

Arun Vs. Roxann Sharma

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Court : Mumbai Goa

Decided On : Aug-02-2014

Judge : F.M. Reis

Appeal No. : Writ Petition No. 79 of 2014

Appellant : Arun

Respondent : Roxann Sharma

Advocate for Def. : Mr. Noel Dias Sapeco

Judgement :

Oral Judgment:

1. Heard Mr. Sudin Usgaonkar, learned counsel appearing for the petitioner and Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent.
2. Rule. Heard forthwith with the consent of the learned counsel and at their request to hear finally.
3. Mr. Noel Dias Sapeco, learned counsel for the respondent waives service.
4. The above Writ Petition inter-alia seeks to quash and set aside an order passed by the learned Civil Judge Senior Division, Margao, dated 31.01.2014 in Matrimonial Petition No.59/2013 whereby an application for interim custody filed by the respondent came to be allowed and the respondent who is the mother was

given interim custody of the male child with visitation rights to the petitioner herein.

5. Before I proceed to examine the rival contentions, the brief facts of the case relevant for the purpose of deciding the above Writ Petition are that the petitioner and the respondent were married in U.S.A. and out of their wedlock a child was born on 18.04.2012 in U.S.A. The petitioner and the respondent thereafter returned to India and were residing in Mumbai in the company of the mother of the petitioner. The record further reveals that there were differences between the petitioner and the respondent concerning marriage and ultimately the petition came to be filed before the learned Civil Judge Senior Division, Margao, under Section 6 of the Hindu Minority and Guardianship Act, 1956 for guardianship and custody of the minor child. It was the case of the petitioner therein that the child was in the custody of the petitioner from the time he had come to India and according to him in view of some difference between the respondent and his mother he had come to live to Betalbatim, Salcete Goa. It is further his case that in January, 2013, the respondent proceed to U.S.A. and the child was left with the petitioner.

The record further reveals that the respondent thereafter returned back to India somewhere at the end of March, 2013 and lived for sometime in the house at Betalbatim. It is further his case that thereafter the respondent left from Mumbai for U.S.A. in April, 2013 and returned to India in June, 2013 and thereafter, she initiated proceedings under the Domestic Violence Act, in the Court at Mapusa. The respondent was served with summons in the proceedings and a written statement was filed by the respondent. In the said proceedings before the learned Trial Court, an application for interim relief was filed by the petitioner inter-alia restraining the respondent from forcibly taking the custody of the child from the petitioner. In the meanwhile, the respondent filed an application in October, 2013 in the said suit for interim custody of the minor baby boy. The record further reveals that by an order dated 20.11.2013, the learned Judge granted the relief inter-alia restraining the respondent from forcibly taking the child from the custody of the petitioner. The application for interim custody was opposed by the petitioner and by the impugned order dated 31.01.2014, the interim custody was ordered to be given to the respondent herein. Being aggrieved by the said order, the

petitioner has preferred the present petition.

6. Mr. Sudin Usgaonkar, learned counsel appearing for the petitioner has pointed out that once the learned Judge has taken a view that the custody of the minor child could not be taken forcibly from the petitioner the question of examining the interim custody on the application filed by the respondent is an erroneous exercise of jurisdiction carried out by the learned Judge. The learned counsel has further pointed out that as from January, 2013, the minor child is in the custody of the petitioner. The learned counsel further pointed out that the respondent had proceeded to U.S.A. in January, 2013 in connection with her job and as from the said date, apart for a short period in the month of April, 2013, when she had returned to India, the minor child was always in the custody of the petitioner. The learned counsel further pointed out that the child is being looked after by the petitioner with the assistance of his mother and as such there are no grievances as far as the care being shown by the petitioner to the child. The learned counsel further pointed out that it is well settled that as far as custody jurisdiction is concerned, what is important is the welfare of the child. The learned counsel further pointed out that considering that the child was in the custody of the petitioner for all this while the question of changing the custody at this interim stage would be totally traumatic to the child. The learned counsel further pointed out that the respondent according to the petitioner was subjected to a medical examination by a psychiatric who has opined that she is suffering from a bipolar ailment which would affect any relationship between the respondent and the child.

