

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO. 12 OF 2015

Aakansha Roy Rasmussen
Aged about 40 years, Occ: Doctor,
Presently residing at B-41,
Rameshwar, S.V.Road,
Santacruz (West),
Mumbai 400 054

.. Appellant
(Org. Petitioner)

v/s.

Adwait Anil Dixit
Aged about 44 years, Occ: Doctor,
residing at Pankaj Villa,
B- Dandekar Road,
Palghar (West),
Pin 401 404

..Respondent
(Org. Respondent.)

Mr. Pradeep Havnur for the Appellant.
Mrs. Seema Sarnaik a/w Mandar Limaye for the respondent

**CORAM : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
DATED : FEBRUARY 23rd, 2015.**

JUDGMENT : (PER ANUJA PRABHUDESSAI, J.)

1. This appeal is directed against the judgment and order dated 02.01.2015, whereby the Family Court, Bandra has dismissed the

Misc. Application No. 34 of 2014 filed by the above appellant and directed the appellant to hand over the custody of the child to the respondent forthwith.

2. The parties to this appeal are the parents of the minor girl child, who is a victim of a bitter custody battle between the parents. The child who is 13 years old is studying in 8th standard at Chinmaya Vidyalaya, Boisar. Being aware of the trauma faced by the child victims in such cases, we did attempt to persuade the parties to arrive at an amicable settlement. The sole intention was to alleviate the pain of the child in having to show preference to one of the parents thereby having to endure the hurt of having betrayed the other parent, whom she loves equally. Having failed in this task, we are left with no other alternative but to decide the matter on merits.

3. Shorn of all unnecessary details, a brief narration of facts, is as under:-

The marriage between the petitioner and the respondent was dissolved by a decree of divorce by mutual consent dated

02.05.2008. The parties had mutually agreed that the custody of the child would remain with the father, while the mother would have visitation rights on every second and fourth Sunday.

4. In the due course, the mother i.e. the appellant herein migrated to Denmark and married a Danish national, while the respondent father remarried a widow having a minor daughter from the first marriage. The child continued to live with her father, stepmother, and stepsister.

5. The appellant has no issue from the second marriage with the Danish national. The marriage between the appellant and the Danish National ended in a divorce in the year 2012.

6. The appellant had come down to India on 28.11.2009. The appellant claimed that the respondent had not allowed her to meet the child. She had filed Misc. Application No. 402 of 2009, for modification of consent decree relating to the access of the child. The appellant had claimed that the respondent was denying to access

and was alienating the child from her. The respondent had contested the application. He had denied having violated the consent terms or having tried to alienate the daughter from the mother.

7. Upon considering the allegations made by the appellant as well as the counter allegations leveled by the respondent, the learned Judge had held that the child was comfortable staying with the father. The learned Judge held that the appellant, being the biological mother is entitled for a reasonable access. The learned judge had, therefore, modified the terms and thereby allowed the appellant to communicate with the child telephonically or by other electronic means, and further provided access during summer and Diwali vacation.

8. The appellant claims that in the year 2012 she had come down to Mumbai to attend the funeral of her brother. During this visit, she had attempted to meet the child. She has claimed that the respondent was reluctant to allow her to meet the child. It was only after her persistent pleading, that he allowed her to meet the child

for fifteen minutes in presence of his second wife.

9. The appellant claims that in the year 2013 she received an e-mail from her daughter expressing her desire to reside with her. The appellant therefore came to India and filed Misc. Application No.34 of 2014 seeking custody of the minor child. The appellant also filed an interim application (EX.13) for grant of interim custody.

10. Upon hearing the respective parties, the learned Judge by order dated 01.12.2014 partly allowed the interim application and provided night access of the child to the appellant from 01.12.2014 to 19.12.2014 with further conditions stated in the order.

11. In the course of the hearing of the main petition, the child was produced before the marriage counselor. The child expressed her desire to stay with her mother, though she had no complaint against her father, step mother and step sister. The counselor submitted the report to the learned Judge. The learned Judge also personally interviewed the child.

12. During the pendency of the petition, on 02.12.2014 the appellant received a phone call from the school that the child was not well. The appellant took the child to a doctor and as per his advice; she took the child to a psychiatrist, Dr. Harish Shetty. The child was counseled by doctor Shetty. He has opined that the child is showing signs of anxiety.

