

CHILD CUSTODY AND EFFECT OF NONCOMPLIANCE OF ORDER OF ACCESS

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Priscila Comino, conducted a study as part of her doctoral thesis in psychology at the University of the Basque Country (UPB/EHU) Spain, by using some of the yardsticks as syndromes like introversion, depression, attention problems or delinquent behaviour. She has stated that the poor handling of divorce by parents, rather than the act itself, causes additional behavioural problems for the children. It is not the divorce in itself that can lead to problems and children. It is the divorce linked to interparental conflict, a lack of co-parenting and an unsuitable family climate, inadequate co-parenting, changes in the child's daily routine or psychological problems of the parents themselves.

The worst affected victims of divorce are probably the children. The most traumatizing situation for a child is perhaps seeing one's parents getting separated. Being the constant witness to fights and an emotional turmoil among his or her parents is certainly an unfortunate circumstance for a child. As for a child, both of the parents are dear to him or her, being away from one of them can hamper his emotional state of mind severely. Hence, child custody and child support is an important affair in divorce that should be dealt with care to ensure a bright future for the child.

Child supported visitation rights also have a positive effect on the child. Due to frequent meetings with non-custodian parent will make him believe that he is still close to his parent. On receiving both the emotional and financial support from non custodian parents will certainly lead to a feeling that his parent still loves and cares for him.

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In matrimonial disputes there are several misconceptions on the issue of custody and visitation rights and guardianship. Custody implies the living of the child with one parent. Guardianship implies the proprietary rights over the child's person and property. In a traditional family it is the father who is favoured to be responsible with regard to the issues of proprietary rights of the minor whereas the mother is favoured with the issue of being a caretaker of the minor, but when there is a custody battle neither the father nor the mother are automatically given the custody.

Section 6 of the Hindu Minority and Guardianship Act, 1956 states that the natural guardian of a Hindu minor is the father and after him, the mother provided the minor has not completed the age of five years then the custody would be with the mother. Under section 6(b) in case of an illegitimate minor child it is the mother and after her, the father.

Section 26 of the Hindu Marriage Act, 1955 is the provision whereby a direction can be given for the custody of the child whilst passing a decree in any proceeding under the Act. The expression 'child' under section 26 of the Hindu Marriage Act covers both legitimate and illegitimate child.

The court can consider to whom the custody of the child should be given, but the court is not competent to appoint a guardian of the minor child whilst granting a decree of dissolution of the marriage.

Section 17 of the Guardians and Wards Act, 1890 describes about the guidelines to be considered consistently with law to which the minor is subject in appointing of the guardian, for welfare of the minor.

The Hon'ble Supreme Court in *Rosy Jacop v. Chakranukhal*¹ has held that the children neither are not mere chattel nor are they play things for their parents. The controlling consideration is the welfare of the child, and not the rights or sentiments of the party.

¹ AIR 1973 SC 2090.

The Hon'ble Supreme Court in the case of *Jai Prakash Khadria v. Shyam Sunder Agarwal*² has observed that the orders relating to custody of children are the very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody, but such change in custody must be proved to be in the paramount interest of the child.

A child always wants an ideal situation. It is not good for the child to live in a broken home. Hence, on the doctrine of best interest of the child in changed circumstances the issue of custody of the child can be modified from time to time.

As regards custody of the minor child there are bitter battles not only between parents but also between grandparents and/or father and grandparents. In *Jai Prakash Khadria*³, the paternal and maternal grandparents of the minor grandson played a tug of war for the custody of minor grandson, having utmost love and affection for him, and not with any oblique motive. The Hon'ble Supreme Court directed the maternal and paternal grandparents to invest Rs. 10 lacks in the name of minor grandchild, and allowed the custody to remain with paternal grandfather.

In the case of *Dinesh @ Syed Mohamed Sheik Sikandar and Ors. v. Jareena Begum*⁴ the battle was between father along with his father, and the maternal grandmother. The Hon'ble Madras High Court after interviewing the child, inquired about whether the father was having regular employment or not. In fact, child was put in a school and she was in healthy condition and proper medical care was also given and there was no allegation of any ill treatment to the child. Hence, the Court awarded custody to the father.