The learned counsel further pointed out that the petitioner has also brought on record the instances showing the attitude of the respondent to the child during their stay in U.S.A. and according to him there was an incident stated in the reply that the respondent had even attempted to commit suicide. The learned counsel further pointed out that though the proviso to Section 6 of the Hindu Minority and Guardianship Act, 1956 (herein after referred to as the Act of 1956) provides that ordinarily the custody of a child below the age of 5 years is to be given to the mother, nevertheless, what is important is the welfare of the child and not the right to the parties under the Statute. The learned counsel thereafter has taken me through the impugned order and pointed out that the learned Judge has failed to

consider this aspect and has proceeded to grant the custody to the respondent only on the basis of the proviso to Section 6 of the said Act of 1956 and that the child of such tender age require the lap of the mother. The learned counsel further pointed out that this consideration would be immaterial at this stage as according to him what is to be examined is whether any case is made out by the respondent to change the custody of the child at this interim stage. The learned counsel further pointed out that the child is happily looked after by the petitioner and as such the question of changing such custody at this stage is totally unjustified. The learned counsel has thereafter pointed out that the respondent is the citizen of U.S.A., and has stated in her application that she is a permanent resident of U.S.A. and does not have any permanent resident in this country.

The learned counsel has taken me through the impugned order passed by the learned Judge and pointed out that the learned Judge has not at all examined the well settled principles of law to be considered at the time of granting interim custody of the child. In support of his submissions, the learned counsel has relied upon AIR 2004 SC 1525 in the case of Kumar V. Jahgirdar Vs Chethana Ramatheertha and taken me through the observations of the Apex Court at para 17 of the said judgment to the effect that there is no generalisation that the custody of the child has to be with the mother. The learned counsel also relied upon the judgment of the Apex Court reported in (2008) 7 SCC 673 in the case of Mausami Moitra Ganguli V/s Jayant Ganguli, and pointed out para 26 of the said judgment to advance his contention that the welfare of the child is only important aspect to be considered at this stage. The learned counsel as such points out that the impugned order deserves to be quashed and set aside.

7. On the other hand, Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent has supported the impugned order. The learned Senior Counsel has pointed out that the learned Judge has rendered a well reasoned order to come to the conclusion that the interim custody is to be given to the mother, the respondent herein. The learned Senior Counsel further pointed out that the learned Judge has discarded the contention of the petitioner that the respondent is suffering from bipolar ailment as such certificate has been manipulated by the petitioner from a doctor who is a private practitioner. The learned Senior Counsel further pointed

out that the learned Judge has rightly discarded the said document and as such the question of examining the correctness of the said findings by this Court is not at all justified. The learned Senior Counsel further pointed out that in terms of the proviso to Section 6 of the said Act of 1956, there can be no doubt that up to the age of 5 years the custody of the minor child has to be with the respondent. The learned Senior Counsel further submitted that the learned Judge has rightly appreciated the evidence on record and has come to the conclusion that the child of such tender age require the lap of the mother and as such the interim custody of the child has to be with the respondent. The learned Senior Counsel has thereafter taken me through the impugned order passed by the learned Judge and submitted that the learned Judge has examined the well settled principles of law by relying upon different pronouncements of the Apex Court as well as the High Court to come to the conclusion that the interim custody is to be given to the respondent. The learned Senior Counsel has relied upon all the judgments referred to by the learned Judge in the impugned order.

8. I have thoughtfully examined the submissions of the learned counsel and I have also gone through the records. The application filed by the respondent for interim custody would have to be examined in terms of Section 12 of the Guardian and Wards Act, 1890 (herein after referred to as said Act of 1890) taking into consideration the provisions of Section 2 of the said Act of 1956. The Court is empowered by this Section to direct the temporary custody of the minor child during the pendency of the proceedings for guardianship or permanent custody. The controlling consideration governing interim custody of the child is the welfare of the child and not the rights of their parents. As such, the sole consideration to be weighed by the Court is what would be good for the paramount welfare of the child and nothing else. The Court will also have to be examined what prejudice would occasion to such welfare by not changing the custody which is in existence at the time of the filing such application. To consider these aspects, the Court takes into consideration several factors such as the child's immediate environment and surrounding emotional security provided by those who have their custody and what would be conducive for the child to try and grow and become a good human being. The law with regard to granting of interim custody of a minor child has been exhaustively examined by the High Courts as well as the Hon'ble Supreme Court.

Whenever there are conflicting demands of the parents the Court does not look into such claim on legalistic basis but takes the decision considering the welfare of such child.

9. In this connection, the Apex Court in the judgment reported in (2010) 2 SCC 654 in the case of Athar Hussain V/s Syed Siraj Ahmed and others has observed at paras 30 and 37 thus :

"30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper". (emphasis supplied) In matters of custody, as well settled by judicial precedents, the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the court to make any order as it deems proper."

