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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
AND
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

O.S.A.No.282 of 2017

T.S.Ramesh ... Appellant/Petitioner

Vs

V.Krithika ... Respondent/Respondent

PRAYER :

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent praying to set aside the Judgement and Decree in O.P.No.327 of 2012 dated 09.08.2017.

O.P.No.327 of 2012:-

Original Petition praying that this Hon'ble Court be pleased to pass a decree and judgment in favour of the petitioner by granting permanent custody of the minor R.K.Bharath Vignesh, male child aged 9 years to the petitioner.

For Appellants : Mr.K.P.Gopalakrishnan

For Respondent : Mrs.Rita Chandrasekar
for M/s.Aiyar and Dolia

J U D G M E N T

(Judgment of the court was made by N.KIRUBAKARAN.J.,)

"AGONY, PAIN, SORROW, SUFFERING, ANGUISH, TORMENT, SADNESS, GRIEF, TRAUMA, MISERY, DISTRESS, DEPRESSION, HUMILIATION, CHAGRIN" etc.,

Above words would fail to describe the mind and person of child of separated/divorced parents. The child becomes victim for no fault of it. It is a human tragedy. However, without understanding the impact of separation/divorce of parents on the child/children, mostly egoistic, arrogant parents go for separation, unmindful of the welfare and future of children. If



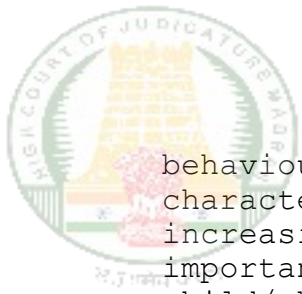
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the marital life is not peaceful from the beginning, the spouses should avoid having child/children. However, in most of the cases, inspite of the unpleasantness from the inception of marriage, the parents are victimizing the life of the children. The parents have to be made responsible morally, legally, ethically for victimization of the children, who are bound to have mental agony, which will last throughout their life affecting their character, caliber and intellectual well being.

2.It is very unfortunate that nowadays children are tossed like balls in between the warring/fighting parents. The result is that the child is left with one parent, who invariably tutors the mind of the child to take vengeance on the other parent. Single parenting of child/children has become common nowadays and it is growing as a social problem. A child is bound to have father's love and guidance and mother's care and affection, which are the birth rights of every child. No parent has got any right to interfere with the said inherent right of the child/children. However, what is happening in the society is, on one pretext or the other, one of the parents is getting separated depriving the child of the normal love and affection and caring of parents.

3.Presently, it is very difficult to bring up the child/children, inspite of love and affection of both the parents. Inspite of proper caring, nowadays there are many chances for the children to have multiple sources of distractions. When sources of distractions are more, there are chances of children getting spoiled and getting trapped in bad company. That is all the more necessary for the parents to live together in the interest of the child /children foregoing their egos, fights, misunderstandings.

4.The parents should understand that life is not theirs after child birth. Child's life is always associated with and dependent on the parents, without whom the child cannot develop good character, moral mind set and social values. The character of a child/children is moulded depending upon the impact caused by the parental conduct and surrounding atmosphere. If a good citizen or member of a society has to be made, it is only possible by the parents and not by others including the surrounding circumstances. A single parent cannot discharge the responsibilities of the parents as what is expected from each of the parents is different as the role of each of the parent is also distinct. The responsibilities have to be discharged towards the children together by the parents. If the parents are divided, definitely, the child cannot be a normal person and there are chances of behavioural changes including erratic



behaviour and likelihood of becoming a person with deviant characteristics. When the offences against the children are increasing shockingly, the parents responsibility is more important. As stated above, pushing aside the interest of their child/children, the parents are executing their misunderstanding, quarrel, inter se litigation to splitting up of parents and separation of one parent from the family formatting. Further, the problem of the children is complicated by the consequential legal proceedings. One such legal battle between two warring parents with regard to the guardianship of a child has come up before this Court through this case.

5.The father, who is the Appellant herein before this Court, is assailing the order passed by the Single Judge, dismissing his petition filed under Sections 7 and 25 of the Guardians and Wards Act, 1890, which has been filed by him, seeking permanent custody of the minor R.K.Bharath Vignesh, son of the appellant and the respondent herein. The appellant got married to the respondent on 27.08.1997 as per Hindu rites and customs. They were blessed with a son on 06.12.2002, who is named as R.K.Bharath Vignesh. The appellant was working in India in a company at Chennai, initially. They set up their matrimonial home at Chennai. The respondent is also employed in a company at Chennai. The child was studying in a school at Chennai. The appellant was working at Chennai as Assistant General Manager in IDBI till 2007. Thereafter, he was transferred to Coimbatore and was working till July 2008. In July 2008 the appellant went for an employment in Kuwait. The Appellant arranged for a full fledged residential set up for the respondent and his son to join him in Kuwait. He also made arrangement to secure admission for his child in an Indian school in Kuwait.

