

15 SCOB [2021] HCD 87

High Court Division

(Civil Revisional Jurisdiction)

Civil Revision Case No. 4400 of 2015

Md. Ahsan Ul Monir and others

..... *Petitioners*

-Versus-

Dr. Md. Fakhru Islam and others

..... *Opposite Parties*

Mr. Md. Nurul Huda, Advocate

..... *For the Petitioners*

Mr. Abdus Salam Mondal, with

Mr. M.A. Muntakim and

Mr. Mohammad Whaiduzaman, Advocate

..... *For the Opposite Parties*

Heard On: 01.10.19 and

Judgment On: 20.11.19

Present:

Mr. Justice Khizir Ahmed Choudhury, J

Editor's Note:

The father of a minor child, who was a physician by profession and was undergoing trial for abetting suicide of his wife (mother of the child), instituted a suit in the Family Court seeking custody of the boy. The Family Court decreed the suit and Appellate Court affirmed the decree in spite of the fact that the boy expressed his preference of staying with his maternal relations before the Appellate Court. On revision the High Court Division taking into consideration the age of the child at the material time, likelihood of influencing his opinion by the maternal relations, acquittal of the father in the criminal case, relative advantage of the contesting parties to ensure the best interest of the child, relevant provisions of Guardians and Wards Act 1890, section 357 of Mulla's Principles of Mahomedan Law and judicial pronouncements of our apex court concluded that no illegality was committed by the Courts below in decreeing the suit. Therefore, the Rule was discharged.

Key Words:

Custody of a minor boy; Section 17 of Guardian and Wards Act, 1890; Section 357 of Mulla's Principles of Mahomedan Law; Section 7 and 25 of the Guardian and Wards Act, 1890; best interest of the child

Section 17 of Guardian and Wards Act, 1890:

In deciding the custody of minor child, the best interest and wellbeing of the child is paramount consideration as mandated in Section 17 of Guardian and wards Act, 1890. It is stipulated therein that in considering the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. It is further stipulated that if the minor is old enough to form an intelligence preference, the Court may consider that preference. ... (Para 10)

Father and paternal male relation is entitled to custody of a boy of seven years of age:
Section 357 of Mulla's Principles of Mahomedan Law stipulates that, father and paternal male relation is entitled to custody of a boy of seven years of age....In the case in hand the minor boy now above seven years old and it is already found that his wellbeing and betterment will be protected at the hand of his father and grandparents and as such the findings and reasonings in deciding the custody of minor boy is sustainable for welfare of the minor boy. ... (Para 14 & 15)

It further appears that the minor boy was examined by the appellate Court wherein he disclosed that he is willing to live with his maternal grandparents and does not intend to go and live with his father. It is noticed that while the minor boy was examined, he was 6 ½ years old and after living with maternal grandparents for quite number of years, he was brought to the Court and naturally the statement made by him may not reflect true state of affairs as there is likelihood of influencing his opinion. In this context the findings of the appellate Court may not be out of context wherein the appellate court held that on perusal of the lower Courts records it is found that the minor boy was present during hearing of the Family Court Suit on some occasions but no unusual attitude of minor boy towards father was noticed. ... (Para 17)

Section 7 and 25 of the Guardian and Wards Act:

It appears that the trial Court granted custody of the minor boy to his father although the suit was filed for appointment of guardian of minor boy but since the father is natural guardian of child he need not make prayer for appointing him as guardian under section 7 of the Guardian and Wards Act, rather he can claim for custody of minor child which the Court rightly granted under the facts and circumstances of the case. In the plaint averments have been centered around seeking custody of the minor boy and as such the courts below rightly granted custody of the minor boy to the plaintiff under section 25 of the Guardian and Wards Act, 1890. ... (Para 19)

JUDGMENT

Khizir Ahmed Choudhury, J:

1. This rule has been issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 06.09.2015 passed by learned Additional District Judge and Deulia Court in Family Appeal No.15 of 2014 affirming the affirming the judgment and decree dated 24.10.2013 passed by learned Additional Assistant Judge and Family court, Dhaka in Family Case No. 597 of 2010 should not be set aside.

2. Opposite party No 1 as petitioner instituted family suit No. 597 of 2010 before the Assistant Judge and Family court, 6th Court, Dhaka impleading the petitioners hearing as defendant for appointing him guardian and custodian of his minor child.