13. The petition came to be disposed of by the impugned judgment dated 02.01.2015. Upon considering the rival contentions, the learned Family Court negated the contention of the respondent that there is no provision for modifying the consent decree and shifting of custody of the child. The learned Family Court held that technicalities have no place in custody cases and that in deciding such cases, the welfare of the child is of paramount importance. The learned Judge therefore held that the custody of the child could be shifted from one parent to another if such shifting is in the welfare of the child.

14. The learned Judge further held that the child was living with

the father since 2008. She had no complaint against the father, the stepmother, and the stepsister. Hence, the fact that the respondent is remarried is not a ground for shift in custody. The learned Judge held that though the child has expressed her desire to live with the mother, the child who is hardly 13 years of age would have no proper understanding or capacity to understand. Her wish to go with the mother could be emotionally charged. The learned Family Court further held that the wishes of the child is only an assisting factor and cannot override welfare of the child.

15. The learned Judge held that the respondent father is not disqualified to retain the custody of the child. The learned Judge rejected the certificate issued by Mr. Shetty. Learned Judge held that the certificate dated 06.12.2014 states that the child is extremely tensed and anxious; however, she is comfortable and normal to depose before the Court. The learned Judge has held that this certificate is self-contradictory.

16. The learned Judge further held that if the custody of the child is

given to the mother, the child would be shifted to Denmark. The learned Judge held that the culture and atmosphere at Denmark is very different from Palghar, the place where the child was born and brought up. The learned Judge has opined that it will not be in the interest of the child to shift her from Palghar to Denmark.

17. Shri Havnur, learned counsel for the appellant has contended that the respondent has in past tried to alienate the child from the mother by giving a free access to the mother in compliance with the consent terms. He has submitted that the hurdles created by the respondent and the desire expressed by the child necessitated the appellant to file applications for modification of the consent terms. He has submitted that the child had sent an e-mail to the appellant expressing her desire to live with her. Learned Counsel for the appellant has claimed that the respondent has a very busy schedule and is unable to give sufficient time to the child. He has not been attending the school meetings and the child is feeling neglected.

18. Learned Counsel for the appellant has further urged that the

child is tensed and anxious and had to be treated by a psychiatrist. He has urged that the appellant, who is a dentist by profession, is doing research at Denmark and has full time permanent employment. Her working hours are flexible and that she has sufficient time to take care of the child.

19. Learned Counsel for the appellant has further submitted that the appellant will be taking her mother to Denmark and as such even in her absence, the child will be in the company of her grandmother. The learned Counsel has further urged that the child is a brilliant child and she will not only have an opportunity in excelling the academics but will also get an opportunity in pursuing her hobbies and other extra curricular acts. Learned Counsel for the appellant therefore contends that shifting the custody from the respondent to the appellant would be in the interest of the child.

20. Learned Counsel for the appellant has submitted that the child can spend both the vacations in India and that the appellant shall bear the cost of one trip. He has further submitted that the

respondent can also visit the child at Denmark whenever he chooses to do so and that the appellant will help him in obtaining the Visa. He has submitted that with such arrangement the child can spend quality time with both the parents.

21. Learned Counsel for the appellant has relied upon the judgments of the Apex Court in (i) Mohan Kumar Rayana v. Komal Mohan Rayana (2010) 5 SCC 657, (ii) Athar Hussein v. Syed Siraj Ahmed & Ors. (2010) 2 SCC 654 and (iii) Gaurav Nagpal vs. Sumedha Nagpal (2009) 1 SCC 42.

22. Ms. Sarnaik, learned Counsel for the respondent has vehemently opposed the appeal. She submitted that within a couple of months from the divorce the appellant had shifted to Denmark and married a Danish national. She claims that the appellant has felt the need for the child only after her second divorce. She has forcefully argued that the appellant had willingly given up the custody of the child, as she did not want to enter into a new relationship with a 'baggage'. She claims that the conduct of the appellant does not

entitle her for the custody.

23. The learned Counsel has urged that the child is with the respondent father since 2008. The child had no complaint against her father, step mother and step sister. The learned counsel has further urged and the child did not face any anxiety till the appellant sought interim custody of the child.

24. Learned Counsel for the respondent has contended that the child who is barely 13 years old could not have sent the e-mail, which is grammatically accurate. She has further contended that as the child is in custody of the appellant, the child has not been attending the school and she would not be allowed to answer the final examination. She contends that the appellant is responsible for wasting an academic year of the child, who is otherwise an exceptionally brilliant child.