In the case of *Anjali Kapoor v. Rajiv Baijal*⁵ the facts were: A female child was born on 20.5.2001 and the mother of the child died at the time of delivery. The child

² AIR 2001 SC 1056.

³ *Ibid.*

⁴ II (2011) DMC 550.

⁵ II (2010) DMC 595(SC).

was taken from the hospital by the material grandmother. Questioning the same, the father sought custody of the child being the natural guardian, in the Family Court. The Family Court rejected the application of the father on the ground that the father was not in a good financial position, and he was taking loans from several persons including the maternal grandparents of the child. The same was reversed by the Madhya Pradesh High Court. The matter was taken to the Hon'ble Apex Court. Ultimately, the Hon'ble Apex Court allowed the appeal, and vested the custody in favour of the maternal grandmother observing that: "Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute, and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the Appellant grandmother for a long time, and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the Appellant to retain the custody of the child."

The issue of custody gets complicated when parents are living in a foreign country. Disputes arise, and one of the parent with the child returns to India. The issue then arises which court has got jurisdiction, and if there are orders passed by the foreign court then, what are its implications.

As regards territorial jurisdiction, the Apex Court in the case of *Pooja Bahadur v. Uday Bahadur*⁶ has observed about where the child ordinarily resides. It is very important to understand the meaning and definition of the word and phrase 'ordinarily reside'. The said meaning and definition has been discussed by the Hon'ble Supreme Court in the case of *Ruchi Manjoo v. Sanju Manjoo*.⁷ It was held that the expression 'ordinary resides' would imply something more than a flying or a casual visit to a particular place. A person resides in a place by choice makes it his abode permanently or even temporarily depends upon the facts of each case. The intention to make that place where the person resides

⁶ AIR 1999 SC 1741.

⁷ II (2011) DMC 317(SC).

once ordinary abode can be considered ordinarily resides at a particular place.

The Principle of Comity Court was also considered in the said case by the Apex Court 1 reproduce the paragraph from the judgment as follows: “Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of section 13 of the Code of Civil Procedure, 1908 as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity, and not object surrender, is the *mantra* in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive, and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plenitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.”

Further it has been held that: “This principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is the entire more so where the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Case of *Dhanwanti*

*Joshi and Sarita Sharma*⁸ respectively also supported the said proposition”.

The Hon’ble Delhi High Court in the case of *Deepti Mandla v. State (Govt of NCT) and Anr.*,⁹ wherein facts briefly were that a petition was filed on behalf of the mother for the issuance of a writ of *habeas corpus* directing the father to produce the minor child before the Court and to handover the custody to her, the mother. Both the parents were working as software professionals in Canada since 4.4.2009. Father and child both are Indian citizens. With the consent of mother, child along with his father came to India on a visit. Father decided not to go back to Canada and got the child admitted in a school in Noida. He also filed a petition under section 7 of Guardians and Wards Act, and section 6 of the Hindu Minority and Guardianship Act before the Patiala House Court, New Delhi to appoint him as a sole guardian of the minor child. Notice was issued to the petitioner mother regarding the custody of minor son, and as a term of the custody order the father shall bring back the minor son to the jurisdiction of the said Court forthwith. On 14.8.2010 respondent father received copy of petition as well as copy of the said Order dated 11.8.2010. On 6.9.2010 the mother/petitioner filed the present writ petition. The Hon’ble High Court observed that the principles of Comity of Courts did not help the mother as the child was born in India; no courts in Canada were already in session of the custody case. The issue of child must always be addressed from the standpoint of the child, and much attention to the right of the parents to custody should not be given. A paragraph is reproduced: “An issue of custody of a minor is actually a facet of the minor’s right to life guaranteed under Article 21 of the Constitution of India. Irrespective of anything, the courts have to look after the interests of the minor, and not let themselves to be sucked into the ugly battles of the minor’s parents. It is not so much a question as which parent deserves to gain custody of the child as it is a question of which parent’s care is best for the child.”