6.Though the respondent joined the appellant in Kuwait, on two occasions, the respondent allowed the family Visa to lapse and did not join the appellant. Even though the appellant looked after the respondent and the child well at Kuwait, strangely the Respondent returned to India and later, did not join the appellant.

7.When he was employed in Coimbatore the Appellant used to visit the Respondent and the child during weekends and holidays and when the appellant was in Kuwait, the Respondent was staying in her father's place at Triplicane. Though the Appellant had shown his interest in admitting the child in Piano class and was asking about his academic performance, the Respondent was neither interested in permitting the Appellant to meet the child nor allowed the appellant to have proper company of the child.

8.When the Appellant came down to India during November 2011 and March 2012, access to the child was blocked by the



Respondent. However, the Respondent went to Daman without even informing the Appellant during March 2012. The Respondent and her family members, weirdly, surreptitiously, without any transparency, blocked the appellant's access to the child. The Respondent went to London without informing the Appellant by leaving the child in India. She also took the child on four occasions to six foreign countries without informing the appellant.

9. The Respondent and her parents treated the Appellant as a stranger and kept him out of the decision making process with regard to the issue of the child, including the academic interest of the child. The Respondent and her family members deliberately did not allow the Appellant to have access to the child in spite of repeated e-mails and phone calls. The Respondent and her family members constantly tortured and poisoned the thoughts of the child about the Appellant father by systematic brain washing, by feeding with negative thoughts about him. Even though, the appellant wanted to be a responsible father, it is stated by the Appellant on the whole, the Respondent and her family members denied the minor child to enjoy his company and therefore, the Appellant filed a petition to grant permanent custody of the minor child, as he is the natural and biological father of the minor child.

10. A counter affidavit has been filed stating that the Respondent was not a responsible father to the child and dutiful husband to the Respondent, the Appellant was very abusive and scolding the Respondent and she was subjected to ill treatment and for nothing, the Appellant used to find fault with the Respondent on petty and small issues. The Appellant is an egoistic person, he is not giving any support or encouragement to the Respondent and was always dominant even before the child birth and he has not changed. The Appellant used to behave very rudely and not even cared to play with the child, he was in the habit of picking up quarrel with the Respondent and her parents whenever he visited the Respondent's parental house. He went to the extent of pushing the Respondent's father, who is a Senior Neuro Surgeon. The Appellant kicked the child, who was 11 years old and in this regard a complaint was lodged at D-1 Police Station, Triplicane. After 2003 nothing was heard from the Appellant for three years, he did not care for the needs and requirements of the child, apart from the Respondent. Because of the rude behaviour, the Respondent was forced to stay in her parents house at Triplicane. Even though he was transferred to Coimbatore in 2006 and stayed for 1 and $\frac{1}{2}$ years he did not bother to take the Respondent and the child to Coimbatore. Even though the Respondent went to Kuwait during December 2008 the Appellant behaved in an indifferent manner and hardly spent quality time with the child when the Respondent stayed for a



period of 10 days there. Subsequently, the Respondent and the child visited Kuwait during May 2009 and he forced the Respondent to take up a job at Kuwait, even though the Respondent explained that it would be very difficult to take care of the needs of the child, if she goes for a job. However, the Appellant did not accept. The Appellant did not even allow the child to watch the television and he used sit and watch the television ignoring the child and he used to be more abusive with the child frequently. In view of the arrogant behavior and abusive nature, the Respondent was compelled to return to Chennai along with the child. In April 2010, when the Appellant visited India, he abused the child when they went for outing and consequently, the child stopped talking to the Appellant even though the Appellant tendered apology for his rude behaviour with the Respondent.

