Before Rakesh Kumar Jain & Harnaresh Singh Gill, JJ.

RAJINDER KUMAR MEHTA AND OTHERS—*Appellants*

versus

RINKESH MALHOTRA—*Respondent*

FAO No.2256 of 2019

March 26, 2019

Guardian and Wards Act, 1890—S.8, 12 and 25—Custody of children to father—Held, merely because FIR under S.306 IPC was registered against the appellant for the alleged abetment of suicide of his wife, cannot be a ground to deprive him the custody of the children, especially when he stood acquitted in said proceedings.

Held that, merely because FIR under Section 306 IPC was registered against the appellant for the alleged abetment of suicide of his wife, could not be a ground to deprive him the custody of the children, especially when he stood acquitted in the said proceedings.

(Para 6)

Abhimanyu Kalsy, Advocate
for the appellants.

HARNARESH SINGH GILL, J.

(1) This appeal is directed against the order dated 03.12.2018 passed by the learned Guardian Judge, Ludhiana, whereby petition under Sections 8, 12 and 25 of the Guardian and Wards Act, 1890 (for short `the Act'), filed by respondent-Rinkesh Malhotra, being the father of the minor children, has been allowed and the custody of the children is handed over to him.

(2) Shorn of all unnecessary details, admitted facts on record are that respondent-Rinkesh Malhotra was married to late Chetna Mehta, daughter of appellant Nos. 1 and 2 and sister of appellant No.3, on 12.9.2005. Two children were born out of the said wedlock. Chetna Mehta committed suicide on 24.4.2014 regarding which FIR No.26 dated 25.4.2014 under Section 306 IPC was registered at Police Station Division No.3, Ludhiana, against the respondent. The respondent was arrested and after having faced the trial, he was acquitted of the charges levelled against him. Pursuant to his acquittal, he sought custody of the children, namely, daughter-Angel Malhotra aged 9 years and son-

Ansuman Malhotra aged 6 years, who were living with the maternal grandparents, after their mother had committed suicide and the respondent was involved in the FIR registered for the said offence.

(3) The petition filed by the respondent was resisted by the appellants by filing a written statement averring therein that Chetna Malhotra, mother of the minors, had committed suicide on account of the abetment of the respondent; that the respondent was not paying maintenance to the children; that the respondent had abandoned the children and that the appellants were capable of bringing up the children and giving them proper education.

(4) On the pleadings, the learned trial Court framed the following issues:-

1. Whether the petitioner is entitled for the custody of the minor daughter and son as prayed for? OPP

2. Whether this Court has no jurisdiction to decide the present petition? OPR

3. Relief.

(5) Parties led their respective evidence.

(6) Under issue No.1, the onus to prove whereof was on the respondent, the learned trial Court, after having appreciated the evidence on record, returned a finding that it could not be shown as to in what manner, the respondent was not competent to have the custody of the children. Besides, the respondent had also examined his mother as RW-2 Poonam Malhotra, to prove that apart from him, his mother is also there to take care of the children. The learned trial Court, after having examined the documents Ex.R1 to R.6, came to the conclusion that having regard to the poor attendance of the children in the School, it appeared that the children were not being provided best of the education by the appellants. After having personal interaction with the children, the learned trial Court came to the conclusion that the desire of the children to remain with their maternal grandparents is because of their tender age leading to indecisiveness on their part. It was found that merely because FIR under Section 306 IPC was registered against the appellant for the alleged abetment of suicide of his wife, could not be a ground to deprive him the custody of the children, especially when he stood acquitted in the said proceedings. It was further found that though the appellants had resources to maintain the children, yet money could be taken to be the only consideration.

(7) Considering the fact that both the children are minor and not intelligent enough to understand their well being, the learned trial Court, found the respondent-father, fit to have their custody, as compared to their old aged maternal grandparents. Thus, issue No.1 was decided in favour of the respondent and against the appellants.

(8) As the parties as also the minor children, were living at Ludhiana, issue No.2 regarding jurisdiction, was decided in favour of the respondent-husband and against the appellants

(9) Learned counsel appearing for the appellants has argued that respondent was booked for the abetment of suicide of his wife (mother of the minor children). Though, he has since been acquitted, yet it remains imprinted in the minds of the children that it was their father, who drove their mother to commit suicide. It is further argued that with this impression in the minds of the children, it would not be possible for them to reside with their father and expect and express any love and affection. Thus, even if the custody of the children is handed over to the respondent, still the aforesaid incident would continue to haunt them for all times to come. This aspect, according to the learned counsel, has been totally brushed aside by the learned trial Court, while passing the impugned order.

(10) We have heard learned counsel for the appellants, but we do not find any merit in the present appeal.

(11) For determining the question of competence of the husband's application under Section 25 of the Act, it is necessary to examine the scheme of the Act as also the relevant provisions of the Indian Divorce Act. The Act was enacted in order to consolidate and amend the law relating to Guardians and Wards. But as provided by Section 3, the Act is not to be constructed, inter-alia, to take away power possessed by any High Court. The provisions of Sections 17 and 19 of the Act are to be considered by the Court in appointing or declaring guardian. The said provisions read as under:-

> "17. Matter to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

> In considering what will be for the welfare of the minor, the Courts 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.
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> If the minor is old enough to form an intelligent preference, the Court may consider that preference.
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> The Court shall not appoint or declare any person to be a guardian against his will.
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> xx xx xx
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> 19 .Guardian not to be appointed by the Court in certain cases.- Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor, or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

(12) The Hon'ble Supreme Court of India in ***Rosy Jacob*** versus ***Jacob A. Chakramakkal***[1], held as under:-

> "14. In our opinion, Section 25 of the Guardians And Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance end education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of the necessary assistance from the Court in effectively

[1] (1973)1 SCC 840

discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit: alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his lifetime, if the Courts does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is Section 25. Without, therefore, laying down exhaustively the circumstances in which Section 25 can be invoked, in our opinion, on the facts and circumstances of this case the husband's application under Section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is therefore, somewhat difficult to impute to the Legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents", It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as

> binding precedents, the facts of two cases in this respect being seldom-if ever identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under Section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children."

(13) Admittedly, in the present case, the respondent-father has a preferential right regarding the custody of the minor children, being the natural guardian. Undisputed also is the position as regards the respondent's acquittal of the offence under Section 306 IPC. We cannot lose sight of the fact that in such cases, where pursuant to the suicide of the mother, without knowing the circumstances leading to the death and further without waiting for the outcome of the criminal trial, if the minors are put in the custody of the maternal grandparents, they would always end up in believing anything against the father. In this case, as of now, the children are of the age of 11 years and 8 years respectively. Thus, the trial Court's finding that the respondent-father should be allowed to exercise his right of custody of the children, cannot be found fault with. With the growing age and truth emerging regarding the actual reasons for their mother's death, the minors would be in a position to fully understand their welfare and further adapt to and accept the love, affection and care, provided by their father.

(14) In view of the above, we do not find any illegality or infirmity in the order passed by the learned trial Court, which may warrant interference by this Court in the present appeal.

(15) Hence, the present appeal is dismissed.

Ritambhra Rishi