Considering all the judgments, there is one principle *i.e.*, the first and paramount consideration is the welfare

⁸ 1998(1) SCC 112 and 1(2000) DMC 413.

⁹ II (2011) DMC 176 (DB).

of the child. While considering the same, the custody can be handed over to either of the parent, or even the grandparents depending upon the facts and circumstances of each case.

The Hon'ble Supreme Court in the case of *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashankar Joshi*¹⁰ has observed that: "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, a court of law should keep in mind the relevant statutes and the rights flowing interpreting 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, ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comfort, 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."

In the case of *Anjali Kapoor v. Rajiv Bajjal*¹¹ it has also been observed that welfare of child prevails over legal rights of parties while deciding custody.

In the case of *Lakha v. P. Anilkumar*¹² the Hon'ble Court has observed that remarriage of father cannot be a ground for not granting custody.

It is normally considered that the girls require guidance of their mother and hence merely because the mother is working lady she should not be refused custody of the female child. This is observed in the case

¹⁰ 1992(3) SCC 573.

¹¹ 2010(1) Mah L J 2(SC).

¹² 2007(1) DMC 57(SC).

of *Thirty Hoshiae Dolikuka v. Hosiam*.¹³ Inhere the Hon'ble Supreme Court has recognized mother being the equal natural guardian on par with father, and in absence of father can act validly on behalf of the minor as her guardian. For the court to consider refusal of custody, the grounds could be cruelty or immorality or renouncing the world, or ascetic.¹⁴

As stated in foregoing para father is the natural guardian of a Hindu minor. But there being changes in social and economical environment in the society, the women have progressed and are in equality with men in all aspects.

The new emergent trend between the couples is that they are agreeing to joint custody of children despite their own differences. This is a favourable approach in the western country to handle the issue, and is also emerging and being considered in the metro cities. Joint legal custody of a minor child enables both the parents to take all major decisions jointly including decisions of the child's education, religion, medicine, discipline, upbringing, and all plans for the future with both the parents considering the best interest of the child. As the child needs to grow in a healthy environment with the involvement of both the parents, sharing parenting time is important more so for the child, rather than the couple. Giving the custody of the child to one parent, and making the other just a visitor, creates distances in a healthy relationship, and not fair to the child; the exceptional cases where one parent is abusive or alcoholic then the custody to one parent is justified.

Maintenance of successful families and communities, are entitled to legal recognition and protection.

Visitation or access rights are granted to non custodial parents or other relatives allowing them to visit and spend time with their child or grandchild. Visitation and custody governed by the same principle, and are closely interlinked.

¹³ (1982) 2 SCC 54.

¹⁴ *Geeta Hariharan v. R.B.I.*, AIR 1999 SC 1149.

Order should be specific, and then it becomes easier for the parties and the court to know the rights of the parents with visitations.

A copy of the order of visitation rights to be sent to the school by the court for the non-custodial parents to participate in the various functions and programmes of the school concerning the child and learn the progress of the child.

If either parent violates or access order then the Bombay High Court in the case of *Vinodchandra v. Anupama*¹⁵ has observed that: “When the husband fails to pay maintenance as per orders of the court, even if interim order, the application of husband for custody or access to child can be stayed till such time arrears are paid.”

Can the right of the child to enjoy the company of his father be equated to the maintenance amount not being paid? No doubt this is one of the measures to discipline the father, and punish him that if he cares for his child he must pay maintenance. On the other hand in spite of the father paying the maintenance the custodian parent mother does not bring the child for access to the father. Due to vengeance against each other the couple uses the child, and he becomes the victim. Can competent court be a silent spectator? Measures have to be evolved to protect the rights of the child to enjoy his parenthood irrespective of the respective indifference between his parents. In USA, they draw up a parenting plan or custody agreement if either parent violates a visitation order, the parent in violation can be held in contempt of court, and fined and jailed until he/she agrees to comply with the order. If the non-custodial parent fails to return the child to the custodial parent and keeps the child for long period of time even after the custodial parent has demanded the child, the non-custodial parent can face criminal charges.

