

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

WEDNESDAY, THE 25TH DAY OF MARCH 2015/4TH CHAITHRA, 1937

Mat.Appeal.No.230 of 2015 (E)

AGAINST THE ORDER DATED 07.01.2015 IN I.A.No.365 OF 2014 IN
O.A.No.443 OF 2013 ON THE FILE OF THE FAMILY COURT, KOZHIKODE.

APPELLANT/RESPONDENT/PETITIONER:

BIJU K.V.
AGED 36 YEARS,
S/O.LATE K.M.VARKY, KATTAKKAKATH VEEDU,
KODATHAYI AMSOM DESOM, KODATHAI BAZAR.P.O.,
KOZHIKODE.673 573.

BY ADVS.SRI.LIJU. M.P
SMT.SEEMA.E.GEORGE

RESPONDENT)/PETITIONER/RESPONDENT:

NEENU ROY, D/O.ROY, AGED 27 YEARS,
POOCHAKKUZHIYIL VEEDU, VENAPPARA PO, KOZHIKKODE 673582.

BY ADV. SRI.VINOD SINGH CHERIYAN
BY ADV. SRI.R.SUDHISH
BY ADV. SMT.M.MANJU

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
25-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

Mat appeal No.230 of 2015

Dated this the 25th day of March, 2015

JUDGMENT

Anil K.Narendra, J.

The appellant is the respondent in I.A.No.365 of 2014 in O.A No.443 of 2013 on the file of the Family Court, Kozhikode. The appellant filed O.A.No.443 of 2013 before the court below for getting custody of his minor daughter Niya Biju born in the wedlock with the respondent herein. O.A.No.443 of 2013 was decreed on the basis of a settlement reached between the appellant and respondent, whereby the custody of the child was agreed to be given to the appellant on every Saturday from 9 a.m. to 5 p.m.

2. The respondent moved I.A.No.365 of 2014 before the Family Court for modifying the order regarding the custody of the child and the court below by order dated 7.1.2015 allowed the said application, by cancelling the order giving interim custody of the child to the appellant on Saturdays, thereby giving exclusive custody of the child to the respondent with effect from the date of that order. The parties were also given liberty to file a fresh application

for modification of the order as to the custody of the child as and when required by future change of circumstances. Aggrieved by the aforesaid order passed by the court below dated 7.1.2015, the appellant is before us in this appeal.

3. On 23.3.2015, after hearing the learned counsel on both sides we directed the respondent-mother to produce the minor child before this Court so as to enable us to interact with the child. Accordingly the appellant-father, the respondent-mother and the minor child are present in court today.

4. We have interacted with the minor child and also with the appellant-father and the respondent-mother. We have also heard the learned counsel appearing on both sides.

5. By order dated 18.2.2014 in O.A.No.443 of 2013 the appellant-father was given custody of the minor child from 9 AM to 5 PM on Saturdays. While the said arrangement was in force, the respondent-mother filed I.A.No.365 of 2014 alleging, among other things, that on 15.3.2014 when she went to take back the child in the evening, the house of the appellant-father was found locked. According to her, the appellant-father was found consuming liquor

with his friends and the child was found in the corner of the room shivering with fear. Later on 29.3.2014 when her sister went for getting back the child, the appellant-father refused to handover the child and abused her. Subsequently the respondent-mother and her relatives went to the house of the appellant-father, but the child was not returned. On 02.04.2014 she filed C.M.P.No.2127 of 2014 was filed before the Court of the Judicial First Class Magistrate-II, Thamarassery and as per the direction of that court the child was produced before the court on 07.04.2014 and handed over to the respondent-mother. It is based on these allegations the respondent-mother moved I.A.No.365 of 2014 before the court below to cancel the order dated 18.2.2014 granting interim custody of the child to the appellant-father from 9 AM to 5 PM on Saturdays.

6. To the above interlocutory application the appellant-father filed a counter statement denying the allegations made in the accompanying affidavit. He denied the incident alleged to have happened on 15.3.2014 and on 29.3.2014. He has stated that, in the evening on 29.3.2014 the respondent-mother called the child over telephone and directed her to stay with the appellant-father.

Accordingly the child remained with the appellant-father and without disclosing the said fact she filed C.M.P.No.2127 of 2014 before the Magistrate Court. According to the appellant-father, it was only an attempt made by the respondent-mother to get exclusive custody of the child.