3. The case of the plaintiff in brief is that he married Dr. Tamanna Haque Munira vide registered deed of marriage and out of their wedlock a male child was born on 10.01.2008 namely Tahmid Faysal Meher. The plaintiff lives in joint family but his wife provoked him to live separately which he declined, consequently his wife started unbecoming behavior with him and on 29.8.2009 she committed suicide hanging with the ceiling fan. Defendant No. 1 took away minor boy from the plaintiff and filed Nari O Shishu Nirjaton case being No.

100(08) 09 under section 9A of the said Act against the plaintiff and his parents whereupon the police submitted charge sheet under section 506 of the Penal Code. The plaintiff intended to get back his minor son as his well being and nourishment has not been ensured at the defendants home and hence the instant suit.

4. The defendant No. 1-4 contested the suit by filing Written statement admitting the marriage, born of male child out of the wedlock and contended inter alia that on 28.8.2009 plaintiff and his family members killed Dr. Tamanna and kept her hanging with ceiling fan and after 12 hours informed her Father at Barishal although her elder brother was residing at Mohammadpur. When the elder brother of Dr. Tamanna along with police force reached the spot, the plaintiff was found absent. The dead body of Dr. Tamanna was taken from the plaintiff's house while the parents of the plaintiff handed over minor boy to his maternal uncle. The security and well being of the minor boy is at stake at the residence of the plaintiff and as such the minor boy deserves to reside with his maternal grandparents and such they prayed for dismissal of the suit.

5. After framing of issues, the suit was posted for peremptory hearing, the plaintiff deposed as PW 1 and submitted papers which were marked as exhibits 1 and 2. The defendants did not examine any witness but cross examined PW 1. After hearing the family court decreed the suit finding that in granting custody of the minor paramount consideration is his welfare and the plaintiff being his father and also being a physician it is logical that he will take care of his minor son devotedly and sincerely. The minor's paternal grandfather is retired government employee and grandmother being the retired official of IFIC Bank, they will be able to take care of minor child as well. The trial court also observed that defendant No. 2 is a student and defendant No. 3 and 4 are doing job and as such minor's well being will not be protected by them but if he stays with his father's family his well being will be best served. The trial court also held that the allegation of killing of Dr. Tamanna Haque by the plaintiff is sub-judice matter for which no comment is called for.

6. The appellate Court concurred with the findings of the trial court and further held that the statement made by the minor boy before the appellate Court seems to be not spontaneous, rather it is tutored by the appellants and as such his statement cannot be relied upon.

7. This court with a view to appraise the mental faculty and intelligence preference of minor boy passed order to produce him in the court, wherein the learned lawyer for the petitioner also agreed, but due to change of the constitution of the Court that could not be done then, but when the matter is posted for hearing again another date was fixed for bringing the minor boy to the Court but the minor boy was not produced by the petitioner.

8. Mr. Nurul Huda, learned advocate appearing for the petitioner submits that the trial Court after closure of evidence did not fix date for compromise or reconciliation which is a mandatory provision under section 13(1) of the Family Court ordinance 1989 and as such the judgment and decree passed by the trial Court is not maintainable for violation of the mandatory provision of law. He next submits that the minor boy has been living with his maternal grandparents since 1 ½ years of age and the maternal grandparents as well as the minor's maternal uncle and niece have been looking after him as per their best ability wherein minor's welfare will be best protected and as such the trial Court as well as the appellate court committed error in passing custody of the minor boy to the father. He next submits that the minor boy was produced before the appellate Court and he disclosed that he intends to stay with his maternal grandparents and he will not be safe in father's custody. He argued that the welfare of the minor is of paramount importance while considering the

custody of a minor boy and it is established that the welfare of the minor will be best protected if he stays with his maternal grandparents. He argued that although criminal case has been disposed of with the acquittal of the plaintiff but never-the-less the petitioner side is taking step for taking legal action against the acquittal and as such the custody of the minor boy should be kept with his maternal grand parents.

