

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.112 OF 2020**

Russell Mark Rodrigues

... Petitioner

Versus

Caroline D'Silva

... Respondent

Shri V. Rodrigues, Advocate for the Petitioner.

Shri A.D. Bhobe, Advocate for the Respondent.

Coram:- DAMA SESHADRI NAIDU, J.**Date:- 29 September 2020****ORDER :****Introduction:**

This is a case of child custody. As usual, the mother and the father have been staking their claim to the child's interim custody. A mother wants her two-and-a-half-year child's custody. For that, she sues her husband. The trial Court orders the child's interim custody to the mother. The father appeals. But he fails in that appeal. So he comes to this Court. Now, the then-two-and-a half-year child has grown to be five-year-old, almost. Does the lapsed time diminish or defeat the mother's claim?

Facts:

2. To appreciate the controversy, I will set out the facts briefly. The petitioner and the respondent got married in May 2011. Later, they had a boy on 4 October 2015. From the date of their marriage till the date of the child's birth, the couple lived in Bangalore, both

employed there. After that too, they lived a few more months in Bangalore.

3. Overtime, differences arose between the petitioner husband and the respondent-wife. It was on account of the petitioner's alleged extramarital affair. If we go by the petitioner's version, on 17 February 2018, the respondent locked herself in along with the child and tried to commit suicide by hanging to the ceiling. Then, the petitioner broke open the door and rescued his wife. The child, in fact, witnessed that traumatic event—the respondent's attempt to hang herself.

4. In March 2018, the petitioner resigned to his job. According to him, it was to take care of the child full time. After that, for about four months, the respondent frequented Goa, with the child. On a couple of occasions, the petitioner, too, accompanied her. First, the respondent spent a few days in the marital home at Goa. Finally, in the last week of April 2018, the respondent went to her mother's house along with the child.

5. On 14 May 2018, the petitioner, along with his mother, went to his parents-in-laws' house, where the respondent was staying. Then, the child had a fever. The petitioner took the child and got him treated by a doctor. But, after that, he did not return the child to the mother. Instead, he took the boy to his house. That has triggered the whole dispute.

Legal Proceedings:

6. First, on 17 May 2018, the respondent lodged a police complaint. Later, on 6 June, she applied to the Civil Judge, Senior Division, Margao, for the child's custody. In that, she also sought the child's interim custody. The trial Court allowed the respondent's

interlocutory application; through the order dated 17.12.2018, it directed the petitioner to hand over the child.

7. Aggrieved, the petitioner appealed to the District Court, South Goa, Margao. He could not succeed, though. On 7 January 2018, the Appellate Court dismissed the Appeal No.96 of 2018. Then, the petitioner has filed this Writ Petition, assailing the appellate Court's judgment.

Submissions:

Petitioner:

8. In the above background, Shri V. Rodrigues, the learned counsel for the petitioner father has, to begin with, underlined the fact that whatever be the child's age, the Courts will, and ought to, consider only one aspect: the child's welfare. That alone, according to him, is the paramount consideration. In this context, Shri Rodrigues argues that the respondent attempted suicide and thoughtlessly exposed the child to witness her attempt. It must have left an indelible impression on the child's mind.

9. Shri Rodrigues also argues that the respondent, all along, has neglected the child by focusing only on her career. But the petitioner went to the extent of resigning his job so that he could focus on the child's upbringing. Therefore, Shri Rodrigues contends that between the mother and the father, the father is the better suited to take care of the child's welfare.

10. Shri Rodrigues has also submitted that until the respondent left the matrimonial house, both the parents had the joint custody of the child. Then, when the respondent was in her mother's house, on 14 May 2018, the petitioner came to know about the child's ill health. So he went over to the in-laws' house along with his mother and took the

child for treatment. After that, he felt that the child would be safer in his custody rather than in the respondent's. Therefore, Shri Rodrigues wants the Court to treat the petitioner's action as not of taking away the child forcefully but of having custody in the child's best interest.

11. Finally, referring to the trial Court's as well as the appellate Court's judgment, Shri Rodrigues has strenuously contended that both Courts have selectively treated the facts. To elaborate, he has submitted that regarding the respondent's alleged attempt to commit suicide, both the courts below left the matter for trial. But regarding the alleged quarrel between the petitioner's brothers and father, they felt it would affect the child's welfare. It is, according to Shri Rodrigues, despite the fact that the petitioner had nothing to do with that altercation. Nor has the child been affected in any manner.

