

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1932 of 2019

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CHANDRIKABEN HARGOVINDDAS PARMAR W/O JAYPRAKASH
NARESHKUMAR JOSHI
Versus
JAIPRAKASH NARESHBHAI JOSHI

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Appearance:

MR SAMIR AFZAL KHAN(3733) for the Appellant(s) No. 1
MR BHUNESH C RUPERA(3896) for the Defendant(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE UMESH A. TRIVEDI

Date : 04/08/2022

ORAL ORDER

1. Heard Mr.Samir Afzal Khan, learned advocate for the appellant-wife as also Mr.Bhunesh C. Rupera, learned advocate for the respondent-husband.
2. This appeal is filed under Section 47 of the Guardian and Wards Act, 1890 challenging order passed by the learned Judge, Family Court No.3, Ahmedabad dated 21.2.2019 rendered in Civil Misc. Application No.52 of 2017 whereby, the application preferred by the wife for custody of minor son' Dhrij' wrongly stated as 'Dwij' in the impugned judgment and order as submitted by learned advocate for the appellant, who was then 2 years, came to be refused.
3. Mr.Samir Afzal Khan, learned advocate for the appellant submitted that considering the age of the child at the time of filing an application being 2 years in view of Section 6 of the Hindu Marriage Act, 1956 ordinarily custody of the child should

be handed over to the wife as per the mandate of the statute. He has further submitted that despite her efforts to get the custody or visit the child, she has been deprived and no custody was handed over to her. He has further submitted that the petitioner is also working woman and she can take good care of child as she is staying with her parents as also brothers and sisters.

4. Assailing the impugned judgment and order, it is submitted that now she has settled at Viramgam where she is serving as a Teacher. Therefore, along with the service, she can take good care of her child and therefore, custody is to be handed over to the petitioner-mother of a child.

5. Reading examination in-chief on oath filed by the petitioner before the Family Court and the cross examination, it is submitted that no one has attempted from the side of the respondent-husband to pursue her to join matrimonial home. He has further asserted that despite ill health of her father neither husband nor his family member have visited him. It is further submitted that she was also looking after her son very well though, at present he is suffering from which ailment, she does not know as the custody is not with her. Therefore, he has submitted that in view of the statutory provisions, the custody of the child 'Dhrij' be handed over to her by allowing this appeal filed by the appellant.

6. It is further submitted that in her application before the Family Court she had asserted that custody of the child 'Dhrij' was snatched away from her. However, admission in the cross examination is seen, she has clearly admitted that on 16.3.2017, leaving her son at matrimonial home in the evening that she

went to visit her father as he was ill. However, it is further submitted that since then, she has not joined her matrimonial home therefore, claim made in the examination in chief that she being deserted and deprived of a custody of a child is incorrect.

7. As against that, Mr.Bhunesh Rupera, learned advocate for the respondent-husband drawing attention to the affidavit in-replay submitted that as such, she deserted not only the husband but the child aged 2 years then, has been brought up by the respondent-husband with the help of his family members. On 16.3.2017 and thereafter, she has never returned to join the matrimonial life with the respondent-husband. He has further submitted that despite so many efforts along with the family members and other relatives to pursue her to join matrimonial home, she refused to do the same and on the contrary, she picked up quarrel and filed the complaint against not only the husband but other family members including relatives, in all 5, in number under Sections 498A, 323 and 114 of the Indian Penal Code (hereinafter referred to as 'the Code'), as also under Sections 3 and 7 of the Dowry Prohibition Act. However, as submitted by Mr.Rupera, learned advocate for the respondent-husband except husband, all have been honorably acquitted and against the conviction of the husband under Section 498A of 'the Code', appeal is already preferred, which is pending before the Court.

8. Not only that, she has admitted in her cross-examination that she has filed a proceedings under the Protection of Women from Domestic Violence Act, 2005. He has further submitted that since wife has deserted the child when he was at the age of 2 years, she cannot pray for custody of the same without any valid

reasons as leaving the custody was the voluntary act by her. Therefore, he has submitted that when she is already serving as a Teacher and starting his journey at 8.00 O'Clock in the morning while serving at Viramgam, and on the contrary, better care of the child would be taken by respondent-husband and his family members. Therefore, he has submitted that the proper reasons are assigned by the learned Judge refusing the custody of the minor child to the appellant-wife and therefore, this appeal be dismissed.

9. Having heard learned advocates for the appearing parties it emerges that, the appellant has deserted her matrimonial home on 16.3.2017 leaving her child at matrimonial home and went to her parental home from where she has never returned. It was on a specious plea that her father was not well and therefore, she had gone there to visit him. But fact remains that, she has never returned back to join the matrimonial home. Since the age of 2 years child is raised by the husband uptill now, he has more attachment with the father and mother appears to have not cared for either having the custody or any attachment for the custody.

10. At the same time, as recorded by the learned Judge from Ahmedabad she is commuting to Viramgam for the purpose of service and leaving home at 8.00 a.m. morning and returned back at 8.00 p.m. in the evening. Therefore, learned Judge has concluded that work schedule of the appellant is such that she is unable to take care of the child in comparison to the work scheduled of the respondent-husband who is serving at Ahmedabad and he is available at any moment, in case of need. At the same time, his parents are also taking care of the child.

Moreover, one more reason weighed with the learned Judge that the appellant-wife has a step mother and in all probability, she may not very well take care of the child and therefore, considering the paramount interest of the child, learned Judge has refused the custody to the appellant-mother.

11. Over and above, there is no substance in argument that the custody of the child was snatched away by the respondent-father and on the contrary, as admitted by her in the cross-examination that she left a child at her matrimonial home to visit her ailing father and since then, not returned back. Not only that, while refusing the custody of the child in this case as coming out from the affidavit in-reply filed by the respondent-husband and not disputed by the learned advocate for the appellant that wife has been permitted visitation right to the child. Hence, I see no reason to entertain this appeal and therefore, it is hereby dismissed. Notice discharged.

(UMESH A. TRIVEDI, J)

ASHISH M. GADHIYA