25. Learned counsel for the respondent further submitted that the appellant being a full time employee would have no time for the

child. Though she is financially independent, the high living standards of Denmark will leave the appellant with little or no money to meet the requirements of the child. She has vehemently urged that the child is born and brought up at Palghar, Thane. The child will face language and cultural barriers if she is uprooted from her birthplace and is allowed to be taken to Denmark and such cultured shift is certainly not in the interest of the child. She has further urged that the permissive society and values in Denmark are not conducive to the growth of the child.

26. Learned Counsel for the respondent has relied upon the decisions of the Apex Court in (i) Sheila B.Das v. P.R.Sugasree 2006 (3) SCC 62; (ii) Kumar Jahagirdar v. Chethana Ramatheertha 2004 (2) SCC 688; (iii) N.Nirmal v. Nelson Jeyakumar 1999 (3) SCC 126; and the decision of a single judge of this Court in Mahadev Rao vs.Kisan Rao AIR 1996 Bom. 221.

27. We have perused the records and considered the arguments advanced by the counsel for the respective parties.

28. It is not in dispute that the appellant and the respondents have obtained a divorce by mutual consent and have chosen to tread separate paths. We are therefore, not inclined to consider the allegations and counter allegations made by the parties against each other. Our only concern at this stage is to decide the issue of custody of the minor child.

29. In the case of ***Gaurav Nagpal vs. Sumedha Nagpal [(2009)1 SCC 42]*** the Apex Court has held that:-

“ The principles in relation to the custody of a minor child are well settled. The paramount consideration of the court in determining the questions as to who should be given custody of a minor child, is the “welfare of the child” and not rights of the parents under a statute for the time being in force or what the parties say. The court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and over physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others. Mature thinking is indeed necessary in such a situation. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis. In such matters, human angles are also relevant for deciding the issues. The object and purpose of the 1890 Act is not merely physical

custody of the minor but due protection of the rights of wards health, maintenance and education. The power and duty of the court under the Act is the welfare of the minor”.

30. The other decisions relied upon by the parties lay down similar principles. Having considered the ratio, it is not necessary to refer to all these decisions in detail. Suffice it to say that it is well settled that in deciding such applications, the interest of the minor child is of paramount importance. Keeping in mind this principle, the only question for our consideration is whether shifting of the custody of the child is in the interest of the child.

31. As stated earlier, the appellant and respondent had obtained divorce by mutual consent and the appellant had agreed that the custody of the child would remain with the respondent and she would only have visiting rights on every second and fourth Sunday of each month. It is not in dispute that after the divorce, the appellant had migrated to Denmark and remarried a Danish National. It is also not in dispute that since 2008, the child is in custody of the

respondent. The respondent has remarried in the year 2009 and the child has been living in the joint family along with the respondent, her stepmother, stepsister and the paternal grand parents. The child had not complained that she is being ill-treated by her step-mother or step-sister and as such the family court was right in holding that the fact that the respondent has re-married is by itself not a ground for shifting the custody of the child.

32. It is equally true that the fact that the appellant had given the custody of the child to the respondent, had gone to Denmark for better prospects, and had remarried a Danish national would also not be the grounds to deprive her of the custody of the child. In the case of ***Vikram Vir Vohra v. Shalini Bhalla*** [AIR (2010) SC 1675] the Apex Court has held that :

“The respondent mother is getting a better job opportunity in Australia. Her autonomy or her personhood cannot be curtailed by the court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact, a right to development is a basic human right. The respondent mother cannot be asked to choose between her child and her career. If the custody of the child is denied to her, she may not be able to pursue

her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.”

33. In the instant case, the appellant is pursuing her career at Denmark. She cannot be compelled to choose between her child and her career, as imposing such restrictions would either jeopardize her career progression or infringe upon her parental rights. Consequently, the appellant cannot be deprived of the custody of the child merely on the ground that she has chosen to pursue her career in a foreign country.

34. It is not in dispute that since the year 2008 the child had been living with her father and was joined by stepmother and stepsister since the remarriage of the respondent in the year 2009. The question, which therefore arises, is whether the shifting of custody is in the interest of the child.