11.The Appellant went to the extent of filing the Writ Petition in W.P. No. 23961 of 2011 to direct the Regional Passport Officer not to renew the passport of the minor child by making false allegations, which fact was suppressed in the Petition. The Appellant went to the child's school in June 2011 and interacted with his class teacher. However, during August 2011, he went to the school and met the Headmistress and behaved rudely. He was cautioned and warned by the Headmistress not to step into the school campus. He also behaved rudely during his visit in August 2011 to the music school of the minor child and physically pulled the minor child and slapped him in front of other children putting the child to mental distress. Even though allegations are being made as if the Appellant father was denied access to the minor child, the Respondent always persuaded the minor child to interact with the Appellant. However, the child could understand the difference in the behaviour of the Appellant during the visit and told her he does not want to meet him. The Respondent has totally dedicated her life to the minor child in the interest of the child, the minor is properly educated and he is getting A1 grade on regular basis, apart from exhibiting interest in sports activities.

12.The child all along has been in the company of the Respondent mother and the Appellant used to visit and even during those visits, he used to be more abusive and arrogant and rude with the child and the Respondent. The Appellant does not show any interest on the child and therefore, the custody cannot be granted.

13.Based on the above pleadings and evidence, the Learned Single Judge dismissed the Petition holding that the child was studying in X standard and it was a crucial stage in the career of any child and he must be well prepared for the State and National Level Educational Competitions and he should not be



affected by the distress caused by eccentricities of the parents. Further, the Learned Judge held that the child has been studying in the same school for many years and the continuity of education in the same school would be in the interest and welfare of the child and therefore, dismissed the Petition holding that the mother is providing a very supportive role both at home and in school and guardianship of the mother has to continue, which would be in the best interest and welfare of the child. However, the appellant was given liberty to approach this Court by filing appropriate petition seeking visitation rights. Aggrieved over the same only, the present appeal has been filed.

14. Heard Mr. K.P.Gopalakrishnan, Learned Counsel appearing for the Appellant and Mrs. Rita Chandrasekar of M/s. Aiyar and Dolia, Learned Counsel appearing for the Respondent.

15. It is contended by Mr.K.P.Gopalakrishnan, without going into the pleadings and evidence, Learned Single Judge has not given any finding as to how the appellant is unfit to have the custody. He would rely upon the report of the Child Psychologist Mrs.Mohana Narayanan to contend that the child did not have anything to say in the negative about his father and therefore, the custody should have been given to the Appellant. The recommendations of the Child Psychologist was not followed by the Respondent. In the absence of any finding regarding bad character, which would disentitle him the custody, Learned Judge should have allowed the custody petition, it was argued. The following judgments have been relied upon by the Learned Counsel for the Appellant:-

- (i) N.Nirmala -vs- Nelson Jayakumar [(1998) 3 Law Weekly 626];
- (ii) Lekha -vs- P.Anil Kumar [(2006) 13 SCC 555];
- (iii) Nil Ratan Kundu -vs- Abhijit Kundu [2008(4) CTC 425];
- (iv) Athar Hussain -vs- Syed Siraj Ahmed & Others [(2010) 2 SCC 654];
- (v) R.Chandrasekaran -vs- C.Umamaheswari [CDJ 2010 MHC 5049];
- (vi) S.Anand @ Akash -vs- Vanitha Vijaya Kumar & Another CDJ 2011 MHC 2065];
- (vii) Sarah Vijayalakshmi and others -vs- Dr.J.D.Devadatta [2011 (2) CTC 372];
- (viii) Vadivel -vs- Umamaheswari [(2013) SCC Online Mad 3853];
- (ix) Roxann Sharma -vs- Arun Sharma [(2008) 7 SCC 673];
- (x) Roxann Sharma -vs- Arun Sharma [(2015) 8 SCC 318];
- (xi) K.M.Vinaya -vs- B.R.Srinivas [(2015) 16 SCC 405];
- (xii) Vivek Singh -vs- Romani Singh [(2017) 3 SCC 231];
- (xiii) Purvi Mukesh Gada -vs- Mukesh Popatlal Gada and Ors [(2017) 8 SCC 819]; and
- (xiv) Order of this Court in J.Meena -vs- T.Manikandan dated 17.02.2012 made in C.M.A. No. 1092 of 2015 etc.



Mr.K.P.Gopalakrishnan would also submit that there was no dispute between the Appellant and Respondent until the child was 9 years old and thereafter only, problems arose. It is the Respondent, who never lived in the house of the in-laws of the Respondent, who are above 70 years of the age and has not shown the child to the in-laws.