9. Mr. Abdus Salam Mondal, along with Mr. M.A. Muntakim and Mohammad Whaiduzzaman, advocate appeared for the opposite parties. Mr. Abdus Salam Mondal learned advocate submits that the trial Court by elaborate judgment found that the custody of the minor boy will be best protected in the hand of the father which has been affirmed by the appellate court and as such it is not desirable to hand over the custody of the minor child to the maternal grandparents. He next submits that the plaintiff has been serving in the Dhaka Medical Collage who did not marry for second time considering the welfare of the minor child and he is eager to impart best education if the custody of the minor boy is retained with him. Learned advocate further submits that the paternal grandparents of the minor boy being retired from their jobs, they can take care of him and other relatives are also very caring to the minor and they are also ready to extend support. He next submits that the father is the natural guardian of the minor and as such the custody of the minor boy has rightly been passed by the Courts below. He contends that the criminal case filed by the petitioner against the plaintiff was found to be not true and the trial Court acquitted him from the charge and as such the apprehension as raised by the petitioner does not subsists. Mr. Abdus Salam Mondal further submits that the evidence of minor as recorded by the appellate Court has got no credence as he was then 6 ½ years old having no intelligence preference, and also it is outcome of tutoring. He lastly submits that according to the petitioner, the minor child is student of class six studying at Barisal but the petitioner failed to produce any documents evidencing his prosecuting study and as such for the welfare of the minor child, he is to be handed over to the custody of the father. In support of his contention the learned advocate referred the case of Nilufar Majid Vs Mokbul Ahmed 1984 BLD 79, Kaymat Ali Sakidar and others Vs Jainuddin Talukdar 14 DLR 657, Md. Abu Baker Siddique Vs S.M.A. Bakar and others 38 DLR AD 106, Major (Retd) Rafiq Hasan Farook Vs Zeenat Rahana and 3 others 4 MLR AD 273.

10. In deciding the custody of minor child, the best interest and well being of the child is paramount consideration as mandated in Section 17 of Guardian and wards Act, 1890. It is stipulated therein that in considering the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. It is further stipulated that if the minor is old enough to form an intelligence preference, the Court may consider that preference.

11. The trial Court while decreeing the suit by granting custody of the minor to the plaintiff-opposite party, considered the welfare and interest of the minor and upon analyses all pros and cons granted custody to the father of the minor boy. The trial Court considered that plaintiff himself is a physician and plaintiff's parents are retired from their respective jobs and as such it is possible for them to take care and look after the minor boy. The trial court also found that defendant No.2 is a student and defendant No.3 and 4 are doing their jobs and naturally they will be engaged in performing their duties and consequently minor boy's best interest and well being will be protected with plaintiff and his parents.

12. The trial Court specifically held that the plaintiff himself deposed as PW.1 and he by producing documents substantiated his claim of custody of minor boy while the defendant's side did not examine any witnesses in support of the statement made in the written statement. So in absence of examination of any witnesses on defendant's side their statements made in the written statement remained unsubstantiated.

13. In the case of Md. Abu Baker Siddique Vs S.M.A. Bakar and others 38 DLR AD 106 it is held that:

“These decisions, while recognizing the principle of Islamic Law as to who is entitled to the custody of a minor son with reference to his or her age and sex, simultaneously took into consideration the welfare of the minor child in determining the question. Courts in all these cases, seem reluctant to give automatic effect to the rules of Hizanat enunciated by Islamic jurists. If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, courts did not hesitate to do so. It may be argued, as the appellant's Counsel did, that the welfare of the child would be best served if his custody is given to a person who is entitled to such custody. Nevertheless, Courts power to determine the entitlement of a party to the Hizanat is not limited to mere observance of age rule so as to exclude the consideration of the interest of the child which would, however, depend on the facts and circumstances of a given case.”

14. Apart from this section 357 of Mulla's Principles of Mahomedan Law stipulates that, father and paternal male relation is entitled to custody of a boy of seven years of age which is as follows:

***“The father is entitled to the custody of a boy over seven years of age and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in 355 above, and subject to the provision to that section
If there be none of these, it is for the Court to appoint a guardian of the person of the minor.”***

15. In the case in hand the minor boy now above seven years old and it is already found that his well being and betterment will be protected at the hand of his father and grandparents and as such the findings and reasonings in deciding the custody of minor boy is sustainable for welfare of the minor boy.

16. So far the criminal case is concerned, it appears that at the time of hearing of Family suit as well as appeal the criminal case was still pending for hearing and as such both the Courts below held that as the case is pending it is better to dispose of the Family Court suits on its own merits. But during pendency of this rule the criminal case being Sessions case No.936 of 2012 was disposed of vide judgment and order dated 03.03.2019 whereby the plaintiff opposite party and others got acquittal from the charge levelled against them which is evident from the certified copy of the judgment and order having been filed by the opposite party by way of counter affidavit.