35. We had personally spoken to the child in our chamber in the absence of her parents. The child, as noticed by us, appeared to be

intelligent but anxious and emotional. She pleaded that she be sent with her mother where she could lead a happy life. From our interaction with the child we are satisfied that the child, was mature enough to take such a difficult and painful decision of choosing between the two parents, both of whom she loves immensely and equally. We are satisfied that the decision of the child is not emotionally maneuvered but is a conscious decision.

36. It is to be noted that the child had also sent an e-mail to the appellant as: “mamma, sending this mail to confirm that I want to share my rest of the life... I want to live wid you in Denmark. But this doesn’t mean that I hate Dad, he is unfair tome. I love you both. I stayed 4-5 years with Dad, n wan to the d wid u. ... this is my confirmation made, love you loads....”

37. The child had also sent a WhatsApp message to the respondent as : “listen, I am going to e-mail you. You didn’t understand what I wanted to say. Why cant you understand that I want my mom! It does not mean that I hate you, I love you both, but now as you know,

I have lived with you, I need my mamma, please let me go with her!
Why can't you just understand this? I can't say that on phone as you
never allow me to speak."

38. The e-mail referred to above was sent by the child to the appellant mother much before filing of the petition. The said e-mail as well as the Whatsapp message sent to the father clearly reveals that the girl is totally torn between both the parents. She wants to have best of both the parents. Having lived with the father for a period of about 4-5 years she yearns to be with her mother. In the light of our interaction with the child as well as considering the e-mail and whatsapp message sent by the child, we are of the considered view that the child sincerely and voluntarily wishes to be with her mother.

39. The child has no complaints against the respondent, but expressed that he is very busy and has very little time to spend with her. Though the child has no complaints or animosity against her stepmother, it appears that she has reservations to accept her as her

mother and is experiencing a sense of insecurity and lack of sense of belonging.

40. The preference shown by the child has to be understood from the perspective of the child. Such expression of the child cannot be construed either as a betrayal of love bestowed upon her by the respondent or as an adverse reflection upon the upbringing of the child by the respondent. It is also to be borne in mind that the reluctance of the child to accept the second wife of the respondent as her mother as well as her sense of insecurity springs out from the fact that she differentiates the second wife of the respondent from her biological mother, whom she considers as her own. Hence, the mere fact that the child entertains such perception is not a ground to brand the second wife of the respondent as a “step-mother” with all its connotations of “step-motherly treatment.”

41. Our interaction with the child did reveal that she is tensed and anxious. This is further evident from the report of Doctor Harish Shetty. The learned family Court, in our considered view was not

justified in ignoring the said report on the ground that as certified by the doctor, the child is otherwise competent to depose. It need not be emphasized that the fact that the child is anxious or tensed would not mean that she is unable to think rationally. An anxious child therefore cannot be branded as an incompetent witness.

42. It is unfortunate that the child who is otherwise brilliant and has an excellent education record has become a silent victim of the custody battle. It is therefore imperative to keep in mind the following observations of the Apex Court in Nagpal (supra) “Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”

43. Keeping in mind these principles and without going in the merit of the blame game, our endeavour is to restore to the child her right to lead a happy and healthy life. In the course of our interaction with the child, she has stated in clear terms that her happiness lies in being in the company of her mother. We are alive to the fact that the wishes of the child cannot be the sole deciding factor and the court has to consider independently the welfare of the child. Nonetheless, the wishes of the child cannot be totally ignored in deciding the custody cases, as the happiness of the child is one of the prime considerations in deciding the issue.

44. The appellant is a doctor by profession and is presently doing research in cancer at Denmark. She has produced the statement of her salary and has stated on oath that she is in a good financial position to maintain and provide all the required facilities to the child. She has further stated that the child would be admitted in an International School which will not only help her in enhancing her academic pursuits, but will also enhance her other faculties and

extra curricular activities. The appellant has further stated that her working hours are flexible and she will be able to devote sufficient quality time to the child. The appellant has further stated that she would be taking her mother to Denmark and as such, the child would never be left alone even during her office timings.

45. We have no reason to disbelieve the statement made by the appellant that she is financially solvent. The appellant, being the biological mother of the child, is concerned with the welfare and future of her child. There is no reason to doubt that she will bring up the child in a normal balanced manner. She will not only help her child in her academic pursuits but will also infuse confidence and instill sense of belonging in the child. We are therefore of the considered view that the appellant is otherwise qualified to obtain the custody of the child.