16.The trigger point for the problems between the husband and wife was taking the child to foreign countries without the consent of the appellant, which was questioned by him. During pendency of the Original Petition, the appellant was granted visiting rights and he was not allowed to see the child in view of the resistance of the boy to see his father due to tutoring and influence of the Respondent and her family members. Unless the child is taken away from the custody of the Respondent and her family, the child would not be normal. The appellant's contention is that the child could be put in a boarding school so that both can have access to the child. In the absence of any disqualification in law for the appellant, who is a biological and natural guardian, he is entitled to have joint custody of the child along with the Respondent. Further, the child could be counselled by a Psychologist to be guided to interact with the father to enjoy the love, affection and the company of the father/appellant.

17.Mrs.Rita Chandrasekar, Learned Counsel appearing for the Respondent would counter the arguments of the Appellant Counsel stating that

- i) the Appellant has not shown any interest towards the child as well as the Respondent.
- ii) the Appellant was always away from the family and not spent quality time with the Respondent and the child.
- iii) the Appellant was very particular that the Respondent should take up full time job in Kuwait, which was rejected by the Respondent in the interest of the child.
- iv) the Appellant was always abusive, rude, using filthy language and unparliamentary words towards the Respondent and the child.
- v) the Appellant used to pick up quarrels not only with the Respondent but also with her parents and he has not interacted with the child regularly.
- vi) the Appellant was informed about the foreign visit of the Respondent as well as the child.
- vii) the Appellant suppressed the fact of filing of the Writ Petition seeking not to renew the passport of the child.
- viii) the Appellant misbehaved with the child in the piano class and behaved rudely with the Headmistress of the School, where the child is studying.
- ix) the Appellant failed to act as a responsible father



23. It is evident from Ex.R8, which is an e-mail sent by the appellant to the respondent that the marital life of the parties was very happy till April 2010. In the cross examination of Respondent with reference to Ex.R8, the following are the question and answer:

"Q: Kindly see Ex.R8, the e-mail sent by you to Mr.Ramesh. In Ex.R.8, you have written "Why are you so sweet to me, are you pretending". Is it not?

A: Yes. I have written so in Ex.R8."

Therefore the contention of the respondent that right from the marriage, the marital life was not happy at the hands of the appellant falls to the ground. Misunderstandings and Quarrels are bound to occur and normal in marital life and it seems the parties are unable to adjust and withstand each other. In any event as already stated till 24.04.2010, the marital life was very happy.

24. Ex.P.43 and Ex.P.45, letters written by the respondent to the appellant speak about the love and affection and intimate relationship they shared with each other. Few lines from Ex.P.45 are extracted as follows, which would show that both the appellant and the respondent were leading a happy life.

"Daey Ramesh, What a feeling. Thanks for asking me to come over there to our place. I am really, really basking in your love and glowing in all the affection that you gave me"

Contrary to the above evidence, during cross examination, she denied that she was living happily till 2002 in K.K.Nagar house, as evident from the following portion:

"Q: You have celebrated Navarathiri function, Grehaprevasam in K.K.Nagar house and all of you were happy in 2002 and thereafter till your son was 9 years old?

A: I deny the suggestion."

Similarly she denied that the relationship between the appellant and the respondent was cordial till 2011 and the portion of the evidence are extracted as follows:

"Q: Till 2011, the relationship between you and your husband was cordial?

A: I deny the suggestion.

Q: Upto which year was the relationship was cordial?

A: The entire marital relationship was unpleasant, we never had cordial relationship."

"Q: Upto the time you left your matrimonial home till 2002 you have no complaint against your in-law's and your husband by you?

A: No."

Whereas the respondent adduced evidence contrary to the above answer in some portion, which reads as follows:

"Q: I put it to you that the relationship between you



and your husband and in-law's were cordial till the birth of the minor child?

A: No, it was not a cordial relationship both with my in-law's and with my husband."

Following is the evidence which has been answered by the respondent about Ex.P.45:

Q: Is a letter in your handwriting written to the petitioner and you have stated that you have love and very much and appreciated every moment of life with him?

A: Yes, I wrote.

25.The respondent lived with the appellant in his K.K.Nagar residence till the child was born on 06.12.2002 and thereafter, she had chosen to live in her parents house in Triplicane, eventhough the appellant's parents and the appellant are available there. In paragraph 7 of the proof affidavit of the respondent, she stated that on account of rude and bad behaviour of the appellant, she was forced to stay in her parents' house. Moreover, the reason given for staying in her place is proximity of the school in which the child was admitted. Therefore, it is evident that it is the decision of the respondent to stay back at her parents' house, and it will reflect upon her as to how she distanced herself from the appellant and how the child was kept away from the appellant. In her cross examination, the respondent adduced the following evidence:

"I stayed in my in-law's place with my husband for five years. I deny the suggestion that myself, my husband and my minor child were staying at my in-law's place at K.K.Nagar. From the birth of my child I am staying with my parents. In 2002 I came to my parents house for delivery, so I left my in-law's house in June 2002."