"37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in Mausami Moitra Ganguli v. Jayant Ganguli. This Court held: (SCC pp. 679-80, para 24)

"24. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

"After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed: (Mausami Moitra case, SCC p. 680, para 26)

"26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father

with visitation rights to the mother deserves to be maintained." (emphasis supplied.)

10. In another judgment of the Apex Court dealing with interim custody reported in (2001) 4 SCC 71 in the case of R.V. Srinath Prasad V/s Nandamuri Jayakrishna and others has observed at paras 10 and 11 thus :

"10. At the outset, we would like to observe that it will not be fair and proper for us to delve deep into the merits of the case since the petition filed for custody of the minor children is pending before the Family Court at Hyderabad and any finding recorded or observation made by us in this proceeding may prejudice the parties. Therefore, we will try to avoid entering deep into the merits of the case as far as possible. On a perusal of the judgment/order passed by the Division Bench, we are constrained to observe that neither the manner of disposal of the proceeding nor the order directing the change of custody of the children from their father to their maternal grandparents can be supported. The Division Bench appears to have lost sight of the factual position that at the time of death of their mother the children were left in custody of their paternal grandparents with whom their father is staying and the attempt of Respondent 1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

"It is relevant to state here that Respondent 1, maternal grandparents, wanted immediate custody of the minor children for the purpose of performing certain obsequies in connection with the cremation ceremony of their deceased daughter and that purpose had been served by the order passed by the learned Single Judge and such necessity for interim custody had ceased when the Division Bench passed the judgment/order under challenge. On the materials on record we

are not satisfied that there was any urgency in disposing of the case with such haste without affording reasonable opportunity to the appellant to place material on record. The procedure followed by the High Court is neither fair nor proper."

"11. The High Court appears to have overlooked the settled principle that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In a sensitive matter like this no single factor can be taken to be decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the court. Here we may refer to the decision of this Court in *Jai Prakash Khadria v. Shyam Sunder Agarwalla*. In such matters usually, courts while granting the custody of minor children to one party extend the facility of visiting them to the other. At the cost of repetition we may state that we are not discussing the merits of the case pleaded by the parties in detail since the application for custody is pending for adjudication before the Family Court at Hyderabad."

11. Keeping in mind the observations of the Apex Court as referred to herein above, I will now proceed to examine the rival contentions which led to change the custody from the petitioner to the respondent. As pointed out herein above, the record reveals that on 20.05.2013 the petition came to be filed by the petitioner under Section 6 of the said Act of 1956. Upon service of summons, the respondent filed her written statement on 02.08.2013 after being served on 28.06.2013. Thereafter, on 31.10.2013, the application for interim custody was filed by the respondent which was opposed by the petitioner wherein the impugned order came to be passed. It is also to be noted that prior to passing of the impugned order, on 28.11.2013 the application filed by the petitioner was granted inter-alia restraining the respondent from forcibly taking possession of the minor child from the custody of the petitioner until further orders. The learned Judge while passing the impugned order has come to the conclusion that the question of res judicata against the application under consideration would not arise. The learned Judge has further found that the marriage between the petitioner and the respondent is subsisting and taking note of the provisions of Section 6 and Section 13 of the said Act of 1956 took a view that under the said Act of 1956 the custody of the Hindu minor who has not attained the age of five years was ordinarily with the mother

and that the welfare of the minor shall be paramount consideration. The learned Judge also found that the provisions of law as far as the custody of child of tender age is in favour of the respondent/mother. The learned Judge further found that the Judge made law is also in favour of the mother. The learned Judge further noted that as the mother developed affection to the child she has first right over the child. The learned Judge also noted that the father cannot be equal to the mother nor substitute for the mother.

The learned Judge also noted that except in exceptional circumstances the child cannot be separated from the mother. The learned Judge took note of the allegations of the petitioner that she was suffering from bipolar disorder and found that there is no definite medical precedent that the person suffering from tantamount bipolar disorder is disqualified to hold the custody. The learned Judge also noted that the allegations put forward by the respondent that the petitioner was alcoholic and drug addict have to be proved only on merits and that they are not disqualifications to hold the custody except against the mother. On these considerations, the application came to be granted and the custody was ordered to be in favour of the respondent. On perusal of the above observations, I find that the learned Judge has failed to take note of the material and the consideration as enumerated by the Apex Court while dealing with change of custody at the interim stage. In the present case, as pointed out herein above, it is not disputed that from January, 2013, up to this date the child was in the custody of the petitioner except when the respondent returned in March, 2013 and again left in April, 2013 to return from U.S.A. again in June, 2013 since when the custody dispute is pending. When the respondent left India to go to U.S.A., in January, 2013 the respondent did not feel that by keeping the minor child with the petitioner it would in any way jeopardize or affect the welfare of the child. The petitioner in his reply to the application filed by the respondent for interim custody has inter-alia contended that the respondent had abandoned the child in January, 2013 and proceeded to U.S.A., and has also given details about the difference between them about the manner of taking care of the child when they were earlier residing in U.S.A.

