

Don Paul vs Tisa Don

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Court : Kerala

Decided On : Jan-11-2023

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : Mat.Appeal/216/2019

Appellant : Don Paul

Respondent : Tisa Don

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR WEDNESDAY, THE 11TH DAY OF JANUARY 2023 / 21ST POUSHA, 1944 MAT.APPEAL NO. 216 OF 2019 AGAINST THE JUDGMENT AND DECREE DATED 30.01.2019 IN O.P.NO.810 OF 2015 ON THE FILES OF THE FAMILY COURT, KOTTAYAM AT ETTUMANOOR

APPELLANT/PETITIONER: DON PAUL AGED 37 YEARS,S/O.PAUL PAUL, THENGUMPALLY HOUSE, MANJOOR.P.O, KOTHANALLOOR VILLAGE, KOTTAYAM-686603. BY ADVS. ABDUL JALEEL.A M.A.SULFIA RESPONDENT/RESPONDENT: TISA DON AGED 31

YEARS,D/O.GEORGE KURIAKOSE, PALACKAL HOUSE, BUS STAND ROAD, VAIKOM.P.O, KOTTAYAM DISTRICT-686141. BY ADVS. SRI.ABRAHAM P.GEORGE SMT.M.SANTHY THIS MATRIMONIAL APPEAL HAVING COME UP FOR FINAL HEARING ON 11.01.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

P.G.Ajithkumar, J.

The appellant filed O.P.No.810 of 2015 before the Family Court, Kottayam at Ettumanoor seeking custody of his child, Elena Maria Don, aged 7 years. The Family Court as per the

judgment dated 30.01.2019 dismissed the O.P. However, the

appellant was allowed to have visitation right. The appellant aggrieved of that judgment has preferred this appeal under Section 19(1) of the Family Courts Act, 1984.

2. This appeal was admitted on 18.03.2019. On the

applications of the appellant, various orders were passed by this Court allowing him interim custody of the child during Onam and Christmas and vacation periods, pending this appeal.

3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

4. Besides O.P.No.810 of 2015 there were two other

original petitions, which were filed by the respondent. She filed O.P.No.1281 of 2015 for a decree for return of gold ornaments and realisation of money. She also filed O.P.No.1032 of 2015 seeking a decree of dissolution of marriage. Those cases were

tried jointly. PWs.1 and 2 were examined and Exts.A1 to A14 were marked on the side of the petitioner. RW1 was examined and Exts.B1 and B2 were marked on the side of the respondent. (In fact evidence in O.P.No.810 of 2015 was initially recorded and later on only a joint trial was ordered. Remaining evidence was recorded subsequently.) The Family Court after considering the evidence on record disposed the original petitions as per a common judgment dated 30.01.2010.

5. The respondent is a Dental Doctor. She conducts a

dental clinic. It is beyond dispute that there exists marital disharmony which resulted in the parties living separate. The respondent left the marital home and now resides along with the child in her parental home. The contention of the appellant is that the respondent was not taking care of the child and he with the assistance of his mother will be able to take care of the child. The respondent, on the other hand, contended that she had to leave the marital home as a result of the cruelty meted out on her by the appellant. Even the appellant and his brother were quarrelling each other. It was her contention that the atmosphere in the house of the appellant was not congenial and

not helpful for proper upbringing of the child. Further, it was contended that the appellant did not have permanent income having he unemployed, and it was unsafe to entrust custody of the child with him.

6. The Family Court taking into account the fact that

being a girl child, the mother is best suited to look after the child atleast during his tender age and the circumstances appeared in evidence took the view that the custody of the child shall be with the respondent. However, the appellant was allowed to have visitation right of the child on his request. During the pendency of this appeal, the child was given in interim custody of the appellant on several occasions. There has not been any complaint with respect to such custody.

7. In Yashita Sahu v. State of Rajasthan [(2020)

3 SCC 67] the Apex Court held that law is well settled by a catena of judgments that, while deciding matters of custody of a child, primary and paramount consideration is the welfare of the child. If the welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one

spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to custody of the child. The court must therefore be very wary of what is said by each of the spouses.

8. In Yashita Sahu (supra) the Apex Court noticed

that a child, especially a child of tender years requires the love, affection, company, and protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation and every re-union may

have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. A child has a human right to have the love and

affection of both parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

9. In Vasudha Sethi and others v. Kiran V. Bhaskar and another [AIR 2022 SC 476] the Apex Court

held that, whenever the court disturbs the custody of one

parent, unless there are compelling reasons, the court will normally provide for visitation rights to the other parent. The reason is that the child needs the company of both parents. The orders for visitation rights are essentially passed for the welfare of minors and for the protection of their right of having the company of both parents. Such orders are not passed only for protecting the rights of the parents. xx xx xx The court cannot accept the submission that, while applying the welfare principle, the rights of the mother or father need to be protected. The consideration of the well-being and welfare of the child must get precedence over the individual or personal rights of the parents.

10. Being a girl child now aged 7 years, it is apposite that

for her welfare, she has to be with the mother. It is true that the appellant relying on Exts.A2, A6 and A8 to A11 contended that the child was interacting with him very happily, and therefore

the interest of the child would be best served by placing her in the company of the appellant. Being the father, the child naturally would be affectionate to the appellant. That cannot be the criteria to decide what is in the best interest of the child. Similarly, the financial stability of the spouses should not be the decisive factor. What counts is in whose custody the welfare of the child can be ensured.

11. The child being a girl of aged 7 years, she shall be in the custody of the mother. No doubt, the father shall be afforded with sufficient opportunity to interact with the child, which will

enable to maintain an emotional connect between them. As held

by the Apex Court in the aforesaid decision, love and affection from both parents are absolutely necessary for the proper upbringing of the child. In order to inculcate social and cultural values in the child also, the care and protection from both parents are necessary. Taking all such aspects into account, we find that the order of the Family Court allowing the respondent to retain custody of the child is not liable to be interfered with. However, there shall be a direction regarding the entitlement of the appellant to have interim custody of the child. We direct that

the appellant shall be allowed to have interaction with the child on every Saturday between 10.00 a.m. and 3.00 p.m. The appellant shall be given custody of the child for five days each during Onam and Christmas holidays. During the summer vacation, he shall be allowed to have custody of the child for 15 days. Periods of such custody shall be during the first half and second half alternately. The custody shall be given and taken

back in the premises of the St.George Church, Thalayolaparambu. The appeal is disposed of accordingly. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr

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