The above contradictory evidence given by the respondent would only denote that the respondent is not telling the truth.

On the contrary in paragraph 23 of the counter statement filed in OP.No.327 of 2012, the respondent stated as follows:

"Even when the child was taken to the petitioner's residence at K.K.Nagar, only his aged parents are residing there and the child does not have company. The school is a distance for him to commute due to present traffic situation. The petitioner's parents keep traveling to United States of America and Dubai frequently and they have also not been loving to the child."



The above statement made in the counter statement would prove that for the above reasons only the respondent voluntarily stayed in her parents house and not due to any dispute as alleged.

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26.The appellant was originally working in IDBI, Chennai. After the child's birth, from April 2003 onwards, the respondent had been living only in her parents place, eventhough the appellant was working in IDBI Bank, Chennai till July 2007.

27.It is the admitted case of the appellant and the respondent that the appellant used to visit the respondent's parents place for taking the respondent and their son for outing. Even after going to Kuwait, the appellant had been visiting the child as well as the respondent.

28.Eventhough the respondent would submit that when she and her son had visited Kuwait, the appellant did not take care of them, the evidence available on record shows that the appellant planned to get family Visa, so that they could stay along with him in Kuwait and for that Ex.P.7, bonafide certificate dated 17.11.2009 from DAV school had also been obtained from the school. If there had been no intention on the part of the appellant, the appellant would not have got bonafide certificate for his son, so that he could be admitted in a school in Kuwait. Ex.P.23, email sent by the appellant on 31.10.2008 would speak about copies of the Visa sent by the appellant to the respondent. Eventhough the appellant was in Kuwait he had been speaking to the respondent and the child and had been following what was happening in India, as evident from email dated 12.07.2010, where the appellant enquired about his son's health and also about the fever which was spreading in various parts of Tamil Nadu. The contents of the said email are extracted as follows:

"How is Mothi's health now? Has the vomiting stopped? Is there any progress in his health? Has he gone to school or is he taking rest at home. I saw the TV news bulletin yesterday about the fever spreading in various parts of Tamil Nadu. A quick response from you would be appreciable."

29.It is the specific case of the appellant that the appellant used to visit Chennai from Coimbatore in the weekends and take the respondent and the child for shopping and dinner. The said practice continued even during his overseas employment. He stated in paragraph 10 of the petition that he has been following the school authorities to know about his son's education. During 2009, he admitted his son in a famous music school for piano classes. All these things would go to show



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that as an affectionate father, he was showing love and affection, care and guidance to the child. It does not mean that the respondent is not affectionate. Both are equally affectionate towards their son. However, what is to be showered on the child together was done separately and parallelly, which is a disturbing factor.

30.The appellant contends that his relationship with the child was very normal till June 2011. When the appellant visited India last time, he spent happy times with his child like watching cartoon movies in theaters, visiting malls, shopping and dining. Though it is denied by the respondent that the appellant spent quality time with the child, there is nothing extracted from the appellant or proved by the respondent to contend that the appellant could not spend quality time with the child. On the other hand, evidence is available to show that the appellant was so affectionate to his son. As stated by the appellant, the child has been spending time with the appellant which is evidenced from Ex .P.39(s) Photographs.

31.The only incident which the respondent would point out is the rude behaviour of the appellant in the Piano class as the appellant directly enquired with the Piano master about the performance of the child. However, it is the duty of the appellant, as a father of the child to verify with the school authorities as well as from the music teacher about the performance of the child and nothing could be attributed for that. The problem with the child started from August 2011 onwards and access to the child was blocked thereafter. Even though there was rude behaviour on the side of the appellant, that cannot be a ground to deny access to the appellant. As a biological father, he is entitled to have company as well as access to the child. It should have been the duty of the respondent to convince the child to interact with the appellant. There was a failure on the part of the respondent.

32.Through Ex.R7, in 2010 the appellant recorded that the child is not speaking to him and requested the respondent to help him in resolving the problem. Following is the evidence of the respondent:

"Q: Kindly see Ex.R7, which was written by Ramesh in 2010. In the E-mail communication Ex.R7, Mr.Ramesh regretted stating that the child is not speaking to him and he requested you to help him in resolving the problem?

A: Yes."

