C.A. 127/52

Motion 80/52

RENA ROZNEK

v.

MELECH DAWMAN

In the Supreme Court sitting as a Court of Civil Appeal.
[July 23, 1952]
Before: Olshan J., Assaf J., and Witkon J.

Custody of minor - Agreement of parents after divorce - Jewish Law - Interests of minor paramount - Application for custody by mother - No defence filed by father - RuIe 134 of Civil Procedure Rules - Discretion of court - Dismissal of application on its merits.

The parents of a girl of five years of age agreed in the course of divorce proceedings that the child should be placed in an orphanage, and that both parents should be entitled to visit her there. The mother remarried, and subsequently applied to the District Court for custody of the child on the ground that it would be in the child's interests that she should live with her mother. The father entered an appearance, but failed to file a defence, and the District Court, after considering the merits of the case, dismissed the application. The mother appealed and contended that, according to Jewish law, she was entitled to the custody of the child, and that as the father had failed to file a defence, the court was bound, under Rule 134 of the Civil Procedure Rules, 1938, to enter judgment in her favour.

Held, dismissing the appeal:

(1) Rule 134 gives a discretion to the court either to dismiss the case, or to deal with it, and in the circumstances of the present case the District Court had acted correctly in dealing with the matter on its merits.

(2) The first duty of the court in matters of custody is to act in the best interests of the child, and although the general rule in Jewish law is that a small daughter should remain with her mother, this rule is not absolute

(3) In the circumstances of the present case the District Court had acted correctly in departing from the rule, by not granting custody to the mother.

Israel case referred to :

(1) *Dr. Meir Manfred Rosenberg v. Mrs. Shoshana Suzi Rosenberg-Ellbogen,* (1950/51), 3 *P.M.* 36.

Levitzky for the appellant.
Scharf, for the respondent.

ASSAF J. giving the judgment of the court :

This is an appeal from a judgment dated June 23, 1952, of the District Court of Tel Aviv, dismissing a claim of the appellant for the delivery of her daughter, Shulamit (Sabena) Dawman, to her custody.

2. These are the facts. The appellant and the respondent are the parents of the child Shulamit (Sabena). They lived happily together for some years, and then serious quarrels broke out between them. Eventually, about a year ago, the appellant and the respondent were divorced, and the child, who was five years of age, was placed in a children's institution in Ramatayim, under an agreement entered into between the parents before the granting of the divorce. One of the conditions of the agreement was that neither of the parents would be entitled to remove the child from the institution without the consent of the other, and that the expenses of keeping her there would be borne by the father. The child has remained in the institution from the date of the divorce, and the father has paid the expenses of her maintenance there as agreed. Each of the parents visits the child once a week on different days, so that they should not meet.

The mother, who has since remarried, now asks that the child be handed over to her - contrary to the agreement entered into between her and the father - since in her opinion the

interests of the child demand that she be placed in the care of her mother. She admits that her daughter has been well cared for in the institution, but she contends that the care given by the institution is not the same as that of a mother. A doctor, who visited the institution on one occasion only, and stayed there with the child for about an hour with the mother present, noticed that the child was worse off from the psychological point of view and was not as bright as she had formerly known her to be. The child was brought before the judge, who formed a different impression. He was not satisfied that there had been a change for the worse, and his opinion was strengthened by the evidence of the owner of the institution.

3. The father, the respondent, entered an appearance in the court below. He did not, however, file a statement of defence, nor did he appear to defend the case at the time of the hearing. We do not now find as a fact what was the reason why he failed to file a statement of defence, although it would appear that the respondent's ill health at that time was the cause. Nevertheless the court dismissed the mother's claim. It is from this decision that the present appeal has been brought.

4. In the meantime an application, supported by an affidavit, was submitted to us on behalf of the respondent, requesting that he be permitted to place certain certificates before the court at the hearing of the appeal. By consent of counsel for the parties, it was decided by the court not to deal with this application separately, but to permit the parties to submit argument at the same time on the appeal itself, and on the question whether the certificates should be submitted.

5. Counsel for the appellant made two principal submissions in regard to the merits of the appeal, namely:

(a) The court below erred in not proceeding in accordance with rule 134 of the Civil Procedure Rules, 1938. The respondent entered an appearance and a statement of defence should have been filed within 15 days. He knew that a claim had been filed against him, and he also knew the nature of that claim. Since he did not file a statement of defence, it must be presumed that he waived his right to do so, and the judge should have entered judgment in favour of the mother, the plaintiff. As far as the application to this court is concerned, it can be of no assistance to the respondent even if it be

allowed. The respondent was given 15 days from March 27, 1952 to file a statement of defence. He fell ill on April 4, 1952. If that is so, he had a period of seven days before he fell ill in order to file a statement of defence, and he should not have left the matter until the last minute.

