



IN THE HIGH COURT OF SIKKIM AT GANGTOK

Mat Appeal Nos.1 & 2 of 2005.

Chimi DolkarAppellant.

-versus-

Karma NamgyalRespondent.

For the appellant : Mr. B.K. Gupta, Advocate.

For the respondent : Mr. T.B. Thapa, Sr. Advocate assisted by
Mr. J.K. Prasad Jaiswal, Advocate.

*Present: The Hon'ble Shri Justice N. Surjamani Singh, Chief Justice (Acting).
The Hon'ble Shri Justice A.P. Subba, Judge.*

Date of decision: 7-7-2005.

COMMON JUDGMENT AND ORDER

N.S. Singh, CJ(Actg)

These two cases/appeals involved same and similar questions of facts and laws and as such we ^{are} hereby propose to dispose of these two appeals by a common judgment and order and accordingly, upon hearing Mr. B.K. Gupta, learned counsel for the appellant and Mr. T.B. Thapa, learned senior counsel assisted by Mr. J.K. Prasad Jaiswal, learned counsel for the respondent, these two appeals are finally disposed of on its merit in ^{the} following order.

The facts of the cases in a short compass are as follows:-

The appellant namely, Chimi Dolkar married with the respondent Mr. Karma Namgyal in the month of January, 1999 with





great hope and high vision and out of said wedlock, they got a son namely, Master Tenzing Yongden @ Yongda now aged about 5 years. After their marriage, the differences amongst the parties cropped up and as a result of which the appellant herein filed a suit in the Family Court concerned, Sikkim at Gangtok for grant of maintenance allowance of Rs.10,000/- (Rupees ten thousand) only, under Family Court Misc. Case No.8 of 2004 which was dismissed by the then District Judge, Family Court, Sikkim at Gangtok, Mr. Udai P. Sharma under his judgment and order dated 30-4-2005. The appellant also filed another petition for custody of her minor son, Master Tenzing Yongden from the respondent under Family Court Misc. Case No.9 of 2004 which was also dismissed by the learned Court below under the related judgment and order dated 30-4-2005. However, the appellant got the decree of dissolution of her marriage with the respondent under the related judgment dated 30-4-2005 passed by the Judge, Family Court, Sikkim at Gangtok in Family Court(Civil) Case No.35 of 2004 and the validity of the decree was not questioned by the respondent as the respondent agreed to it. Be that as it may, the appellant being aggrieved by the impugned judgment dated 30-4-2005 passed by the Family Court under Misc. Case No.8 of 2004 and the another judgment dated 30-4-2005 passed by the Judge of Family Court under Misc. Case No.9 of 2004, the present appellant preferred these two appeals.





This Court, in the first instance, make efforts for settlement amongst the parties amicably as required under Section 9 of the Family Court Act, 1984 read with Order XXXIIA of the C.P.C. by taking assistance of the learned counsel for the parties as well as the Registrar and the Joint Registrar-cum-P.P.S. of this Court for amicable settlement but, those efforts were in vain. The Registrar of this Court had submitted a report on 10-6-2005 about the related proceedings held in her chamber on 10-6-2005 in terms of the directions of this Court and in the said report, it is stated that the minor child namely Tenzing Yongden @ Yongda refused to meet his mother and even declined to talk to her or set beside her though, the appellant had made efforts for taking the child on her lap. It is also stated that the parties did not want to compromise. We have perused the related report of the Registrar which is relevant and important and the same is hereby formed as part of record and marked as 'X' for identification.

We have perused the related impugned judgments passed by the learned Court below. Without entering into merit of the case in depth, we hold that the learned Judge of the Family Court, Sikkim at Gangtok completely lost the sight of the mandatory provisions of Section 9 of the Family Court Act, 1984 read with Order XXXIIA of the C.P.C. while passing the impugned orders and on this ground alone, these two impugned judgments deserve to

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be quashed. In other words, learned Court did not follow the prescribed procedure of law while deciding the two cases. Be that as it may, now this Court is to decide these two appeals/cases on its own merit in accordance with law as the parties are not in a position to come to a compromise or amicable settlement despite the efforts have been made by this Court. Considering the existing facts and circumstances of the case, so far the custody of the minor child Master, Tenzing Yongden and also social status of both the parties as well as the grandfather and the grandmother of the minor child, we are of the view that Mr. Ngawang Rapgyal and Mrs. D. Doma are the righteous persons for custody of the minor child called Master Tenzing Yongden, as Mr. Ngawang Rapgyal and Mrs. D. Doma are respected citizens of this State. Apart from the fact that they are grandfather and the grandmother of the minor child, they have good sources of income to maintain the Master Tenzing Yongden for the welfare and career of the child in the days and years to come and, accordingly, we hereby give the custody of the child Master Tenzing Yongden to and in favour of his grandfather and the grandmother from today. They are present today in the Court and they had accepted to be the lawful guardian of the said minor child/grandson. This Court hope and trust that Mr. Ngawang Rapgyal and Mrs. D. Doma shall have the endearing touch and caress with Master Tenzing Yongden. We hereby decline the prayer of the appellant,





Mrs. Chime Dolkar for the custody of the child because the minor child even did not like to see her and, not to go to her lap and if the said minor child is given to her custody, we have a doubt about the fate of the minor child and for his welfare and apart from that she is a young lady and similarly the respondent, Mr. Karma Namgyal is a young man. We ~~are~~ also decline to afford the custody of the child to his father and apart from that he did not make a prayer for custody of the child. After proper application of our mind in the matter, we hold that the grandfather and the grandmother are the best custodian of Master Tenzing Yongden.

However, the appellant as well as the respondent are given liberty to meet and see their son, Master Tenzing Yongden twice in a month after giving prior information to Mr. Ngawang Rapgyal and Mrs. D. Doma.

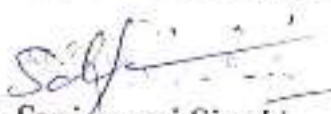
So far the maintenance of the appellant/wife is concerned, we are of the view that it is bounden duty of the husband to maintain his wife. The respondent/husband is a young man with all good physique and good health and he has the capacity to maintain his wife/appellant. The respondent is also a businessman and in view of the above position, the respondent, Karma Namgyal has to pay a sum of Rs.3,000/- (Rupees three thousand) only, per month as maintenance allowance to the appellant, Mrs. Chime Dolkar on or before the 7th day of every month. However, it is made clear that if





the appellant re-married with another person, the appellant shall not be entitled to get monthly maintenance allowance from the respondent, Karma Namgyal. Despite the observations and order given above, liberty is granted to both the parties to settle the matter once again amicably outside of the Court.

For the reasons, discussions, observations and directions made above, these two appeals are finally disposed of thus setting aside the impugned judgments but, no order as to costs.


(N. Surjamani Singh)
Chief Justice (Acting)


(A.P. Subba)
Judge

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Registrar
High Court of Sikkim
Gangtok