It seems the dispute reached its peak only when the appellant wrote to the passport authorities and filed a Writ Petition to



cancel the passport of the child, as he learnt that four times, the child was taken to foreign countries without any information to him. As a father he should know where the child is, even though the respondent would contend that the appellant was already informed.

33. Taking the child to foreign countries is really a big event and as a biological father, the appellant should have been informed, though the respondent would contend that she took permission orally. No person would go to the level of filing a Writ Petition to cancel the passport of the child unless he is frustrated with the behaviour of the respondent in not informing him while taking the child out of the country continuously. He is an interested person and he should have been informed. Therefore, this Court has to accept the version of the Appellant. Again, there is a failure on the part of the respondent. Further it would prove that the appellant was kept in the dark about the travel plan of the respondent and the child.

34. Taking the child without the permission of the appellant was the main dispute for separation of the couple and filing of this proceedings. The respondent also filed petition for divorce and they already got divorced. Even while the child was taken to Tirupathi for tonsuring his head for the first time, the appellant was not informed about the same. The said allegation of the appellant has not been denied by the respondent in paragraph 17 of her counter statement. This is also an act which would violate the appellant's right as a father.

35. In 2003, the respondent went to London leaving the child in India, without informing the appellant about her travel plan. The above events would only indicate that the appellant was put out of decision making process regarding the child. The allegations made against the appellant that he was cruel and uncultured cannot be believed.

36. What is more surprising is that having lived with him, the respondent does not know whether her husband is a teetotaler, i.e., whether he takes alcoholic drinks or in the habit of smoking, as evident from the following evidence:

"I do not know whether my husband is a teetotaler. I do not know whether my husband takes alcoholic drinks.

Q: Was he has a habit of taking liquor?

A: He may be.

My husband drinks in a few parties. But I do not know whether he used to take drinks regularly.

Q: Did you drink along with him in parties at times?



A: I do not wish to answer this question.

Q: You must answer to my earlier question.

A: I should be cross examined only within the scope of the plea raised and not outside. Everything has been documented already.

I don't know whether he is in the habit of smoking."

Though she has stated that the appellant was not showing love and affection to the child, she has not pleaded anywhere in the pleading as well as evidence to show that the appellant is unfit to have the custody of the child, as he is a man of bad character and the same is admitted by the respondent in her evidence.

"Q: In the pleading in the proceeding before the Hon'ble Court, you have not mentioned that he is unfit to have custody of the child as he is a man of bad character, having the character of drinking, smoking and he is womanizer.

A: I have never made any such statement anywhere in my pleadings."

37. One more point to be considered is the report of the child psychologist Mrs. Mohana Narayanan, to whom the child was referred to for counselling by this Court. The psychologist recorded that the respondent admitted that the appellant was a very good father and would be very responsible and the trigger point for the divorce and custody case was regarding the cancellation of passport of the child alone. The relevant portion of the psychologist's report is extracted as follows:

"She also said that he was a very good father, would be very responsible and in fact he would take the child for all the vaccinations.

In the matter of the passport, which seems to have been the trigger for the divorce and the custody case, she mentioned that she had not kept the child informed about the issue, as 'he would be heartbroken'.

She claimed she had filed for divorce only after he filed for custody, as she now realized there was no future in the marriage. When I questioned her as to why they did not seek professional help, she side-stepped the question. This was surprising, as being a doctorate in psychology herself, professional help would have gone a long way in eliminating many disturbing elements."

It was observed that the child's demeanour and speech was very adult like, as he seems to have spent lot of time in the company of adults. His perception about his father, the psychologist



"Towards the end of the session, the child really opened up and appeared emotional when he spoke of his father. But he only had to speak about one incident, wherein he mentioned the cancellation of the passport, and the incident when the father had scolded him in a car, which even the mother had spoken about.

While travelling in a car, the appellant rudely scolded the child and that was one of the reasons why the child refused to contact the appellant, the respondent would contend. It is stated in the Ex.P.38 Psychologist report that the appellant scolded the child as he kept calling his uncle as daddy. Following is the relevant portion of the report of the psychologist:

Finally the psychologist opined as follows:

There could also be childhood depression, as the child seemed hopeless and helpless in the situation, and seemed to be living a dual life. Once the guard was off, he came across as a child, wanting to have fun, but being limited by the environment.

He did not have anything else to say negative about the father, except the car incident and the passport incident, and he had such vivid details about it, that what the mother claims as to have not given the child information seems doubtful."