46. The child is 13 years old. A girl child, who is on the advent of puberty, would need motherly love and support. Depriving the child of the company of her mother can have adverse impact on the

physical, intellectual, as well as psychological development of the child. Thus, not conceding to the wishes of the child will certainly cause harm to the child. Consequently, the interest of the child lies in entrusting her custody to the mother.

47. The apprehension of the respondent no.2 that uprooting the child from the local environment and compelling her to adjust to a foreign country, culture, and education system will have adverse impact on her development and overall growth is in our opinion baseless. Young children are more resilient than adults are and they learn and adapt quickly and find their own ways to cope with any new situation and surroundings. In the instant case, the child is at an age where she would have no difficulty in getting with the new culture and country. The appellant is an educated woman. There is no doubt in our mind that the appellant, who is a biological mother of the child, will ensure that the child gets best of education and will help the child in her initial adjustments and inculcate moral and ethical values.

48. We are conscious of the fact that the child has been in the custody of the respondent no.2 since 2008 and that he has made every effort to bring up the child in the best possible manner. We can also fathom the pain that would be caused to the respondent while handing over the custody of the child to the appellant. However, as held by the Apex court in the case of Nagpal “Merely because there is no defect in his personal care and his attachment for his children-- which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him.” In the instant case, we are constrained to take the decision of handing over the custody to the appellant, keeping in mind the welfare and wellbeing of the child.

49. Insofar as the visitation rights of the respondent are concerned, the respondent can keep in touch with the child through electronic and social media. Besides, the appellant has assured that the child would spend both vacations with the respondent in India. She has

agreed to bear the cost of one trip and has stated that the respondent can bear the cost of the second trip. She has further submitted that the respondent can visit the child at Denmark as and when desired and that she would assist him in obtaining the Visa. The visitation rights of the respondent no.2 can therefore be well secured in the above terms.

50. It has been submitted before us that since the child has not attended the school, the school authorities have taken a decision not to allow the child to appear for the final examination. Learned counsel for the respondent has submitted that the court should not interfere with the administrative matters of the school and should not instruct the school to permit the child to answer her final exams. We are totally perplexed with the submissions made by the counsel for the respondent. The concern of the respondent should be to ensure the wellbeing of the child and not to vilify the child. The child is already carrying emotional scars of the bitter parental divorce and custody battle. In such a scenario, such unmindful approach of the parent can evoke a sense of betrayal, anger, and frustration, which

can cause irreparable psychological harm to the child. We certainly expect that the parties will not rob the child of her childhood by using her as a pawn to settle their personal score or to overcome their frustrations with the other partner. The least that can be expected from the parents is to let the child be a child. Let her play, study and grow in to a good human being and a responsible citizen.

51. The child is stated to be academically brilliant. She has been a victim of fierce custody battle. Undoubtedly, having to repeat the year would be injurious to the morale and self-esteem of the child. We hope and trust that the school authorities would certainly look at this aspect sympathetically and as a special case allow the child to answer her exams.

52. Under the circumstances, and in view of discussion supra, we pass the following order.

ORDER

- (a) The appeal is allowed. The impugned order is set aside.

(b) The consent decree is modified to the extent that the custody of the child is ordered to be handed over to the appellant.

(c) The appellant shall ensure that the child spends both the vacations with the respondent in India.

(d) The appellant shall bear the traveling expenses towards the cost of one trip of the child.

(e) The respondent is also permitted to keep in touch with the child through electronic media or social network.

(f) The respondent is also permitted to visit the child at Denmark as and when he desires, subject to giving advance notice of the visit to the appellant.

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)

. At this stage, learned counsel for the appellant submits that the appellant would be traveling with the child to Denmark as soon as

possible. Since the custody of the child is already ordered to be handed over to the appellant, the passport authorities to complete the formalities expeditiously on an application filed by the appellant.

(ANUJA PRABHUDESSAI)

(RANJIT MORE, J.)

On the request of learned counsel for the respondent, matter again called out at 3.00 p.m.

. Mr. Limaye, learned counsel for the respondent, at this stage states that the order may be stayed in order to enable him to approach the Higher Court. During the pendency of the custody application before the trial Court, the interim custody of the child was given to the appellant-mother. Though the trial Court had ultimately dismissed the appellant's application, the impugned order was stayed in the appeal. Thus, the custody of the minor child continued to be with the appellant. In that view of the matter, this order cannot be stayed. The request is, accordingly, rejected.

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)