

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.164 OF 2010
WITH
CIVIL APPLICATION NO.324 OF 2010
IN
FAMILY COURT APPEAL NO.164 OF 2010
WITH
CIVIL APPLICATION NO.145 OF 2016
IN
FAMILY COURT APPEAL NO.164 OF 2010

Dr. Bindu Devdutt Purohit
Age: Adult, Occ. Doctor,
Hindu, Indian inhabitant of Mumbai
R/o Flat No.B/102, Gokul Apartment,
Shimpoli Road, Borivali (West),
Mumbai – 400 092.

..... Appellant

V/s

Ms. Alka Purohit
Age: Adult, Occ. Housewife,
Hindu, Indian, C/o R.P. Pandey
Old 86, New 95, Residency Area,
Radio Colony, Indore (M.P.)

..... Respondent

Ms. Seema Sarnaik i/b Mr.Amitkumar D. Sale for the Appellant/Applicant.
Ms. Mamta Sadh a/w Mr. Ishwar Ahuja i/b M/s. Thakordas Madgavkar for
the Respondent.

CORAM : A.S. OKA &
A.A. SAYED, JJ.

DATED : 22 JUNE 2016

ORAL JUDGMENT: (Per A.S. OKA, J.)

1 Called out for final hearing. At the outset, we may record here that
though the Family Court Appeals of the year 2007 onwards are pending

in this Court for final hearing, out of turn priority is given to this Appeal of the year 2010 in the light of the order passed by the Apex Court directing the expeditious disposal of this Family Court Appeal.

2 By this Appeal, the Appellant husband has taken an exception to the judgment and decree dated 5 August 2010 passed by the Family Court at Bandra, Mumbai. The Appellant is the husband and the Respondent is the wife. An Application was made by the Appellant under section 25 of the Guardians and Wards Act, 1890 (for short “the said Act”) for the custody of minor children. When the Application was filed by the Applicant on 7 December 2009, a prayer for custody was made in relation to the eldest daughter Medhavi born on 15 February 2006 and son Dhruv born on 14 August 2008. During the pendency of the Application before the Family Court, the third child by the name Savyasachi @ Saurav born on 19 January 2010. By the impugned judgment and decree, the learned Judge of the Family Court has dismissed the said Application.

3 The learned Counsel appearing for the Appellant husband has made submissions which are in two parts. The first submission is based on the conduct of the Respondent wife which is reflected from the averments made in the Petition under section 25 of the said Act. She

urged that without consent of the Appellant husband, on 6 July 2009, the Respondent walked out of his house along with two children. She invited our attention to the material averments in the Petition which are supported by an Affidavit in lieu of examination-in-chief of the Appellant and in particular paragraphs 17 to 19 of the Petition. She pointed out that the Respondent wife was under treatment of a Psychiatrist. She also pointed out the averments made in paragraph 19 of the Petition and in particular regarding the effect of a patient of schizophrenia stopping intake of medicines. It is pointed out that as a result of the Respondent's failure to take medicines, her behavior became very aggressive. She invited our attention to the incident of 6 July 2009 when the police were brought to the residence of the Appellant. She also invited our attention to the manner in which custody of the minor daughter was snatched by the Respondent, as a result of which the Appellant was required to report to the police. Her submission is that the evidence of the Appellant husband has gone unchallenged and, therefore, there was no reason for the Family Court to protect the illegal custody of minor children by the Respondent wife.

4 Her second limb of the argument is based on events which have happened during the pendency of the Appeal. She has relied upon the reports of the Marriage Counselor. The first report which is relied upon is dated 22 November 2013 of the Marriage Counselor attached to Family

Court at Indore. The second report which is relied upon is dated 9 August 2011 is of the Marriage Counselor at Family Court at Bandra, Mumbai. She submitted that the Appellant is entitled to rely upon the subsequent events which are reflected from the documents placed on record of the Appeal. She, therefore, submits that an opportunity may be granted to the Applicant to prove the subsequent events and especially the documents which are annexed to the Civil Application No.145 of 2016.

5 We have given careful consideration to the submissions. The Application under section 25 of the said Act was made by the Appellant on 7 December 2009 when the third child was not born. Affidavit in lieu of examination-in-chief was filed by the Appellant on 29 June 2010. As stated earlier, the third child Savyasachi @ Saurav is born on 19 January 2010. In the Affidavit in lieu of examination-in-chief filed by the Appellant on 29 June 2010 a prayer is specifically made only for grant of the permanent custody of Medhavi and Dhruv. As stated earlier, Medhavi is born on 15 February 2006. Thus, her approximate age today is 10 years and 4 months. Dhruv is born on 14 August 2008. Hence, his approximate age is 7 years and 10 months. The prayer for custody of the third child which has been made in the Appeal will have to be kept it out of consideration as no such prayer was made by her parents before the Family Court.

