

IN THE COURT OF THE JUDGE, FAMILY COURT,
BHUBANESWAR.

Present : Shri Pravakar Mishra, OSJS(SB),
Judge, Family Court, Bhubaneswar.

Civil Proceeding No. 441 of 2015

Manoranjan Sundar Ray, aged about 46 years,
S/o-Bidupada Mahuanta,
Permanent resident of Vill-Sebasahi,
P.O./P.S.-Rajkanika, Dist-Kendrapara,
At present at Plot No. N-4/322, IRC Village, Bhubaneswar,
P.S.-Nayapalli, Dist-Khurda.

... Petitioner

... Versus...

1. Rashmirekha Behera, aged about 42 years,
W/o-Manoranjan Sundar Ray,
Permanent resident of Vill.-Gangadharpur (Kalikapur)
P.O./P.S.-Rajkanika, Dist-Kendrapara,
At present working as Multipurpose Health Worker (F),
Bahadajhola P.H.C., At/P.O.-Bahadajhola,
P.S.-Odagaon, Dist-Nayagarh
2. Bighnesh Sundar Ray, aged about 7 years,
S/o-Manoranjan Sundar Ray,
Permanent resident of Vill.-Sebasahi,
P.O./P.S.-Rajkanika, Dist-Kendrapara,
Represented through his mother guardian,
At present residing with his mother,
At/P.O.-Bahadajhola,
P.S.-Odagaon, Dist-Nayagarh

... Respondents

Date of argument : 02.11.2015

Date of order : 17.11.2015

J U D G M E N T

The petitioner has filed a petition U/s. 7 and 10 of the Guardians and Wards Act, 1890 (in short, the Act 1890) to declare him as the guardian of minor son namely Bighnesh Sundar Ray.

2. The facts of the case of the petitioner are that he married to the respondent as per Hindu Custom and rites on 11.07.2007 and out of their wedlock one male child namely Bighnesh Sundar Ray was born in SCB Medical College and Hospital, Cuttack on 10.05.2008. According to the petitioner, the respondent used to visit her parental home very often causing disturbance in his own family. According to the petitioner he is practicing Advocacy in Bhubaneswar. At the time of initiation of marriage proposal the respondent was working as Multipurpose Health Worker (F) at Bahadajhola PHC in the district of Nayagarh. After birth of the male child she stayed in his house and after completion of her Maternity Leave she left for her working place at Bahadajhola along with his mother to look after her as well as the newly born child. On 09.06.2009 at about 7 P.M. the respondent assaulted the small child for which he cried loudly. When he objected the aforesaid work of the respondent and tried to dissuade her from assaulting the small child, the respondent made argument with him and when he countered her, she became violent and misbehaved him, tore his pants and shirts, cut off his mobile charger, threw away his articles and broke the other household articles and thereafter locked the door from inside for which he stayed on the veranda of the rented house throughout the night. Seeing rude behavior of the respondent he called his parents as well as the parents of the respondent. On 10.06.2009 at about 4 P.M. his parents and the mother of the respondent reached there and knowing their arrival the respondent locked the room from outside and went away from house to avoid them. Thereafter he searched but could trace her. On 14.06.2009 at about 12.30 P.M. the respondent returned with her brother and called her mother to her room and locked it from inside without caring him and his parents. Thereafter attempts have been made from his side along with some gentlemen of the locality to settle the dispute between them but the respondent and her family members avoided it on some plea or other and assured them that everything will be right after some days. On 05.06.2011 he along with his mother went to Bahadajhola and reached there at about 3 P.M. Seeing them the respondent locked the door from inside.

In spite of his several calls she did not open the door for which his mother stayed in the neighbours house in the night and he slept on the veranda of her rented house and on the next day they returned. Knowing her arrival to her house during Holi Vacation of 2014, his mother and sister-in-law (younger brother's wife) went to the parental home of the respondent to bring her back but she refused to come. Lastly on 26.07.2014 he himself went to the rented house of the respondent to bring her back and join his company for betterment of their child but she avoided on various pleas. It is further averred by him that accidentally he saw his son (respondent No.2) with his uncle at Jagya and took him with him to his house and thereafter got his admissions in Kalyan Bal Bihar, English Medium School in Standard No.1 on 28.10.2014 having roll No. 10. On 17.11.2014 when he along with his minor son proceeded to Bhubaneswar, the brothers of the respondent No.1 and some others overpowered him and snatched away the minor son from him. According to him now his minor son is under the custody of the respondent No.1. and even he is aged about 7 years and two months, he has not uttered his name and the respondent No.1 has also not admitted him in any educational institution till now. Being the father, he prays to appoint him as guardian of the child for his well being.

3. The Opp. Party did not enter contest the petition and therefore, is set ex-parte.

4. The following points are to be determined for decision of this case:-

- (i) Whether petitioner is the legally married wife of the respondent No.1 and Bighnesh Sundar Ray is the legitimate child of the respondent?
- (ii) Whether the respondent No.1 has forcibly taken away the minor son Bighnesh Sundar Ray from the custody of the petitioner and he is capable enough to look after the proper care of the minor son?
- (iii) Whether the petitioner is entitled to take back the minor son to her custody and be declared as guardian of the minor son?