17. It further appears that the minor boy was examined by the appellate Court wherein he disclosed that he is willing to live with his maternal grandparents and does not intend to go and live with his father. It is noticed that while the minor boy was examined, he was 6 ½ years old and after living with maternal grandparents for quite number of years, he was brought to the Court and naturally the statement made by him may not reflect true state of

affairs as there is likelihood of influencing his opinion. In this context the findings of the appellate Court may not be out of context wherein the appellate court held that on perusal of the lower Courts records it is found that the minor boy was present during hearing of the Family Court Suit on some occasions but no unusual attitude of minor boy towards father was noticed.

18. Regarding not fixing date for post trial hearing it appears that after remitting the record from the appellate Court, the trial Court fixed a date for examining witnesses of the parties on 10.10.2013 but on that particular date the defendant side remained absent and consequently the trial Court after closing evidence fixed the date for argument on 24.10.2013 and on that date the defendant-petitioner also remained absent and the trial Court after hearing argument of the plaintiff-opposite party fixed date for judgment on 28.10.2013 and on that date judgment was pronounced. So the trial court committed no illegality in posting the suit for argument after closing evidence. Apart from this even after preferring appeal this point has not been raised before the appellate Court.

19. It appears that the trial Court granted custody of the minor boy to his father although the suit was filed for appointment of guardian of minor boy but since the father is natural guardian of child he need not make prayer for appointing him as guardian under section 7 of the Guardian and Wards Act, rather he can claim for custody of minor child which the Court rightly granted under the facts and circumstances of the case. In the plaint averments have been centered around seeking custody of the minor boy and as such the courts below rightly granted custody of the minor boy to the plaintiff under section 25 of the Guardian and Wards Act, 1890. In the case of Mrs. Nilufar Majid Vs Mokbul Ahmed 1984 BLD AD 79 it is held that;

“Earlier it has been noted that apart from filing a written objection in the case the respondent also filed on 12.05.83 an application u/s 25 of the said act praying that the appellant be directed to return the minor girl Tahsina Yasmin to the custody of the respondent who was all along the custodian of the said minor. The learned District Judge by order No.9 dated 12.05.83 ordered that he said application be kept with the record for the present. While disposing of the case the learned District Judge treated the written objection filed by the respondent to be an application u/s 25 of the said Act. this was not necessary. The respondent had in fact filed a formal application u/s 25 of the said Act for disposal by the Court. The learned District Judge was probably unmindful of this application when he disposed of the case. He had full legal authority to pass an order concerning the custody of the child, as the respondent had already filed a formal application to the effect. The respondent need not have filed any application u/s 7 of the said Act because the father is the natural guardian of the minor child.”

20. In the case of Kayemat Ali Sakidar And others Vs Jainuddin Talukdar 14 DLR 657 it is held that:

“Mr. M.H. Khondkar, Advocate, appearing on behalf of the respondents, has not directly opposed this contention urged by Mr. Rahman and merely expressed his doubt as to whether such a relief could be granted without amending the plaint suitably. In this connection, he has posted out that the relief that is now being sought is not quite consistent with the case made in the plaint and as such, it may not be according to him permissible to grant the same with the pleading remaining as it is. I am, however, not impressed with this argument inasmuch as in this particular instance the relief in question does not appear to be wholly inconsistent with the pleading and even if that were so, that cannot, I am afraid, stand in the way of a decree being rendered as contended on behalf of the appellants. There can be no dispute that it was perfectly open to the plaintiffs to make a case to the effect that in case they were found not to be holding direct under the landlord and the relief asked for by them on that basis were found untenable, they might be given a declaration of their under-raiyati right in the disputed lands under the contesting defendants to the extent such under-raiyati tenancy was determined. So, the only drawback in this case has been and omission on the part of the plaintiffs to make such an alternative case and seek such an alternative relief; but this omission can hardly be a sufficient justification for driving the parties to a separate suit for determination of the question that has actually been adjudicated upon and conclusively determined in this suit. In other words, they said omission cannot, in my opinion, operate as a bar to the grant of the relief prayed for on behalf of the appellants before me. ”

21. The revisional Court is to see whether the trial court as well as the appellate Court committed error or whether findings of the Courts below are the outcome of misreading, non reading and non consideration of material facts. On perusal of the judgments of the courts below there appears no misreading, non-reading and non consideration of the evidence therein.

22. In the above facts and circumstances I find no merit in the rule and accordingly the rule is discharged.

23. No order as to cost.

24. The order of stay granted at the time of issuance of the rule is hereby re-called and vacated.

25. The petitioners are directed to hand over the minor boy namely Tahmid Faysal Meher to the opposite party within 90 days from the date of judgment.

26. Office is directed to send copy of the judgment to the concern Court as expeditiously as possible.