(b) The judgment is contrary to law. The judge took no account whatever of Jewish law, according to which "a daughter shall always be with her mother, even after the age of six... and even if the mother has remarried - her daughter shall be with her" (Shulhan Aruh, Even Ha-Ezer, 82, 7). It is true that, in terms of the agreement, the child was to have been kept in an institution, and the father - with the consent of the Rabbinical Court of Tel Aviv - was the one to decide to which institution she should go.
According to both Jewish and English law, however, no great importance is to be attached to an agreement relating to the custody of a child, and the court must have regard to the interests of the child alone. In the present case the interests of the child demand, in the submission of the appellant, that she be delivered into her mother's care, and counsel for the appellant relies upon the evidence of the doctor who saw the child.

6. We shall deal with these submissions seriatim.

We do not accept counsel's first argument in which he relied upon rule 134 of the Civil Procedure Rules, 1988, for he based his submission upon the opening words of that rule without taking into account the last words. That rule provides that if the party served with a summons does not file a defence on or before the day fixed therefore, "the plaintiff may set down the action for judgment and such judgment shall be given on the statement of claim as the court shall think fit." Counsel for the appellant emphasised the opening words of the rule : "...and such judgment shall be given on the statement of claim", but the concluding words of the rule provide "as the court shall think fit". The court, therefore, is not bound to give judgment on the statement of claim, but may deliver such judgment as it thinks fit, being guided by what is just. If the court is of opinion that the statement of claim is not well founded, it will refuse to give judgment upon it and will not hold the defendant liable, even in the absence of a statement of defence filed within the period provided by law, and will give the judgment in his favour not only in his absence, but even without his knowledge.

7. In regard to the second and far more important submission of counsel for the appellant, we must hold that the rule under which a son is not separated from his mother until he is over six years of age, and a daughter remains with her mother always, is not absolute. This rule may be varied according to the circumstances. It was already laid down by one of the great Rabbis about 300 years ago that in matters such as these :-

> "There is no contradiction between the scholars, for each case is dealt with on its own merits ... and the decisions will vary according to the facts. He who decides in a case of this kind cannot be accused of departing from what has been laid down by another scholar, where it has not been first ascertained that the circumstances of the two cases were the same, for even a slight difference in the facts may change the legal position of the case, and in this branch of the law, each case depends upon its own facts." (Responsa Darchei Noam of Rabbi Mordechai Halevi, Even Ha-Ezer, 38.)

8. The governing consideration in every case of this kind is the welfare of the child. When the scholars of the Talmud laid down that a daughter shall remain with her mother permanently, and a son until he has reached the age of six years, they did so for the good of the child, for even a boy of six feels more comfortable in the company of his mother (Eruvin, 82b). This general rule, however, only applies "when both the father and the mother are alive, and both are equally good for the child -in that case the mother is to be preferred." (Darchei Noam, ibid.) If the court was of opinion that it was in the interests of the child to be with his father, or even with relatives of his father, he would be taken from the care of his mother and handed to the father or the father's relatives (Darchei Noam, 26). This is also the case with a son of over six years of age, and if the court is of opinion that it is in his interests to be in his mother's home, he is left in the care of his mother (see also Compilation of the Judgments of the Chief Rabbinate of Eretz Yisrael, Jerusalem, 1950, p. 12). Rabbi David Ben Zimra went even further, and ruled that a small sick child whose mother had died should be given to his grandmother, who was prepared to take him, although the father requested that the child remain with him and be supervised by neighbours. It is clear that, according to the rule, a son must remain with his mother and not with his grandmother but if, in the opinion of the court, it will be better for the child that it

should be with its grandmother, although the father "seeks the pleasure, and the joy of having his son with him", the child is not to be taken from his grandmother's home. (Responsa, Rabbi David Ben Zimra, 1, 128; Response Darchei Noam, 88.)

9. Rabbi Meir of Padua, after holding that where the sages laid down the rule that a daughter should remain with her mother, their purpose was to protect the welfare of the daughter, also concludes :-

> "If it appears to the court that it is in the interests of the orphan to take the opposite course, and that she should be with her brothers, the court may simply reverse the rule in her favour ...and if she be in her brothers' home, and wishes to remain with them, there will be no need to remove her from there and return her to her mother, for it is her welfare that is sought, and not something to her detriment" (Responsa Meir of Padua, 53).