6. The petitioner in order to buttress his case he, himself, has been examined as P.W.1 and relied on three documents. They are:- Ext. 1 is the

certified copy of the judgment passed in C.P. No. 47 of 2014 dated 04.04.2015, Ext. 2 is the admission cash receipt bearing No. 3474 dated 28.10.2014 issued by Kalyan Bal Bihari English Medium School in favour of Bighnesh Sundar Ray for admission in Standard-I and Ext. 3 is the Identity Card issued by the principal Kalyan Bal Bihar English Medium School in favour of the Bighnesh Sundar Ray.

7. The petitioner in his affidavit evidence has stated that on 11.07.2007 he married to the respondent No.1 and out of their wedlock one son namely Bighnesh Sundar Ray (respondent No.2) was born in SCB Medical College and Hospital, Cuttack on 10.05.2008. His aforesaid statements have not been challenged. Thus, it can safely be concluded that the respondent No.1 is the legally wedded wife of the petitioner and out of their wedlock one son namely Bighnesh Sundar Ray (respondent No.2) was born in SCB Medical College and Hospital, Cuttack on 10.05.2008.

8. The petitioner has further stated that on 17.11.2014 when he along with his minor son proceeded to Bhubaneswar, the brothers of the respondent No.1 and some others overpowered him and snatched away the minor son from him and since then she has been depriving of any love and affection of the child. P.W.1 has further stated that in spite of her efforts, the respondents and his family members did not give the minor son to his custody. He had approached before different forums with request to take back his son, but in vain. The above evidence of P.W.1 remains unchallenged and there is no reason to disbelieve the evidence of P.W.1. From the above evidence of the petitioner, it is established that the respondent No.1 with the help of her brothers forcibly took away the respondent No.2 from his custody from Bhubaneswar on 17.11.2014. Therefore, this court assumed the jurisdiction to entertain the petition.

9. No doubt, though the father is the legal guardian, law requires that the custody of a minor child above six years should normally be with the father but, when circumstances are exceptional and when there are strong reasons to make that the father unfit to have the custody, it is the paramount duty of

the court to entrust the child to the mother. In the instant case, the exceptional circumstance which goes against the petitioner is that he did not have any independent income to support himself and child. The petitioner has not disclosed his income. On the other hand, it has been admitted by the petitioner that the respondent No.1 is gainfully employed as Multipurpose Health Worker (F) at Bahadajhola PHC in the district of Nayagarh. It is equally admitted that the minor is of tender age of seven years old. The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or as so fast as in England, but at the same time, the right of the mother to the custody of her young children is undoubtedly recognized in this country. However, the paramount consideration is the interest of the child rather than the rights of the parents. Human nature is much the same all the world over, if the mother is a suitable person to take charge of the child, it is quite impossible to find any adequate substitute for her for the custody of a child of tender age of 7 years. In *Saraswatibai Shripad Vrs. Shripad VasANJI* reported in AIR 1941 Bom 103 where it has been held though the father is the natural guardian of Hindu child, if the mother is suitable and is living, it is impossible to find an adequate substitute for her for the custody of a child of tender years, and that it is the interests of the child, whose interest should be the paramount consideration with Courts, that the mother should have the custody (see also *Kaliappa Goundan Vrs. Valliammal* reported in AIR 1979 Mad 608 at p.609).

10. The aspect which is more significant is whether the child will get an atmosphere of care love and affection to grow in a healthy manner. The cultural and social back grounds of the family also play an important role. The cultural and social back ground of the family of the petitioner is not better. Therefore, the right of the petitioner to the custody of the child if recedes then the child will be in precarious psychological trauma. Therefore, in my considered opinion, I feel that the interest of the minor will be served best if he

remains with the respondent No.1 but with sufficient access to the petitioner at frequent intervals but so as not to disturb and disrupt his normal studies and other activities. Hence, ordered;

O R D E R

The petition is dismissed on ex parte in favour of the respondent No.1 but with certain direction which are:- (i) The petitioner has every right to see the minor son (respondent No.2) with previous notice to the respondent No.1 (ii) The petitioner is also entitled to keep the child in his custody for five days each during winter vacation, Dusserah, Christmas vacation and for 20 days continuously in summer vacation.

JUDGE, FAMILY COURT,
BHUBANESWAR.

Dictated, corrected by me and is pronounced on this the 17th day of November, 2015.

JUDGE, FAMILY COURT,
BHUBANESWAR.

Witnesses examined for the petitioner:

P.W.1 Manoranjan Sundar Ray

Witnesses examined for the respondents:

None

List of documents by petitioner:

Ext. 1 Certified copy of the judgment passed in C.P. No. 447 of 2014 dated 04.04.2015

Ext. 2 Admission cash receipt bearing No. 3474 dated 28.10.2014 issued by Kalyan Bal Bihar English Medium School in favour of Bignesh Sundar Ray

Ext. 3 Identity Card issued by the principal Kalyan Bal Bihar English Medium School in favour of Bignesh Sundar Ray

List of documents by respondent:

Nil

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