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% 29.10.2010

Present:- Ms. Monika Arora for the appellant.

+CM Nos. 19275-76 in MAT APP No. 120/2010

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Allowed subject to all just exceptions.

MAT APP No. 120/2010

By this appeal filed under Section 28(2) of the Hindu Marriage Act, 1955, the appellant seeks to challenge the impugned order dated 6.9.2010 passed by the court of the learned ADJ whereby the petition for custody of the child filed by the appellant was dismissed.

Ms. Monika Arora, counsel for the appellant submits that the respondent no.1 (the ex wife of the appellant herein) after remarriage is now settled in New Zealand and after her remarriage, she has not taken any care for the welfare of the minor child who is now 7 years old. Counsel further submits that instead of restoring the custody of the child to the natural father, the respondent no.1 has given the custody of the child to her parents i.e. maternal grand-parents

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of the child. As per the counsel for the appellant the maternal grand-parents of the child under no circumstances are in a better position to take care of the child as compared to the natural father. Counsel also states that the child calls respondent No.1 as her sister and does not know of her actual relationship with respondent No. 1. Counsel further submits that even in the passport of the child the name of the father has been disclosed as Rakesh Gupta, who is the maternal grand-father of the child and same is the position in the school records of the child. The counsel further submits that the child has been made to change five schools during a short period and now after filing of the petition by the appellant the child has been shifted to a better school.

I have heard learned counsel for the appellant at considerable length and have gone through the impugned judgment.

It is not in dispute that the present appellant at the time of seeking divorce entered into a mutual settlement with his wife, respondent no.1, and in terms of the said settlement the appellant had agreed that the child would remain in the

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custody of his wife. The appellant had also undertaken that he would not file any case for the custody of the minor child as well as for any visitation rights of the child in any court of law against his wife. The appellant and respondent No.1. got married on 02.07.2001 and a child named 'Kishika' was born out of the said wedlock on 13.03.2003. The matrimonial ties of the parties came to an end vide judgment dated 29.05.2007 and since then the custody of the child was with the respondent no.1-wife who throughout had been living with her parents i.e. maternal grand-parents of the child. It is further not in dispute that the respondent no.1 has remarried and is presently settled in New Zealand and similarly the appellant has also re-married and is now living happily with his second wife.

A perusal of the impugned judgment clearly shows that the learned trial court has carefully gone through and dealt with the contentions raised by the appellant in his petition and this court does not find any illegality, perversity or any kind of irrationality in the impugned judgment. Undoubtedly, the right of the natural parents cannot be

defeated or circumvented when the question of paramount welfare of the minor child arises even though there may be settlement in this regard between the parties. Although, the appellant had himself agreed that he will not even visit the minor child and will not claim custody of the child by filing any proceedings before the court of law, yet this court is of the view that the said clause would not come in the way of any of the natural parents to approach the court under Section 26 of the Hindu Marriage Act, if such natural parent find that the child is not being looked after properly by the person to whom the custody of the child has been given. It is not in dispute in the present case that right from the date of the birth of the child, her custody has been with her mother as well as with her maternal grand-parents. It has also come on record that in fact the child does not even recognize the appellant to be her father. In these circumstances, in any case the appellant father is a total stranger to the child and to give any visitation rights to the father at this stage would adversely affect the psychology of the child and such a step would not be in the interest of the child or for her welfare.

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Both the parties i.e. appellant and the respondent no.1 are quite young and both of them have remarried and are trying to settle down with their second marriage. The respondent no.1 after remarriage is now settled in New Zealand. The learned trial court has also observed that if the respondent no.1 fails to take the child to New Zealand, then the appellant will be at liberty to move the Court for appropriate relief if he so desires. It would be thus better for the appellant to wait and then seek appropriate relief if the respondent no.1 fails to take the child to New Zealand.

It is a settled legal position that the welfare of the child is the paramount consideration of the court while deciding sensitive issues of custody and visitation rights. Undoubtedly a prior mutual settlement cannot encompass termination of parental rights of the natural father, but it cannot be lost sight of the fact that the child does not even recognize the appellant and he has no existence in her life whatsoever. Therefore the intentions of the father, however genuine, cannot take precedence over the well being of the child. The child who is being provided a congenial atmosphere for growing up with

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her maternal grandparents cannot be uprooted as it will affect the child emotionally and psychologically. The child cannot be made to suffer in the fire of shattered relationships and has the utmost right to parenthood sans prejudice.

Hence in the light of the above, this court does not find anything wrong if the temporary custody of the child remains with the maternal grand-parents of the child who are also the natural parents of the respondent no.1 till the time the child is provided with a secure, protective and loving environment. The appellant has not brought on record anything to show that he in any way is in a better position to look after the well being of the child as compared to her maternal grand-parents with whom she is in temporary custody and not in permanent custody or of any harm or lack of efforts on their part for the upbringing of the child.

So far other issue with regard to name of the maternal grand father in the school records is concerned, the trial court has already given directions that correct name of the father should be recorded in the school records. Same

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direction would apply so far the passport and other records are concerned.

There is no merit in the present appeal and the same is hereby dismissed.

Registry is directed to send copy of this order to the respondents.

October 29, 2010
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KAILASH GAMBHIR, J