12. Apart from that, the material on record produced by the petitioner suggests that the respondent is suffering from bipolar disorder. A medical certificate has

been produced by the petitioner to substantiate the said contention. The learned Judge has rejected the said document on the ground that it was obtained from a private doctor. The respondent did not produce any document to rebut the certificate produced by the petitioner. Apart from that, the respondent does not dispute that in fact she had accompanied the petitioner to the said doctor. The opinion of the doctor in such circumstances cannot be brushed aside merely because he is a private practitioner. Besides that the petitioner has made averments on affidavit about some specific instances that there was some neglect of the child during their stay in U.S.A. It is also to be noted that in the document produced by the respondent, there is a report from 'Pasadena Women's Medical Group' which is dated 25.11.2013 wherein there is a observation that the respondent had stated that her husband believes that she was exhibiting signs of postpartum depression. It further states that she expressed some fearfulness and anger about the move to India. The respondent was referred to mental health professionals to help her adjust to the changes occurring and to possibly help with communication with her husband. The report also finally suggest that the respondent did not want to do any harm to the child. This report coupled with the medical certificate produced by the petitioner would have to be proved during the course of the trial for guardianship/custody of the minor child. Suffice it to say that these are matters which have to be borne in mind while examining the case of change in custody at the interim stage of the proceedings.

Apart from that, it is also to be noted that the child is now used to a particular environment and to a particular set up in the house belonging to the petitioner. It is not in dispute that the petitioner is an Indian National and a permanent resident of India. The petitioner also owns a residential house at Betalbhatim, Salcete Goa. The child is also with the paternal grandmother in Goa as well as in Mumbai. On the other hand, the respondent is an US National having American citizenship. The respondent also admits that she has no permanent residence in India. The respondent has also not disclosed any address of a fixed place where she resides in Goa. In such circumstances, it was incumbent upon the learned Judge to examine whether the change of environment and custody would be beneficial for the welfare of the minor child. The learned Judge has not at all taken note of this aspect while passing the impugned order.

13. In this connection, the Apex Court while dealing with a petition under Article 32 of the Constitution of India and deciding the case of interim custody claimed by the mother by relying upon the provisions of Section 6 of the said Act of 1956 in the judgment reported in (2000) 9 SCC 745 in the case of Sumedha Nagpal V/s State of Delhi and others has observed at paras 4, 5 and 6 thus :

"4. Even at this stage, Shri D.D. Thakur, the learned counsel for the petitioner laid great emphasis that we should not shirk our task at least with respect to the limited question of ordering restoration of the custody of the minor child to the mother. He submitted that though Section 6 of the Act recognises guardianship of the minor child with both the parents, exclusive right of the mother is recognised in respect of the custody of a minor child below five years. This legislative recognition of the maternal instinct should be honoured by us by treating the custody of the child with the father as illegal and the custody should be handed over to the mother pending the proceedings suggested by us earlier in the course of this order."

"5. In deciding such a question, what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. In the pleadings and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D. Thakur as to grant of interim custody to the petitioner, we should not be understood as having held that a petition would lie under Article 32 for grant of custody of a minor child; we refrain from examining or deciding the same."

"6. Before parting with the case, we cannot but express our deep anxiety over the matter. No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child and we do hope that in this case the petitioner and Respondent 2, the parents, would realise what their responsibility should be and set right their broken home for the sake of their child."