In our State, we have access/visitation rights given to the non-custodial parent to the Children Complex situated in the court complex, or with the consent of both

¹⁵ AIR 1993 Bom 23.

parties suiting the convenience of the child at the nearest N.G.O. Office, where such facility is available, and where the rapport between the child and the parent is very cordial, the non-custodial parent take the child with his at a specified time and place, and returns the child at the specified time and place to the custodian parent.

The wife held that children did not want to meet the father hence she was not liable and had not willfully defaulted the order. After considering all the facts on record the Court observed that the wife had willfully breached the order of access and had consistently defaulted in bringing the children as directed to Children Complex.

In Para 22 the Court held that the report of the Child Counselor is must, as the facility is provided in Family Court. In Para 23 it has been observed that in the normal course it is a correct order to struck off the defense of the wife. The Court in Para 26 held that in an order of access of a child to his father which would require to be effectuated not to grant father any 'rights' he may claim, but to grant the child the invaluable right of having his father's care and affection, the wife deserves to be given one more opportunity to mend her ways to allow the child access to the father by herself, not interfering therewith directly or indirectly. The Court gave direction to the wife to attend the Child Counselor to decide the venue, so also the husband and the wife to get the children for access at the said venue, and leave the premises of the mentioned date and time. Thirdly, if she did not follow the direction then her defense to be struck off.

This judgment gives stimulation for a deep thought process. It, therefore, needs to be considered that though technically one need to pass an order, but whether the interest and welfare of the child will be protected.

In the event of noncompliance by the party directed to act, custody orders are enforceable by the remedies generally associated with equitable, injunctive or coercive court orders.

The selection of remedy and imposition of sanctions by the court in each is depended on the circumstances of

the family, the nature of the parenting plan violations, and the remedial goals set by the court. The first test is whether the custodian parent had willfully disobeyed/violated the order of the court if not was there a good cause for withholding the child.

Margaret M. Mahoney¹⁶, in her article, *The Enforcement of Child Custody Orders by Contempt Remedies*, has stated various remedies for violation of a court order. They are as follows:

- The custodian parent should be sent for a day of two, to a community centre like hospital, orphanage, old age home, municipal school, juvenile centre, etc.
- A working parent can be punished by suffering simple imprisonment on weekends/holidays.
- There can be an order of court arrest for a day/days depending upon the period of disobedience.
- Temporary shift of custody.
- Compensation of access for the loss of time to be spent with the child.

Lastly, one would also like to mention about the case of two minor children, Aishwarya, then five months old, and Abhigyan, then two years old, which had been handed over to different foster houses, by the Norwegian court. The natural parents were allowed to meet their children only once in a year for one hour, on considering the facts that the mother over-fed the children, she fed with her hand, and that the son slept with his father, which are perfect normal acts in an Indian family life. It reflects the Indian culture. This culture and behavior is alien to the Norwegian Government, and they have their own moral yardstick.

On learning the facts of this case there does not appear to be any abuse or mal-treatment of the children.

¹⁶ Professor of Law, University of Pittsburgh, Pennsylvania, United States.

By keeping the children in different foster homes at that tender age, away from their natural parents till the age of 18 years, would traumatize them. It is incredible that a State can infringe on the personal affair of a family to such an extent that the relations between the children and their natural parents are broken down, and between the siblings snapped. The children, being separated from their natural parents, are not beneficial as it is not in their interest and welfare. It could amount to gross violation of human rights and the rights of the child to enjoy his parenthood with the natural and be rooted to the culture of his family.

To conclude there is one principle of paramount consideration, *i.e.*, the welfare and interest of the child is of prime importance irrespectively wherever he resides. The same is supported by child welfare laws. The issue of custody and access are dependent upon the facts and circumstance of each case. The court order is to be specific so that the rights of the parent as regard visitation are clear. If the same is disobeyed then the court has to select a remedy and impose the same in order to reinforce the credibility of the courts, and a general attitude of public deference to judicial authority.