12. Shri Rodrigues has eventually accepted that the child was about two and a half years when the petitioner got his custody. But now the child is almost five years old. Therefore, at this juncture, as an interim measure, it is inadvisable for the courts to force the child to go back to the mother. In this context, he assures the Court that the petitioner will examine no other witnesses than himself and see that the trial gets concluded at the earliest. That done, the child's custody may be determined on the merits finally rather than as an interlocutory step, more particularly, after about two and a half years. Thus, the learned counsel has urged this Court to take a 'pragmatic view' of the issue and allow the Writ Petition.

Respondent:

13. In response, Shri Bhobe, the learned counsel for the respondent-mother, has submitted that the boy was taken away—forcefully or by deception—at a very tender age. He has strenuously

denied that the respondent has ever attempted any suicide, leave alone in the child's presence. On the other hand, he contends that the mother is naturally suited, apart from emotionally well-equipped, to take care of her child. In this context, Shri Bhobe points out that until the child was taken away, he had been with the mother many months after the alleged attempt of suicide.

14. As to financial security, Shri Bhobe points out that the mother has been gainfully employed drawing a handsome salary. But the petitioner is dependent on the other members of his family. After forsaking the job, the petitioner cannot paint his idleness as an ideal or sacrifice to take care of the child. The mother wants to give her child a more secure future, by example.

15. About the petitioner's conduct, Shri Bhobe stresses that the petitioner has ruined the marital bliss with his extramarital affair. According to him, first, the trial Court granted the interim custody to the mother. Next, in appeal, the Appellate Court has not stayed the order. Despite that, the petitioner has not abided by the judicial directive. Instead, he dragged the proceedings and now contends that the child is about five years.

Reply:

16. In reply, Shri Rodrigues has submitted that on 14 April 2018, the child was suffering from fever. But the mother did not get him treated. So the petitioner had to go to the in-laws' house to get the boy treated. This fact, he stresses, is undeniable, as is evident from the medical records. He has also reiterated that from the beginning, the child has been in joint custody; and, now, for the last two and a half years, he has been in the father's exclusive charge. As the child has been

accustomed to father, any change or shift now will emotionally disturb the child.

17. Heard Shri Vivek Rodrigues, the learned counsel, for the petitioner, and Shri A.D. Bhole, the learned counsel, for the respondent.

Discussion:

18. The dispute concerns the child's interim custody. Married in May 2011, the couple had a child on 4 October 2015. Until February 2018, the couple lived in Bangalore. In March, the petitioner husband resigned his job; he asserts that he gave up his job to take care of their child. On the contrary, the respondent-wife accuses him of irresponsibility. According to her, it was the company that asked the petitioner to leave the employment. When the marital disputes multiplied, the respondent reached her maternal home in Goa. It was in the last week of April 2018. True, before the respondent went to the maternal home for good, she had stayed for some time in the matrimonial house. We need not, however, probe into the marital disputes, much less into the causes behind those disputes. The fact remains that when the petitioner and the respondent parted ways, the respondent had the custody of her son, who was about 2 1/2 years then.

19. On 14 May 2018, along with his mother, the petitioner went to the respondent. He allegedly found the boy suffering from a fever. He took the boy to Doctor, got him treated, and then took him to his own house, instead of returning the boy to the mother. For this action, the petitioner supplies a justification: when the boy was with fever, the mother ignored him. So he felt it safe for the boy to be with him.

20. The respondent mother contradicts the petitioner's version. She maintains that the petitioner wanted to spend some time with their

son. Then, the child had a mild temperature. Yet she handed over the boy to the petitioner with an understanding that he would hand him back to the mother, by evening. But that did not happen. At any rate, she asserts that the petitioner took the boy before she could get him treated.

21. Indeed, as is the case in most matrimonial disputes, the allegations fly thick and fast from both the ends. But I may bear in mind the stage of the dispute and the scope of adjudication before this Court.

22. If we go by the respondent's pleadings, despite the petitioner's initial promise, he did not return the child by evening; the respondent's requests and entreaties fell on the deaf year. So she first complained to the State Women's Commission, but that yielded no result. Then, she lodged police complaint before Margo-Curtorim Police Station. It was on 17 May 2018. The petitioner, however, refused to attend the police station; instead, he told the respondent that she could go to a court of law, for he was not prepared to hand over the child. Under those circumstances, the respondent filed Port. Civil Miscellaneous Application No. 243 of 2018.

23. In the pending Child Custody Proceedings, on 17 December 2018, the trial Court ordered interim custody to the respondent mother. Aggrieved, the petitioner filed Miscellaneous Civil Appeal No. 96 of 2018 before the District Judge-3, Margao. Eventually, the Appellate Court dismissed the appeal.

24. So essentially, the adjudication in this Writ Petition under Article 227 concerns an interlocutory order. And that is in the face of concurrent findings—prima facie they may be. Thus, it goes without saying that the adjudicatory ambit of this dispute is severely constricted.

