

CASE NO.:
Appeal (civil) 2863 of 2001

PETITIONER:
KUMAR V.JAHGIRDAR

Vs.

RESPONDENT:
CHETANA K.RAMATHEERTHA

DATE OF JUDGMENT: 18/04/2001

BENCH:
D.P. Mohapatra & Shivaraj V. Patil

JUDGMENT:

D.P. MOHAPATRA, J
L...I...T.....T.....T.....T.....T.....T.....T.....T..J

Leave granted.

The controversy raised in this case relates to the custody of a minor girl, Aaruni K. Jahgirdar, who, as stated by learned counsel for the parties, is about 6 years of age. The petitioner herein is her father and the respondent, her mother. The marriage between the spouses was dissolved by mutual consent on certain terms vide the order dated 17th April, 1999 of the Ist Additional Principal Judge, Family Court at Bangalore. The operative portion of the order reads : The petition is allowed;

a) dissolving the marriage between the petitioners dt.2.6.86 by mutual consent under the provisions of Sec.13-B of the Hindu Marriage Act;

b) appointing both the petitioners as joint guardians and custodians of their minor child, subject to conditions as at para 8(d) of the petition.

The conditions agreed between the parties which are relevant for the purpose of the present case, are extracted hereinbelow: 7. The parties have come to an understanding that they obtain decree of divorce by mutual consent.

8a. The Petitioners have full faith in each other with regard to safety and both are duly concerned about the welfare of the child. Keeping the welfare of the child as the paramount concern it is agreed that both the petitioners will continue to remain as joint guardians and the child should be shifted alternate 1 weeks. The child should continue to study at her present school only i.e., Sophia High School, Palace Road, Bangalore until she completes her 10th standard. She should not be admitted in any Boarding School, under any circumstances.

8b. Both the parties undertake that the child should be sent to the school regularly. The child shall not absent classes for whatever reason except under inevitable circumstances of ill-health.

8c. The Passport should be exclusively under the custody of the 1st Petitioner and the fathers name has to be recorded as legal guardian in her Passport until the child attains her Majority. The II Petitioner shall be given the passport whenever she wants to take the child abroad for holiday trips.

8d. Any petitioner settling outside the jurisdiction of this Honble Court i.e., Bangalore shall automatically loose the custodial right

8e. The custody of the child shall not be under any third party (friends or relatives care under any circumstances and at any point of time).

8f. All jewellery of the child should continue to be in HDFC Bank locker, Kasturba Road Branch, Bangalore and the locker fees shall be paid by the father and S.B.Account No.009123612 corresponding to this locker account should be maintained jointly, until the child attains reasonable age.

8g. All documents pertaining to minors account and records of the same should be maintained by the I Petitioner and should be operated by the I petitioner in the welfare of

the minor. The accounts opened by the II petitioner in the name of the minor shall be operated by the II petitioner.

8h. Both the parties undertake the safety and welfare of the child. It shall be the responsibility of the I petitioner to maintain all costs pertaining to the child's welfare.

After the marriage was dissolved by the decree of divorce, the respondent married Anil Kumble, a cricketer, who represents India in matches in and out of the country. After the case was disposed of by the Family Court, several rounds of litigations have taken place on the applications filed by the respondent seeking permanent custody of the child, permission to take the child to Australia, Europe and other foreign countries and orders were passed by the Court rejecting the prayer for permanent custody but permitting her to take the child abroad.

On the application filed by the respondent seeking permission of the court to take the child to Europe during the period 10.4.2000 to 10.6.2000, the Family Court by the order passed on 4th April, 2000 in M.C.No.1195 of 1998 ordered as follows: IA No.15 is allowed, on the following conditions:

1. The second petitioner is permitted to take the minor Aaruni to Europe for the period from 10.4.2000 to 10.6.2000 and the first petitioner shall hand over the passport of his daughter to the second petitioner;
2. It is further made clear, since the first petitioner is deprived of the company of his daughter during this vacation, the same is made good by permitting the first petitioner to have the custody of the child from 10.6.2000 till the end of December 2000, with a condition that during week ends, he shall hand over the custody of the minor Aaruni to the second petitioner, if she is in India;
3. It is also made clear during Dasara and Christmas vacation, the second petitioner will not have a right to take the child during vacation to any other place and during that period, the first petitioner will be under the care and custody of the minor child Aaruni.

No order as to cost.