<https://hcservices.ecourts.gov.in/hcservices/>



38. The above facts would prove the following:

- (a) The appellant has been very affectionate to his child.
- (b) Equally the respondent/Mother is also very affectionate, caring and loving.
- (c) The appellant was deliberately kept out of the following decision making process, concerning the child.
 - (i) Tonsuring the head of the child for the first time at Tirupathy.
 - (ii) Respondent visiting London during 2003, leaving the child in India, without information to the appellant.
 - (iii) Taking the child to the foreign country four times, without any information to the Appellant.
- (d) The respondent admitted in her evidence that the appellant is not a person of bad character and she also admitted that it is not her pleading in the case.
- (e) Access to the child has been blocked deliberately by the respondent from 2011 onwards.

Though the appellant made many attempts to have access to the child, it proved to be futile. Left with no other option only, the appellant has come before this Court, seeking custody of the child.

39. The learned single Judge after interacting with the child found that the child is very intelligent and having a vision regarding his future, even though the parents have got prejudices and tall egos. The learned Judge rightly took into account the interest of the child alone, while deciding the custody petition, opined that what is paramount is welfare and the interest of the child and not the rights of the parents under the statutes. Paragraph 6 to 10 are extracted as follows:

6. In this regard, Section 17 of the Guardians and Wards Act, 1890 is as follows:-

'17. Matter to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous



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relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

7. In *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840, this Court held that the object is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship. The Court further observed that 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. The Court also observed that 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 has, 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.

8. In *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, (1982) 2 SCC 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

9. In *Mausami Moitra Ganguli v. Jayant Ganguli*, JT (2008) 6 SC 634, it was held that "The principles of



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law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned."

10. In 2008 4 CTC 425 (Nil Ratan Kundu and another Vs. Abhijit Kundu), it was held that '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 custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing there from. But such cases cannot be decided solely by interpreting legal provisions. It is a humane 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 judgement, 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."

In the order, the learned Judge relied upon various judgments. Brushing aside the evidence on record, the learned Judge rightly took only the welfare of the child and observed that the child is to attain majority within a short period of 4 years and he has to prepare for facing the reality of life and therefore, the custody of the child with the respondent should not be disturbed; As the child was at the crucial stage in education, the learned single Judge was of the opinion that the child should not be mentally affected by the disturbance caused by the parents and any relocation of the child as well as relocation of



the child to any other school would certainly affect the child; Continuity of the education in the same school would be in the interest of the child and therefore, the appellant's prayer for shifting the child to a Boarding school was rightly rejected. Though this Court agrees with the learned single Judge with regard to the welfare of the child, for no fault of appellant, the appellant has been kept away from the child. This is the point which has to be taken into consideration.

40. When the matter was heard, this Court called both the appellant as well as the respondent and the child. Since the child was in the custody of the mother, the child developed animosity against the father as he visited the child's music class event, which according to the child was a disturbance. Taking note of the crucial stage of the child, the appellant already undertook not to visit the child, till the child completed XII Standard. It would only go to show that as a responsible father, the appellant does not want to establish his right over the child in the interest of the child. The father himself voluntarily had foregone his visitation rights till his son completed his XII Standard and NEET examination. The proceedings dated 14.08.2019 is extracted as follows:

"Both the appellant and the respondent are present along with their son. The father is convinced with the educational prospects of his son, though he has expressed certain reservations in the atmosphere in which the child is growing. 2. Further, taking into consideration that the child is going to write his +2 examination and NEET examination, the father himself volunteered to forego his visitation rights till his son completes his +2 and NEET examinations. The father would also submit that after the completion of those examinations, if his son wants to communicate to him or meet him, he is always at liberty to do so and the father has given his address and contact number to his son. 3. Call the matter on 11.09.2019."

41. It is not known whether the child has contacted the father or not. The way in which the child has treated the father, this Court is of the opinion that the child would not have contacted the father/appellant. The child requires both mother's love and affection and father's care and direction. However, in this case, because of the utter failure of the parents, especially, the respondent, the child is deprived of the father's care and guidance, even though mother's love and affection is available. It is very difficult even for responsible parents to groom a child in these days of distractions. However, even though the father is alive, the



respondent deliberately kept the child out of the reach of the father. This Court can only sympathise with the appellant for having been denied access to the child during child's formative years, even though he has exhibited his love and affection, care and guidance. When the respondent has been taking the child out of the country without any intimation to the appellant, the appellant was left with no other option except to file a Writ Petition to cancel the passport.