25. The courts below have examined—again I may note—prima facie the questions of fact. That is, the courts have weighed the rival claims of the mother and the father for the custody of a still nursing child, aged two years eight months. I may note that the interlocutory order emanated from the judicial discretion concurrently and consistently exercised by the courts below. Both orders are detailed, suffused with sufficient reasons. Despite the Herculean efforts by the petitioner's counsel, I see no perversity in the findings rendered by the trial Court as well as the Appellate Court.

26. The courts have noted the relative conduct of the rival claimants for the custody but have refused to be drawn into the factual controversy. In fact, both the courts have saved the dispute for further adjudication during the trial. But they did consider the fact that the child was of tender age; that he was, to begin with, in the mother's custody; that the father took him away from the mother involuntarily; and that the atmosphere in the petitioner's house is not conducive for the child's safe growth. To support these conclusions, the courts below have considered FIR No. 113 of 2018. It was launched by the petitioner's mother against the petitioner's father and brothers. First, the respondent has nothing to do with this complaint. Second, the complaint contained allegations of violence in the petitioner's house. So the courts concluded that the atmosphere in the petitioner's house is not conducive for the child.

27. Here, we may note the petitioner's conduct. Though the trial Court asked the petitioner to handover the child to the mother, he did not comply with the judicial directive. Instead, he appealed. Recourse to judicial remedies is no disqualification. Agreed. Pending the appeal, the petitioner did not secure any stay. Despite that, he clung onto the custody—without legal backing. The respondent alleges that when she

tried to take the child, the petitioner resisted that with threats and violence. That forced her to lodge another police complaint on 21 December 2018.

28. Finally, we may note one salient aspect of the dispute. When the petitioner took away the child, he was barely two and a half years old. He was said to be still nursing then. The petitioner's mother, that is the child's grandmother, may have acted as the surrogate mother for the child. But she is no substitute for the biological, nursing mother. At this stage, as rightly disregarded by the courts below, I need not pay any attention to the allegations and counter-allegations, including that the mother is career-oriented and would not pay attention to the child. Any comment without evidence may prejudice either party.

29. Indeed, the petitioner's counsel has strenuously argued that the boy is completing five years next month; so it would be inadvisable for the Court now to shift the custody. According to him, planted in the new environment, the boy would feel disturbed. I am afraid the petitioner's plea is specious. It is the petitioner that dragged the proceedings, spending over two years. He refused to hand over the child despite judicial directives. Can he be allowed to take advantage of his own conduct, especially, in the face of adverse judicial findings? If we take as a determining factor the time lapsed in litigation, it will provide a premium to those that litigate, disregarding the judicial directives. Thus, they may drag the proceedings until the position turns adverse to the one that has been law-abiding and successful, too, in the litigation.

30. This court is not prepared to hand down such an advantage to a parent who took away the child but told the wife that she must go to a court of law to establish a right. Yet he has consistently refused to

abide by the judicial directives. Nor has he himself thought it fit to go to court to the child's custody, in the first place.

The Child's Preference:

31. As the boy is almost five years old, I tried to make the parents see reason. But I could not succeed; both remained unrelenting. Then, in the chamber, I interacted with the boy. I have found him agile. In the father's presence, he refused even to look at his mother, whom he hardly knew. I asked the father to leave the chamber and allowed the mother to interact with her child. Initially shy and reluctant, the boy relented, interacted with her, hugged her, and behaved as if he loves his mother. Then I asked him whether he would like to stay with his mother. He has agreed.

32. I find nothing unusual in the child's behaviour. Brought by father ever since he was 2 1/2 year old, he has his affinity with and affection for the father. Given a chance to interact with his mother, he has soon responded to the mother's love, too.

Result:

33. I find no merit in this writ petition, so I dismiss it.

34. Given the petitioner's previous conduct, this Court does not want to let the petitioner take advantage of the systemic delays. Though he failed to have the trial Court's order stayed, to this day, he has not handed over the child. Instead, he wants to take advantage of his wanton conduct. Impermissible.

35. So the Court orders the petitioner to handover the child to the respondent in eight weeks from today. Meanwhile, the petitioner may take recourse to the legal remedies available to him. If the petitioner fails to handover the child in eight weeks, this Court will

regard the petitioner's conduct as willful disregard for the judicial directives and may prosecute him for contempt of court, besides ensuring the child's handover through the process of the court.

36. The petitioner shall deposit Rs.10,000/- as costs before the trial Court. The trial Court will handover the money to the respondent-mother to be used for the child's educational purposes. The trial Court is free to give suitable directions to the mother in this regard.

Thus, the Writ Petition stands dismissed with costs.

DAMA SESHADRI NAIDU, J.

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