7. On an interaction with the minor child we found that the child is not having any ill-will either towards the appellant-father or the respondent-mother. She even stated that she wants the company of both. She also expressed her desire to go with the appellant-father on interim custody.

8. It is well settled that in a case for custody of a minor child, the paramount consideration shall be the welfare of the child. The Supreme Court has in **Nil Ratan Kundu Vs. Abhijit Kundu** [2008(9) SCC 413] dealing with the principles governing the custody of children, held that a court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting a proper guardian for a minor, the paramount consideration should be the welfare and well-being of the child. The Apex Court held further that, a child is not

“property” or “commodity” and that the issues relating to custody of minors and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

Paragraphs 52 and 58 of the judgment read thus:-

"52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this: in deciding a difficult and complex question as to the custody of a minor, Court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting the legal provisions. It is a human problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be

ignored. They are equally, or we may say, even more important, essential and indispensable considerations.

If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

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"58.*Though this Court in **Rosy Jacob Vs. Jacob A. Chakramakkal** [1973 (1) SCC 840] held that children are not mere chattels nor toys, the trial Court directed handing over custody of Antariksh 'immediately' by removing him from the custody of his maternal grandparents. Similarly, the High Court, which had stayed the order of the trial Court during the pendency of appeal, ordered handing over of Antariksh to his father within twenty-four hours positively. We may only state that a child is not "property" or "commodity". To repeat, issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem."*

9. Later, in **Gaytri Bajaj v. Jiten Bhalla** [2012 (2) SCC 471] the Apex Court reiterated that, it is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. Paragraphs 12, 13 and 14 of the judgment read thus :-

"12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal (2009(1) SCC 42) the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved (AIR 1941 Bombay 103) ; Rosy Jacob v. Jacob A Chakramakkal (1973 (1) SCC 840) and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka (1982 (2) SCC 544) this Court eventually concluded in paragraphs 50 and 51 that :

"50. That 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 relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case (AIR 2008 SC 2262 : 2008 AIR SCW 4043) the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

13. *The views expressed in Paras 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli (2008 (7) SCC 673) would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree (2006 (3) SCC 62) would also require a special mention.*

14. *From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is*

the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

10. In the case on hand on our interaction with the minor child we notice that she is not having any ill-will towards the appellant-father or respondent-mother and she wants the company of both her parents. She has also expressed her desire to go with the appellant-father on interim custody. Therefore, we are of the view that while giving exclusive custody of the minor child to the respondent-mother, the court below failed to note that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. In the result, we hold that the impugned order passed by the court below cannot be sustained.

11. Considering the welfare and interest of the minor child, who expressed her desire to have the company of both her parents, we find it appropriate to set aside the impugned order passed by the court below dated 7.1.2015 in I.A.No.365 of 2014 in O.A.No.433 of 2013 and permit the appellant-father to have interim custody of the minor child on the second Saturday and fourth Sunday of every

month from 7 AM to 5 PM. The respondent-mother has agreed that, the interim custody of the child can be handed over to the appellant-father, in the presence of the Vicar of St.Mary's Jacobite Syrian Church, Velamcode. Accordingly, it is ordered that, the respondent-mother shall bring the minor child Niya Biju before the Vicar of St.Mary's Jacobite Syrian Church, Velamcode at 7 AM on the aforesaid days to hand over her custody to the appellant-father. Similarly, at 5 PM on the aforesaid days the appellant-father shall bring back the child before the Vicar of the aforesaid Church to restore her custody to the respondent-wife. This arrangement shall continue till the Family Court passes modified orders as to the custody of the minor child, as and when required by future change of circumstances.

12. Taking into consideration the fact that, the minor child is having summer vacation during the months of April and May, 2015 we find it appropriate to permit the appellant-father to have interim custody of the child from 11.4.2015 to 18.4.2015. In order to enable the appellant-father to have interim custody of the child during the aforesaid period, the respondent-mother shall bring the child before

the Vicar of the St.Mary's Jacobite Syrian Church, Velamcode at 7 AM on 11.4.2015 for handing over her custody to the appellant-father. Similarly, the appellant-father shall bring back the child before the Vicar at 5 PM on 18.4.2015 for restoring her custody to the respondent-mother.

13. It is made clear that the parties will be at liberty to move the Family Court by filing appropriate applications for modifications of the order as to custody of the minor child, as and when required by future change of circumstances.

The appeal is disposed of accordingly.

P.N.RAVINDRAN, JUDGE

ANIL K.NARENDRAN, JUDGE

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