42. The Interest and welfare of the child is paramount as stated by the Hon'ble Supreme Court as well as by this Court. However, what is to be seen is whether welfare and interest could be served without the father's participation in the growth of the child and the only answer is "it cannot be". If a child grows being deprived of one of the parent's love and affection, definitely, it would not be a normal child and it would exhibit negative tendencies which is evident from the following medical research articles:

1. Parental Divorce or Separation and Children's Mental Health - World Psychiatry - 2019 Feb;18(1):100-101.
2. Effects of Divorce on Children's Health - Marripedia.
3. Experience of a child - Parent Separation and Later Risk of Violent Criminality - American Journal of Preventive medicine; 2018 Aug; 55(2):178-186.
4. Family Separation : How does it affect children? - The Journalist's Resource June 27, 2018
5. Children of divorce : Long Term Psychological Effects and Neurological Consequences - Diva-Portal, 2019

43. This Court agrees with the learned single Judge's finding that the child should be in the custody of the Mother as he has been continuously in the custody of the mother for years together and he has been studying in the same school right from admission and at the crucial stage, the child cannot be relocated in any other school.

44. Though in custody matters, the rights of the parties cannot be given importance and what is pertinent is only the interest of the child; however, the appellant's rights cannot be completely violated at the instance of the respondent. However, what has been done cannot be erased. Finally, the appellant is the victim and equally so, is the child.

45. It is the contention of the respondent that right from the beginning of the marriage, their relationship was not cordial and the appellant has been rude, uncultured, abusive, adamant and arrogant and if that had been so, being a well qualified psychologist, she should have avoided having a child. Educated persons like the Appellant and the Respondent should



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have understood their responsibilities before going for a child. Before the child is born, it is the life of the spouses to be enjoyed, but once the child is born, the life of the couple is only for the child which most of the parents forget and eventually many approach police stations and Courts for redressal. In the said process also, the children become victims. The mental trauma, agony, pain and sufferings suffered by the young child will have lasting effect throughout her/his life which cannot be erased.

46. Once the child is born, the parents should completely forget their rights, egos and devote their time only for the welfare of child. There are many couples who are without child and they are taking treatment for getting blessed with a child, spending lakhs together and that is the reason why, many fertility centres have come up throughout the country. When God/Nature has been so benevolent to bless the couple with a child, it is the combined responsibility of the couple to forget their egos and contain their prejudices in the interest of the child. It is the parents who have to introduce the World to the child and not the bad side of the father or mother. When other children are coming to the school with their respective parents, the agony and pain being suffered by single parent child to commute with one parent cannot be estimated and equally compensated. It is a violation of the child's right and human right.

47. This Court finds that the respondent is responsible for keeping the appellant in dark about the decisions taken regarding the child and for taking the child without the knowledge of the appellant to the foreign countries and also tansuring the head of the child without intimation and presence of the appellant at Tirupathi, which certainly violates the rights of the appellant as a father thereby denying the love, affection and care of the appellant to the child. Therefore, without disturbing the judgment of the learned single Judge, this Court only finds that the respondent is responsible for denying access to the appellant and violating the rights of the appellant. However, in due course, the child has become a major and it is for him to take a decision either to interact with the father or to go with the father or to remain with the mother and this Court cannot direct to do so, or take a decision in a particular direction. The Appellant is at liberty to pay for education of the child.

48. For having brought up the child, both the appellant and the respondent are equally responsible. Though the respondent is mostly responsible for the proceedings, the child has become a victim in the process. Therefore, both the appellant and the respondent have to compensate the child.



49. Gods have to be worshiped; However the Gods (Parents) have to be necessarily fined for letting down the child by not him bringing up together showering love and affection and giving clear guidance in the day today life. Hence, even though the sufferings and mental agony being suffered by the child cannot be estimated in terms of money, however, this Court directs both the appellant and the respondent to pay a sum of Rs.1,00,000/- (Rupees one lakh only) each to the child by depositing the same in the name of the child within four weeks from the date of receipt of a copy of this order. The appeal is disposed of with the above findings and directions. No costs.

50. This case should be an eye opener for all couples as to how children should not be victimized because of the issues between the parents and the spouses should take a decision before having a child as to whether it is possible for them to live together, after child's birth, adjust with each other, forgetting their prejudices and egos and withstanding each other, otherwise it is better not to have a child.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

Maya

To

The Sub Assistant Registrar,
Original Side, High Court,
Chennai-104.

+2ccs to Mr.K.P.Gopalakrishnan, Advocate, S.R.No.26653

O.S.A.No.282 of 2017

PVS (CO)
CS/11/10/2021