In the above judgment which was also dealing with the case of interim custody in similar circumstances, the Apex Court was examining the claim by the mother for interim custody of a child less than five years. The facts therein also disclose that there were also allegations in the said case that the mother had abandoned the child for more than six months as on the date of the said order. In the background of the such facts, the Apex Court took note of the fact that the child was in the custody of the father for more than six months and that changing the custody at the interim stage would be harmful to the welfare of such child. The Apex Court also noted that Section 6 of the said Act of 1956 would not in any way militate against the welfare of the child. In such circumstances, considering that the respondent herein has not made any averment in the application for interim custody as to how the welfare of the child would be prejudiced in case the custody continues with the petitioner, the question of granting any interim custody without any cogent material to that effect is not at all justified. Hence, the question of disturbing the custody from the petitioner without any adequate cause and unless there is sufficient material to establish that keeping the child in the custody of the petitioner till the Court finally decides the dispute of such custody would be detrimental to the welfare of the child, the question of changing the custody at this interim stage would not be appropriate.

The learned Judge while passing the impugned order has essentially examined the welfare of the child in the background of the provisions of Section 6 of the said

Act of 1956 and the fact that the child would require the lap of the mother. These considerations by itself as observed by the Apex Court would not give rise for any change of custody at the interim stage unless the respondent has brought cogent and material evidence to establish that the welfare of the child is at a peril in case the custody is not changed at the interim stage. This would have to be examined in the context that the learned Judge had already passed an order in the interim application filed by the petitioner inter-alia restraining the respondent from forcibly taking the minor child from the custody of the petitioner until further orders.

14. Considering the above judgments of the Apex Court referred to herein above, the judgments relied upon by Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent and referred to by the learned Judge in the impugned order would not be applicable to the peculiar facts and circumstances of the case. The judgment of Madras High Court relied upon by the learned Judge, the considerations therein were totally different inasmuch as the father was not available to take care of the child continuously. Apart from that, it was dealing with a female child. Even the judgment of the Apex Court referred to by the learned Senior Counsel is with regard to the custody of a female child who require the guidance of the mother up to the age of puberty. In such circumstances, I find that the judgment relied upon by the learned Judge would not be applicable to the facts of the present case.

15. Thus considering the peculiar facts and circumstances of the case and taking note of the fact that the child was in the custody of the petitioner, admittedly from January, 2013, the question of changing the custody in the absence of any cogent evidence to show that the welfare of the child would be at peril in case the interim custody is not given to the respondent, I find that the learned Judge has committed a jurisdictional error while passing the impugned order which calls for interference by this Court in the present Writ Petition.

16. Be that as it may, it cannot be disputed that for upbringing the child, love of the petitioner as well as the respondent who is the mother is very much essential for the healthy growth of such child. In such circumstances, though the custody would continue with the petitioner nevertheless, the respondent being the mother would

definitely have frequent visitation rights of the minor child. Such visitation rights shall tentatively be for at least 3 days in a week. The parties are at liberty to fix such days before the learned Judge at a mutual agreeable place preferably within the jurisdiction of the Court.

17. Another aspect which the learned Judge would have to examine is about the jurisdiction of the Court. Section 9 of the said Act of 1890 provides that jurisdiction to grant custody is by the Court where the child ordinarily resides. In the present case, on perusal of the petition filed by the petitioner, I find no averments with that regard therein. Merely residing temporary in Goa by itself cannot suggest that the child ordinarily resides within the jurisdiction of the Court. Apart from that, the interim order passed by this Court, by consent, some visitation rights of the child were mutually agreed in Mumbai. Apart from that neither the Act of 1956 nor the Act of 1890 are extended to the State of Goa. In such circumstances, the learned Judge would have to direct the petitioner to make an appropriate averment with regard to the place where the child ordinarily resides.

18. Considering the dispute is with regard to the custody of the minor child, I find it appropriate to direct the learned Judge to dispose of the petition filed by the petitioner for custody as expeditiously as possible in any event within six months from the date of the receipt of this order.

19. At this stage, the learned counsel appearing for the respondent states that the respondent shall file an appropriate application before the learned Judge to fix the days for visitation and the place within two weeks from today. The learned Judge shall accordingly fix the days and the place after hearing the petitioner.

20. In view of the above, I pass the following:

ORDER

(i) The impugned order dated 31.01.2014 is quashed and set aside.

(ii) The custody of the child shall continue with the petitioner subject to the respondent getting visitation rights in the manner referred to herein above.

(iii) The learned Judge shall proceed to dispose of the petition filed by the petitioner as well as the counter claim as expeditiously as possible in the light of the observations made herein above after hearing the parties in accordance with law.

(iv) The learned Judge shall not be influenced by any observations made by this Court herein while deciding the petitions filed by the petitioner and the respondent on its own merits.

(v) Rule is made absolute in above terms.

(vi) The petition stands disposed of accordingly.

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