

* **HIGH COURT OF DELHI : NEW DELHI**

CM (M) No.936/2010

% Judgment reserved on: 26th July, 2010

Judgment delivered on: 28th July, 2010

Sh. Arun Grover
R/o 12-B, Mathura Road,
Jangpura-B,
New Delhi

Through: Petitioner.
Mr. Gurinder Pal Singh with
Mr. Animesh K.Sinha,
Advocates.

Versus

Ritu Grover
R/o B-7, Kailash Apartment,
Kailash Colony,
New Delhi

....Respondent.

Through: None

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. To be referred to Reporter or not? | YES |
| 3. Whether the judgment should be reported in the Digest? | YES |

V.B.Gupta, J.

This petition under Article 227 of the Constitution of India

CM (M) No.936/2010

Page 1 of 8

has been filed by the petitioner for setting aside of order dated 5.7.2010, vide which petitioner's application seeking interim visitation rights was dismissed by the Guardian Judge, Delhi.

2. Brief facts are that marriage between petitioner and respondent was solemnized in the year 2000. From the said wedlock, minor child Aryaman was born on 7.12.2001. Due to differences between the parties, petitioner filed petition under Section 25 of the Guardians and Wards Act, 1890 (for short as 'Act') seeking custody of the child. Pursuant thereto, some reconciliatory talks took place between the parties and finally on 16.1.2006 petitioner unconditionally withdrew that petition.

3. Thereafter in 2009, petitioner filed another petition under Section 25 of the Act and in that petition, he filed an application under Section 12 of the Act seeking interim custody and visitation rights of the minor child Aryaman.

4. Trial court, vide impugned order, dismissed the application of petitioner.

5. It is contended by learned counsel for the petitioner that trial court has denied the basic visitation rights to the petitioner which any father, being the natural guardian of the child is

entitled to. The grant of visitation rights to the petitioner would have not only given an opportunity to shower his love and affection to the child but also would have been in the best interest of the child and would have helped the child grow in a healthy atmosphere.

6. The petitioner has been denied legitimate visitation rights to meet the minor child and as such the impugned order passed by the Trial court is illegal and there was no justification for the same.

7. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

8. In ***Waryam Singh and another vs. Amarnath and another, AIR 1954, SC 215***, the court observed;

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in – ‘Dalmia Jain Airways Ltd. V. Sukumar Mukherjee’, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

9. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is

maintainable or not.

10. In custody matters, the welfare of child is of paramount consideration. Supreme Court in ***Mausami Moitra Ganguli vs. Jayanti Ganguli AIR 2008 SC 2262***, observed;

“14. 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 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 statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. 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 here 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.

15. In *Rosy Jacob v. Jacob A.Chakramakkal*, (AIR 1973 SC 840) a three-Judge bench of this Court in a rather curt language had observed that 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 changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in 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.

16. In *Halsbury's Laws of England* (Fourth Edition, Vol.13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

“809. Principles as to custody and upbringing of minors. Where in any proceedings before any Court, the custody or upbringing of minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.”

11. Admittedly, earlier petition filed by the petitioner under

the Act was withdrawn pursuant to an amicable settlement. That withdrawal has been an unconditional withdrawal. There is nothing on record to show that the earlier settlement entered into was due to any force, fear or coercion.

12. Trial court in impugned order observed as under;

“10. Needless to say the welfare of the child is the paramount consideration while considering such matters but from the entire petition, petitioner has not been able to show any change in circumstances or fresh events, which have necessitated the change in custody of the child by filing the petition.

11. Admittedly there has been no order of visitation rights having granted in favour of the petitioner till date except the one dated 9.8.2005 on the application U/S 12 of the Act, which stood extinguished with the withdrawal of the main petition i.e. GP-02/2005.

12. Undoubtedly, this court has the inherent jurisdiction to go into the question of guardianship and custody but from the petition, petitioner has not spelt as to what has prompted him to file the petition on 11.11.2009 seeking such rights. So far the allegations against the Respondent averred in detail in the petition upto January 2007 is concerned, the relief on such allegations is not available and cannot be considered pursuant to the unconditional withdrawal of the petition on 16.1.2007.

13. Secondly, even during the period between 16.1.2007 and the filing of the petition on 11.11.2009, petitioner has not been able to

show that the child was not properly looked after by the Respondent or the welfare of the child has been in jeopardy in the hands of the respondent so as to necessitate passing of some orders. Though, no technical or pedantic approach should be adopted by the court in such matters but at the same time, the petitioner cannot be allowed to take the law at his whims. In order to make out a case for custody, petitioner prima facie has to show that the welfare of the child lies in his custody rather than the custody of the Respondent. Petitioner has not been able to make out a prima facie case in his favour. The petitioner never expressed any desire to meet the child during this interregnum period i.e. between January, 2007 and the filing of the petition and only on few occasions has met the child that too as accommodated by respondent without any orders from the court. The petitioner has never paid the school fee or made any contribution towards the educational and other expenses of the child. The child was examined by the undersigned in Chamber and it was observed that the child was averse to even talk to his father. While going through the documents, this court is also disturbed at the manner in which the petitioner has been sending SMS's and blaming the Respondent and taking judicial system for a ride as per his wishes and whims. Since the petitioner has not challenged the order dated 27.9.2008 passed by Ld. ADJ seeking restoration of his petition, the present application seeking interim visitation and custody is also devoid of substance. The order dated 27.9.2009 has attained finality as the same has not been challenged before the appropriate forum. The Petitioner has prima facie failed to show his entitlement for interim custody or to show the Respondent having negligent or unfit to have/retain such custody. I do not feel proper to allow the application in such circumstances. Dismissed."

13. Having bestowed my anxious consideration to the material on record and the observations made by learned Trial Court, though, petitioner being father of the minor child can certainly claim visitation rights to meet his minor son but conduct of the petitioner as apparent from the record, disentitle him to this relief.

14. Further as per impugned order, petitioner never expressed any desire to meet the child during the interregnum period i.e. between January, 2007 and filing of the present petition. Moreover, petitioner never paid the school fee or made any contribution towards the education and other expenses of the child and even the child was averse even talk to the petitioner.

15. Thus, I find that there is no ambiguity, illegality or irrationality in the impugned order. The present petition has no merit. The same is hereby dismissed.

28th July, 2010
mw

V.B.GUPTA, J.