

\$~50

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

+ **CM(M) 990/2017**

ADITI GOEL

..... Petitioner

Through: Ms. Geeta Luthra, Sr. Adv. with Mr.
Anshul Duggal, Adv.

Versus

ROHIT GOEL & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

12.09.2017

CM No.33025/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 990/2017 & CM No.33024/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 12th July, 2017 in GP No.25/2014 of the Court of Principal Judge, Family Court, Central District, Tis Hazari Courts, Delhi] of dismissal of the applications of the petitioner (respondent in the guardian case) (a) for deletion of the respondents No.2&3 Urmila Kumari and Rajendra Prasad, being the grandparents of the minor, as petitioners no.2&3 in the guardianship case (and in which the respondent No.1, being the father of the minor is the petitioner no.1); and, (b) for modification of the issue no.1 framed as under:

“Issue No.1: Whether it is in the interest of Master Redit Goel @ Aviaansh Goel, if his permanent custody is granted to the petitioner No.1/Father or Petitioners No.2 and 3/Grand-Parents? OPP”

to as under

“Whether it is in the interest of Master Redit Goel @ Aviaansh Goel, if his permanent custody is granted to the petitioner No.1/Father? OPP

OR

“Whether the custody of the child be handed over to the petitioner No.1/Father?”

4. The respondent No.1, being the father of the minor and the respondents No.2&3, being the paternal grandparents of the minor have filed the guardianship case from which this petition arises, against the petitioner being the mother of the minor.
5. The contention of the senior counsel for the petitioner/mother is that since under Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a male Hindu minor, as the minor in the present case is, is the father and after him the mother, the petition by the respondents No.2&3 grandparents does not lie.
6. The senior counsel for the petitioner/mother has in this regard drawn attention to ***Githa Hariharan Vs. Reserve Bank of India*** (1999) 2 SCC 228 and ***Nirali Mehta Vs. Surendrakumar Surana*** AIR 2013 Bom 123.
7. I have drawn attention of the senior counsel for the petitioner/mother to Section 8 of the Guardians and Wards Act, 1890 and under which the proceedings from which this petition arises has been filed which entitles the person desirous of being, or claiming to be, the guardian of the minor, or any relative or friend of the minor to apply to the Court for order appointing him/her to be the guardian of the minor. I have enquired from the senior counsel for the petitioner/mother, as to how the respondents No.2&3, being the grandparents, can be ousted at the threshold and whether not the contentions as urged are to be decided at the final stage only.

8. In this respect I may notice that the respondents, in the petition seeking guardianship of the minor, have pleaded that considering the welfare and future of the minor, the child should remain in the custody of the respondents, as the respondent No.2 being the paternal grandmother is a house wife and remains at home and the respondent No.3 being the paternal grandfather is also a retired person and remains at home and the respondent No.1 being the father of the minor, though working at Kuala Lumpur, Malaysia visits Delhi often and the respondents are better equipped to look after the minor than the petitioner/mother.

9. It has further been enquired from the senior counsel for petitioner, whether not the Guardianship Court, at the preliminary stage, cannot decide whether the claim of the respondents is correct or not.

10. In fact, the senior counsel for the petitioner/mother has herself drawn attention to para 13 of *Nirali Mehta* supra which lays down that in determining who the guardian of the child would be, the welfare of the child is the prime aspect which would come up for consideration and a legal guardian can be given custody or access as interim or as ancillary reliefs.

11. No particular passage of either of the judgments cited, which disentitles the grandparents during the lifetime of the parents to apply for guardianship of the minor, has been shown. It thus cannot be said that a petition by the grandparents, during the lifetime of the parents or of either of the parent, is not maintainable. It is a different matter that the Guardianship Court, at the final stage may come to the conclusion that the guardianship and custody of the minor should be jointly with the parents or with either of them, in preference to the paternal grandparents and the father.

12. The senior counsel for the petitioner/mother then draws attention to para 20 of *Nirali Mehta* supra where it is held that for any person other than the parents of the child, the guardianship would be considered only in their absence and their rights are similar to those under Section 3(2) of the Children Act, 1989 of United Kingdom.

13. The same also does not amount to holding that the guardianship claim of grandparents is not maintainable in life time of parents.

14. Moreover this is not a case where it is the grandparents alone who have sought custody against the mother of the minor. It is the paternal grandparents along with the father, who have applied to the Guardianship Court and no argument has been made of the prejudice if any which will be caused to the petitioner/mother, if the guardianship case continues with the grandparents being parties thereto along with the father of the minor.

15. In *Rosy Jacob Vs. Jacob A. Chakramakkal* (1973) 1 SCC 840 it was held that in considering the question of welfare of the minor, though due regard of course has to be paid to the right of the father to be the guardian and that there is a presumption that a minor's parents would do their very best to promote their children's welfare, but if the custody of the father cannot promote their welfare, then he cannot claim indefeasible right to their custody, merely because there is no defect in his personal character and he has attachment for his children. It was further held that merely because 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. Similarly in *Gaurav Nagpal Vs. Sumedha Nagpal* (2009) 1 SCC 42 it was held that the paramount consideration of the Court in determining the question as to who

should be given custody of a minor child is the welfare of the child and not rights of the parents under a statute for the time being in force or what the parties say.

16. Though both the aforesaid judgments are in the context of warring parents but what is abundantly clear therefrom is that it is not as if the parents alone have a right to the custody and / or guardianship of the minor and no other person can stake a claim. Here, the father of the minor along with his parents is seeking guardianship of the minor and their claim to such guardianship is pitted against that of the mother of the minor. The father of the minor, in conjunction with his parents, has to be given a chance to prove that the custody and guardianship of the minor with them is better than that with the mother. The father of the minor cannot be deprived of an opportunity to prove the same. In fact in ***Gaurav Nagpal*** supra it was also held that though the provisions of the special statutes which govern the rights of the parents may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases and that the absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions, must yield 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.

17. I am thus unable to agree with the senior counsel for the petitioner that the petition of the grandparents for guardianship of their minor grandson, in the lifetime of the parents, has to be thrown out at the threshold.

18. Mention may also be made of (i) ***Budhulal Shankarlal Vs. An Infant-Child*** AIR 1971 MP 235 (DB) where custody of the minor was given

to the foster parents as opposed to the natural father; (ii) *Vegetina Venkata Narasaiah Vs. Chintalapati Peddi Raju* 1971 AP Law Journal 123 (DB) where custody of the minor was allowed to remain with the grandmother; (iii) *A.V. Venkatakrishnaiah Vs. S.A. Sathyakumar* ILR XXIX 1979 Karnataka 334 (DB) where custody and guardianship of the minor was allowed to be retained by the maternal grandparents; (iv) *Babu Ram Vs. Keshwa Chand Joshi* AIR 1978 P&H 174 where custody of the minor was granted to maternal grandparents instead of father; and, (v) *Baby Sarojam Vs. S. Vijayakrishnan Nair* AIR 1992 Ker 277 (DB) where custody of the minor was granted to maternal grandparents as opposed to father.

19. Even otherwise, no case for interference in exercise of jurisdiction under Article 227 of the Constitution of India with the order of the Guardianship Court of dismissal of the applications aforesaid is made out.

20. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 12, 2017

bs / pp..