Venugopalan Vs. Beena

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Court : Kerala

Decided On : Nov-08-2006

Reported in : 2006(4)KLT936

Judge : M. Ramachandran and; K.T. Sankaran, JJ.

Acts : Guardians and Wards Act, 1890 - Sections 7, 17 and 19; Hindu Minority and Guardianship Act, 1956 - Sections 5, 6, 8, 13 and 13(2)

Appeal No. : M.F.A. (G and W) No. 150 of 2006

Appellant : Venugopalan

Respondent : Beena

Advocate for Def. : K. Ramachandran and; P. Ramachandran, Advs.

Advocate for Pet/Ap. : S.V. Balakrishna Iyer,; K. Jayakumar,; P.B. Krishna,

Disposition : Appeal dismissed

Judgement :

M. Ramachandran, J.

1. K. Venugopalan, appellant herein, had married respondent K.V. Beena, on 30-12-1993. A daughter, Raveena, was born to them on 02-07-1996. For the last about five years, Raveena was residing along with her father, as the couple had

separated a few years back. The mother craved for the company of her daughter, and had moved the Family Court for custody of the minor daughter. Order passed by the Family Court, Malappuram dated 13.07.2006 in O.P.(G & W).No. 45 of 2006 directs that the father of minor Raveena should handover custody of the child to the mother, respondent herein. Visitorial right, however, had been reserved in favour of the father so that he can see the child and spend time with her for two hours on every alternate Sundays. The appeal has been filed by the father feeling aggrieved about the orders so passed.

2. We had heard Sri. S.V. Balakrishna Iyer, who appeared on behalf of the appellant and had also occasion to hear Sri. K. Ramachandran, appearing for the respondent.

3. The parties are Hindus and they reside in their respective houses, not far apart, and though not too close by. The appellant was running a Driving School initially. After the marriage, he had secured employment as an Executive Officer in the Commissionerate of Hindu Religious and Charitable Endowments. The respondent/wife had also secured employments a teacher. Their family life became tumultuous thereafter.

4. Application had been filed by the wife for custody of the child, as she contended that situated as she was it would have been more secure and congenial for the daughter to grow up under her care than that of the father. She had a further case that the husband could not have been acceptable as a guardian or guide, because of deficiency in his personality and outlook. The very reason for their separation, according to her, was that he had developed affinity with another woman. The husband was continuing the relations with his new acquaintance and had also fathered two children, respectively during April, 2002 and August 2003. She felt that time was therefore ripe for the daughter to get herself separated from such debilitating atmosphere. The daughter is about 10 years old and her continued residence with the father would adversely affect her welfare. It was claimed that when the child had her unencumbered mother capable of looking after her, including her physiological as well as psychological needs, custody of the child required to be entrusted with the mother.

5. After a detailed examination of the attendant facts, the Family Court had held that although the father was natural guardian and it was also a case where he was prepared to take all responsibility in respect of the daughter, the circumstances pointed out for a positive preference in favour of the claims put up by the wife. The Court had held that the mother, who is educated and anxious about the prospects and future of her girl child, was preferable to a father as guardian. The extra marital relationship also was a factor and he had already two small kids in such relations, which also was relevant, it was observed.

6. Mr. Balakrishna Iyer refers to the legal provisions, which govern the subject. According to him, under the Guardians and Wards Act 1890, where the Court is satisfied that it is for the welfare of a minor, it may appoint a guardian of his person or property or both. He refers to Section 17 of the said Act and urges that while appointing or declaring the guardian of a minor, the Court is to be guided by what is in consistency with the law to which the minor is subjected to. If the minor is old enough to form an intelligent preference, the Court may consider that preference as well.

7. He had also invited our attention to the Hindu Minority and Guardianship Act, 1956. A 'guardian' means an individual having the care of the person of a minor or of his property or of both his person and property, and includes a natural guardian. He asserts that in unambiguous terms, under Section 6, it is declared that a natural guardian of a Hindu minor, in the case of a boy or an unmarried girl, is the father. The said person should act as custodian also. The only exception is that the custody of a minor who has not completed the age of five years can be with the mother. That is not the case here. Of course, he also refers to Section I 3 of the said Act, where the statute provides that welfare of a minor always is to be the paramount consideration, in the matter of appointment or declaration of a person as guardian by a Court.

8. Discussions of the Family Court, according to him, before it reached a conclusion that the appellant was unfit to be recognised as a guardian, are haphazard and the Court had omitted to note the correct perspective, suggested by the statute. He was educated, was residing along with his mother, and under

his care and tutelage the minor girl was distinguishing herself as one of the topmost students of the class. She had no complaints about the present arrangements, which were prevailing for over five years. Such living conditions gave her adequate time to reach the school nearby, and there was nothing pointed out, at the instance of the wife, to upset the situation. Now the situation is about to be upset. He has a further complaint that the Family Court had adverted to extraneous considerations without factual basis. He was an employee of a statutory authority, financially sound, and the allegations were insufficient to establish that he was not to be recognised as a guardian of his daughter. Mr. Iyer submits that it was not a case where it was held that he was unfit. Therefore, the issue of competing or superior claims had no relevance. Security and safety provided by the father has no substitute, he points out. Court was not justified in passing orders, whereby the minor child was required to be uprooted and there is possibility of her wilting, by removing her from her kins, surroundings and company of friends. Mr. Iyer also pointed out that by an interlocutory order dated 21-08-2006, a sharing arrangement had been prescribed and this would have satisfactorily met the situation as it could have avoided a change of school and change of environment.