10. This principle - that the court must act in the interests of the child alone - runs like a golden thread through all the authorities and the Responsa of all the periods of history (see the Responsa of Rabbi Shlomo Ben-Adereth which are ascribed to Maimonides, 38; Responsa of Rabenu Asher Ben-Yehi'el, 82, 2; Responsa Perah Matte Aharon, I, 110, and so forth), and the court will not give its assent to a contract entered into between the parents if such contract is not in the interests of the child. (See *Rosenberg v. Rosenberg-Ellbogen* (1).) Such a contract may indeed have some relevance. That will only be so, however, where the contract does not conflict with the interests of the child, that is to say, where the homes of both the father and the mother are equally good for the child. If the mother in such a case consents to waive her preferential right, then she is bound by her agreement, and her waiver is a valid waiver. But if such an agreement is against the interests of the child, then it is void.

The same rule applies where the agreement was not against the interests of the children at the time it was made, but it became so when the situation changed. In that case too the agreement is void. We find a case such as this in the Responsa of Hamabit**,** 2, 62:-

> "Reuven divorced his wife. He had two daughters, and they remained with their mother ...she remarried, and had quarrels with her husband, and for the sake of peace in the home she returned her daughters to their father after he too had remarried. Her husband then went to another place and did not wish to return ...The daughters were unhappy in their father's home because of his new wife and wished to return to their mother now that her husband was no longer with her ...Reuven said to his former wife, 'it was your wish to hand them to my care - I do not wish to return them.' "

It was held by Hamabit that "even if it was the mother's wish to hand the daughters over to their father, he is obliged to return them to her, for when it is said that a daughter must remain with her mother, it is not because the attachment and love of a mother for her daughter are greater than those of her father, but for the better upbringing of the daughter... and it is well known that it is better for a daughter to remain with her mother than with her father who has married a second time."

11. We shall now return to the case before us. The learned judge said in his judgment:-

> "I have heard the owner of the institution in which the child has been placed, and she has given me the impression that the child is in good hands. I have seen the child in my chambers, and although I cannot pretend to be an expert in understanding children, her appearance made a good impression upon me: she looks well, she is well-dressed and well-mannered ... As far as I could see she was quite untroubled.
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> Personally I feel that in the majority of cases, though by no means in all cases, the intimate treatment which a child receives in its parents' home is better than the best treatment which it receives at the hands of strangers...But the parents' home was broken up when the plaintiff and defendant separated, and that home no longer exists. The arrangement reached by the parents seems to me to be effective and fair, and I am not convinced that the welfare of the child calls for my intervention... The

> child has the benefit today - it is true in a partial and incomplete form - of the care of both father and mother - while the proposed arrangement is likely to afford her the full benefit of her mother's care, it will take from her completely that of her father. I do not think that, in the absence of some compelling reason, I am called upon to act against what one of the parents regards as his right, particularly as the arrangement in question was made by consent."

We see that the learned judge weighed all the circumstances thoroughly, and was not convinced that the welfare of the child demanded his intervention. After having considered the matter, we are of the same opinion as the learned judge, and we accordingly dismiss the appeal.

12. It follows from what I have said, therefore, that the judgment of the court below must be confirmed. Counsel for the appellant, however, has presented us with a new - and alternative - prayer and that is that should this court decide to dismiss the appeal, the arrangement made between the parties in regard to their visits to the child should be varied so as to permit the mother to visit her every day when the mother wishes and even take her on excursions. It is not the function of this court to consider and decide on this new prayer, which was not even mentioned in the grounds of appeal. This is a matter for the District Court. Since, however, we are dealing here with arrangements for the welfare of a small child, we wish to avoid the necessity of a new case which will involve the loss of a great deal of time. Despite the fact, therefore, that we agree with the judgment of the court below, we shall set that judgment aside and return the case to the District Court with the following instructions :

(a) that it deal with the application for altering the terms of the present arrangement and decide in the matter, after hearing both the parties, and after taking the advice of those experienced in matters of education, whether more frequent visits by the parents are desirable from an educational point of view;

(b) that it add to its previous judgment the conclusions at which it will arrive in regard to the new prayer of the mother .

13. In view of the conclusions which we have reached on the merits of the appeal, we see no reason for acceding to the application filed before us by the respondent. We are doubtful, moreover, whether we are entitled in any case to accede to that application.

Appeal dismissed, but case remitted to District Court to consider appellant's application for variation of existing arrangements between the parties.

Judgment given on July 23, 1952.