The respondent challenged the said order before the High Court of Karnataka, in R.P.F.C. No.74 of 2000 which was disposed of by the Court vide the order dated 29th September, 2000. The operative portion of the order reads as follows: In the result, the petition is allowed, the impugned order is set aside with the following conditions.

1. The custody of the child will be given to the mother for a period of one year from the date of this order.
2. The Respondent shall deposit passport in the Court of the Principal Family Judge, at Bangalore.
3. The respondent is permitted to meet the child at every week ends between 9 a.m. and 9 p.m. and further permitted to take the child to his house on second and fourth Saturday of every month with the condition that he should bring back the child on the same day before 9 p.m.
4. The custody of the child shall be positively given to the petitioner by the respondent on or before 8th October, 2000.
5. Whenever either of the party wants to take the child abroad, the necessary permission should be sought for from the Principal Family Judge, Bangalore. Such order should be necessarily beneficial for the minor child.

The said order is under challenge in the present appeal filed by the father of the minor child.

At the outset, Shri Rohinton F.Nariman, learned senior advocate appearing for the respondent submitted that both the parties have filed separate applications seeking custody of the minor child, the applications are pending for adjudication before the Principal Judge, Family Court, Bangalore. In the circumstance, Sri Nariman submitted that this Court may not take any decision in the matter and direct the Family Court to dispose of the petitions expeditiously.

On the other hand, Shri S.S.Javeli, learned senior advocate appearing for the appellant contended that though the appellant has no objection for expeditious disposal of

the petitions pending before the Family Court, but this Court should clarify the position that the Family Court, while deciding the petitions for custody of the child, should not be influenced by any observation or finding made in the impugned order of the High Court.

We have heard learned counsel for both the parties at some length. We have also perused the order of the High Court under challenge. We are constrained to observe that the High Court in its approach to the case has ignored the well-settled principle that in a matter relating to the custody of a minor child, the interest and welfare of the child is the paramount consideration and not the convenience or pleasure of the parents. The learned Judge while stating the facts has observed that the petitioner (respondent herein) has married again whereas the respondent (appellant herein) has remained unmarried even after separation. He is a stock broker by profession and he is more prosperous, wealthy and affluent man with good financial background. After noticing certain decisions cited before him, the learned Judge observed in paragraph 11 of the order that while passing the order in case of custody of minor child, the paramount consideration is the welfare of the minor child. In paragraph 12, the learned Judge has observed: Admittedly he has not remarried. In event he had remarried, there could not have been any guarantee that the child could have been looked after well by the second wife. In paragraph 14, the learned Judge expressed the opinion that the condition 8a (quoted earlier) is not a healthy condition as it has lost sight of the fact that the welfare of the child is the paramount consideration. The learned Judge has expressed his views by saying that Merely there is a divorce and merely she has remarried again does not mean that she can afford to ill-treat her child. In paragraph 17 of the order, the High Court observed: the petitioner is although a divorcee, she is not doing any work, she has got all the time in the world to attend to the needs of the girl.

We do not intend to consider in-depth the merits of the case for the reason that both the parties have approached the Family Court with petitions seeking custody of the minor child. Suffice it to say that the High Court does not appear to have considered the welfare of the minor child in its proper perspective. Therefore, the order and the directions issued by the High Court should not influence the

Family Court while deciding the question of custody of the child. We dispose of this appeal by passing the following orders:

1. Custody of the minor child Aaruni will remain with the mother (respondent herein) till disposal of the petitions filed by the parties for custody of the child;

2. The father of the child, appellant herein, will have the right to visit his daughter or take her out between 10 a.m. to 8 p.m. on Saturday and Sunday every week. He may also keep the child with him overnight on a Saturday once a month with prior intimation to the mother of the child.

3. Till the disposal of the petitions filed for the custody of the child by the Principal Judge, Family Court, Bangalore, the mother will not take the child out of the country. If she is to go abroad at any time she will leave the child in custody of the father during her absence.

4. The Principal Judge, Family Court, Bangalore will dispose of the petitions filed by the parties for custody of the child expeditiously within a period of four months from today without being influenced by the observations and findings in the order passed by the High Court on 29th September, 2000 in R.P.F.C.No.74/2000.

5. The above arrangements will remain operative till disposal of the petitions filed for custody of the child by the Family Court, Bangalore.

This order is passed without prejudice to the rights and contentions of the parties in the proceedings for custody of the child which is pending before the Family Court, Bangalore.

The appeal is disposed of on the above terms. No costs.