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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 03.10.2013

+ **MAT. APP. (F.C.) 38 OF 2013**

HARISH KUMAR Appellant

Through: Mr.P.K.Srinivasan,
Advocate.

versus

ANU PRIYA Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR.JUSTICE S. RAVINDRA BHAT(Open Court)**

1. This is an appeal directed against the judgment and order of the Family Court delivered on 13.03.2013 dismissing the petition under section 25 of Guardian and Wards Act, 1890 (the 'Act').

2. The brief facts of the case are that the appellant preferred a petition for custody and guardianship of his children. The marriage of petitioner and respondent was solemnized on 13.01.1996. The two children i.e. a daughter (Shubhangi) and a

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son (Sagar) were born on 27.12.1996 and 10.04.1999 respectively. On account of differences, the wife started living separately with the children from 03.05.2005 in her parental home. She did not join her matrimonial home at any stage thereafter. It is the common case of the parties that on 04.04.2011, the marriage of the parties was dissolved by a decree of divorce. It is in this background of circumstances i.e. the husband / appellant moved a petition under Section 25 of the Act. It was alleged during the proceedings by the appellant that the respondent interfered with his right to custody and visitation of the children and that it was in the best interest of the children that an order in his favour towards custody be made. The appellant alleged that the respondent neglected to take care of the health of his son who was suffering from a 'neuro problem'.

3. Trial court taking into consideration the evidence in the case, held that the respondent / wife be granted custody. In the course of the evidence, the petitioner examined himself in his affidavit, Exh.PW.1/1. He also relied upon certain documents

i.e. Exh.PW.1/A to Exh.PW.1/E. Trial court after considering the submissions was of the opinion that it is in the best interest of the children that the custody and guardianship be stayed by the respondent.

4. After discussing the evidence, the impugned order observed as follows:

“In the present case, the respondent left the matrimonial home with minor children on 03.05.2005 on account of some disputes and temperamental differences and went to her parental home. Thereafter, the respondent did not join the company of the petitioner. Both the children have been living in the care and custody of the respondent since 03.05.2005. It is worth noting petitioner has deposed that the minor son Sagar is having some Neuro problem. However, he has not placed on record any document in this regard. It is further significant to note that petitioner has also not placed on record any document to show that the respondent is not taking care of both the children and he is in a better position to take care of children. It is further significant to note that petitioner has categorically deposed that the respondent is a qualified lady as she is MA, B.ed. He has also deposed that being a teacher, she is getting handsome salary and is also working as an insurance agent.

Since the respondent is a qualified lady and getting handsome salary, in these circumstances, it cannot be said that respondent is not taking care of children and is not worried about the welfare of the

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children. No evidence has been brought on record by the petitioner that the respondent is not providing proper treatment to the son. Since, both the minor children are in the care and custody of the respondent, since 2005, I am of the considered view that the custody of both the children should not be disturbed only on the ground that the petitioner is paying maintenance regularly and is earning a handsome salary. I am also of the view that any disturbance, by changing the custody of the children would traumatize them and will not be conducive to the welfare of children. It will certainly affect the balance of mind who have developed love and affection for their mother as they have been living with her since May, 2005."

5. The appellant reiterated that the Trial court failed to consider the grant of visitation rights. It was submitted that the impugned order failed to take note of the health problem of the son and financial capability of the appellant to provide better for the welfare of the minor children.

6. Apart from asserting that son is suffering from a neuro problem, the appellant appears to have made no other allegations. During the course of hearing, Ld. Counsel conceded that no order was sought for discovery of the medical record nor was any doctor summoned. It was submitted that the respondent / wife did not care for her children for more than 8

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years i.e. 03.05.2005. In the testimony under oath, the petitioner / appellant was unable to establish how many times he had approached the respondent seeking visitation rights and for guardianship. The respondent lived separately for more than 6 years after which the divorce was granted. This court is conscious of the fact that while granting custody, the Court is guided only by the welfare and overall interest of the children and not by the opinion or desires of the parents. Having regard to the totality and circumstances present before it, this court is not in a position, to differ with the conclusion arrived at by the Family Court.

7. In view of the above discussion, the appellant's appeal being devoid of merits, is dismissed.


S. RAVINDRA BHAT
(JUDGE)


NAJMI WAZIRI
(JUDGE)

OCTOBER 03, 2013
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