signature of Court Master.

**(ARUNA SURESH)
JUDGE**

**July, 27 2009
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