6 We have perused the averments made in the Petition under section 25 of the said Act as well as the Affidavit in lieu of examination-in-chief of the Appellant. First allegation is that though the Respondent was under treatment of a Psychiatrist, on 2 July 2009 when she learnt that she had conceived for the third time, she stopped taking the medicines prescribed by the Psychiatrist from that day. The allegation is that as a result, she became aggressive. The second part of the allegation is about the manner in which the Appellant was deprived of the custody of the two minor children from 6 July 2009. Neither in the Petition under section 25 of the said Act nor in the Affidavit in lieu of examination-in-chief a case is made out that from 6 July 2009 onwards, the Respondent mother is not properly looking after the children. It is not the case made out that she has ill-treated the children. The reliance is placed on the aforesaid two reports of the Marriage Counselors. The report of the Marriage Counselor attached to the Family Court at Indore at highest suggests that both the minor children were tutored. The home visit report relied upon by the Appellant of the Marriage Counselor at Family Court at Bandra, Mumbai dated 9 August 2011 specifically records that the Respondent has admitted the three children in a school in the vicinity of the premises acquired by her parents at Borivali and the children are involved in extra-curricular activities. The learned Counsel appearing for

the Appellant pointed out that subsequently the children were shifted to Madhya Pradesh and today, they are not residing with the Respondent.

7 The issue is of disturbing the custody of two minor children. As stated earlier, the present age of the daughter is 10 years 4 months and that the age of the son is 7 years 10 months. The question is whether the custody of minor daughter and son at this tender age should be disturbed only on the ground that the custody was illegally snatched by the Respondent mother on 6 July 2009. As far as alleged psychological ailment of the Respondent is concerned, no attempt is made by the Appellant to examine the Psychiatrist as a witness.

8 As far as the subsequent events on which reliance is placed by the Appellant are concerned, we must note here that on 23 March 2016 this Court directed that the Appeal should be added to the weekly board for the final hearing. After perusing the order of the Apex Court dated 15 December 2014 and after noticing that the Appeal did not reach final hearing, the same was fixed on 6 June 2016 for fixing early date of hearing. On 6 June 2016, the Appeal was ordered to be notified on the weekly board of the week commencing from 27 June 2016 high upon board. Though the Appellant was aware that from 23 March 2016 that the Appeal is likely to be heard finally, no attempt is made by the

Appellant to even file an Application for seeking permission to lead additional evidence on the basis of subsequent events.

9 The issue is of disturbing the custody of the mother of minor children of tender age. Suffice it to say that before the Family Court there was no evidence adduced for justifying the drastic order of disturbing the custody of the mother. As stated earlier, the two children are continuously in the custody of mother from 6 July 2009. Even according to the case of the Appellant, till 6 July 2009, the Appellant and the Respondent were staying together with their children.

10 The law is very well settled as far as the issue of custody of minor children is concerned. The dispute between their parents is of no consequence and the only paramount consideration is the welfare of the minors. There is not even an iota of evidence on record to show that either the children are not being properly looked after by the Respondent mother or that there is any other ground to disturb the custody of children of tender age. Only on the basis of the documents placed on record of the Appeal in the form of a compilation, no such conclusion can be recorded. Firstly, none of the documents are proved by the Appellant. Secondly, the Respondent had no opportunity to deal with the said documents as there is no Application made for grant of permission to

lead additional evidence. Moreover, the two reports of the Marriage Counselors relied upon by the Appellant do not support the case of the Appellant.

11 Thus as of today, as far as the Appellant is concerned, it is a case of no evidence. We are of the view that disturbing the custody of minor children of tender age will be against their interest and welfare.

12 It is well settled that the orders of custody of minor children are never final in the sense that in case of change in circumstances, the parties can always approach the competent Court for seeking the orders regarding grant of custody or temporary access or visitation rights. If according to the case of the Appellant, after filing of the Appeal, there are many subsequent events which according to him are sufficient to compel the competent Court to disturb the custody of the mother, the Appellant can always file appropriate proceeding before the appropriate Court for grant of appropriate relief.

13 Suffice it to say that on the basis of evidence on record of this Appeal, it is not possible for us to disturb the custody of the children. We may make it clear that we have considered the evidence which was adduced before the Family Court and not any other material placed in the form of compilations except the two reports of the Marriage Counselors.

14 The learned Counsel appearing for the Respondent tried to raise a contention regarding the Court before which such an Application will lie. However, it is not necessary for us to decide the said issue. Needless to say that the Appellant will have to file an Application before the Court having jurisdiction to entertain such Application.

15 Accordingly, we pass the following order:

- i) Family Court Appeal No.164 of 2010 is hereby dismissed with no order as to costs;
- ii) Civil Application Nos.324 of 2010 and 145 of 2016 do not survive and the same are disposed of;
- iii) Notwithstanding the dismissal of the Appeal, it will be open for the Appellant to file appropriate proceeding before the competent Court on the basis of the alleged subsequent events;
- iv) If such an Application is made, we are sure that the Family Court will give necessary priority to the disposal of the Application. If any Application is made for grant of interim relief in such proceedings, the Family Court shall endeavor to dispose of the interim Application as expeditiously as possible and preferably within a period of two months from the date on which the notice of the said Application is served to the Respondents;

- v) We make it clear that except for the two reports of the Marriage Counselors which are referred in the judgment, we have not taken into consideration any of the documents placed on record by the Appellant in the form of additional compilation and hence, we have made no adjudication thereon.

(A.A. SAYED, J.)

(A.S. OKA, J.)

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