9. Learned Counsel also had relied on a decision reported as Bakthavatsalam v. Srinivasan 2000 (1) KLT SN 52 - Case No. 58. A Hindu father, the Madras High Court held, was the natural guardian of the children and has prima facie the paramount rights to the custody of the minor, and unless he is unfit for the job, the arrangements are not to be disturbed. Court was examining a situation where the father had remarried, but it had been held that it never operated as a valid ground for disqualifying him from being guardian of a minor child of the first marriage.

10. The counsel had also adverted to the decision in Chakki v. Ayyappan 1988 (1) KLT 556. Reliance was placed on paragraph 22 of the judgment, which may be extracted herein below:

The two conflicting principles as we have mentioned above have necessarily to be reconciled. The legal right of a natural guardian and the welfare of the minor child have to find equal accommodation in any order which the Court devices in

applications under Sections 6 and 13 of the Hindu Minority and Guardianship Act. In case of conflict between the two, the Court has necessarily to choose the welfare of the minor as the paramount consideration as is enjoined by Section 13. One of the relevant considerations in determining the welfare of the minor is to compare the credentials of the father and the mother. Unless there are outweighing considerations, an affectionate father with the necessary means to maintain his child sans abnormalities in his character which will make him otherwise unfit, may have a better claim for custody by reason of the provisions contained in Section 6 of the Act. What we suggest is that the rights of a natural guardian who is designated as the guardian may be one of the factors to determine the welfare of the minor as the paramount consideration in custody proceedings.

Thus unless there were outweighing considerations, an affectionate father with necessary means was always to be preferred sans abnormalities in his character.

11. To a very large extent perception of the deciding Judge do find a place while the issue of custody of a minor child is adjudicated. Dr. Justice Kochu Thommen, in Madhavan Nair v. Viswanathan 1977 KLT 479, held that the father of the child was entitled to custody in preference to grand-parents. The learned Judge had found that the father had been remarried after demise of his wife and had begot a son. He was financially secure and was absolutely capable of looking after the child. It was noted that the step-mother had expressed her willingness and ability to look after the minor child of her husband. These were positive qualifications to confer on him right of custody, as the learned Judge observed that child would be happy and comfortable in their home. On the other hand, if the child is left with the maternal grand-parents, he would not have had the same advantages educationally, socially or culturally as he might enjoy with his father, step-mother and step-brother. There was no doubt, according to the learned Judge, to the position that the child was thus going to a happy home where there was a young mother and little baby to play with, and this was the kind of congenial atmosphere where a child was to grow up. To deny him this opportunity and leave him with aging grandparents would be not only unfair to the child, but also opposed to the legislative intent of Act 32 of 1956. Relying on the decision, counsel for the

appellant submits that the father has a position of pre-eminence, and even a remarriage is not usually frowned upon. According to the counsel, irrelevant considerations had been adopted for displacing the appellant from the position of guardian, and the order required to be set aside.

12. However, Sri. Ramachandran appearing for the respondent submits that it was a case where the Family Court had examined all aspects of the case and had come to a correct conclusion, that it was in the prime interest of the child that a new arrangement required to be brought about. He submits that although the Guardians and Wards Act as well as the Hindu Minority and Guardianship Act recognise the father as a natural guardian, sufficient safeguards have been there in the statute, as could be gatherable from Section 17 and Section 13 of the two enactments respectively. The Court was not obliged to follow the text of the law as relied on by the appellant, but had adequate discretion taking notice of the peculiarities of a case for prescribing the course to be followed. The learned Counsel submits that consistently the Court was following a principle, namely that a natural guardian had no right in any absolute terms.

13. In this context, the counsel had referred to decisions reported as Gopalan v. Rajan 1994 (2) KLT 753, Peravakutty v. Velayudhan : AIR1992 Ker290 , Merlin T2homas v. C.S. Thomas : AIR2003 Ker232 and Chandrakala Menon v. Vipin Menon : (1993)2SCC6 . Counsel had also relied on Kurian C.Jose v. Meena Jose (1992 (1) KLT 818), to which reference could be made at a later stage.

14. Mr. Justice M.M. Pareed Pillay, in Gopalan's case (cited supra), held that merely on the basis that the father who seeks the custody of his children is their legal guardian, Court cannot jump to any conclusion that their welfare would be safe with him. The Court has necessarily to look into the mental or emotional feelings of the children, their careful, planned up-bringing and also their tender age. Though father is the natural guardian of the minor, on that count alone he cannot have any preferential claim. Again, while dealing with such a situation, where custody of the child was involved, Mr. Justice Guttal, speaking on behalf of the Division Bench, in Peravakutty's case (cited supra), prescribed as much as five relevant parameters, which were to be borne in mind by the Court. The question of

custody of the child was not to be decided upon consideration as to which of the two rival claimants is more affluent. The child does not grow merely on food and clothing. A barren life, devoid of emotional attachment, love of parents, brothers and sisters and friends, retards as well as impairs growth of a child. The expression 'welfare' has an extremely wide connotation and an approach after evaluating on all factors were to be made.

15. Mr. Justice K. Thankappan, in Merlin Thomas's case (cited supra), had occasion to hold that the emotions of the parents do not have much weight while the issue of custody is examined. Primarily, it was to be ensured that children were kept away from scratch, since the children were like petals of a flower. Especially, if it is a girl child, the Bench observed that the company of the mother is more desirable, which will give protection to the child in developing her personality, intelligence and character. On these parameters, the Court had directed that the custody of the child concerned was to be given over to the mother.

16. We have also for our guidance, recent observations of the Supreme Court in Chandrakala Menon's case (cited supra). The Supreme Court held that though the father is the natural guardian of the minor child, the question of custody has to be decided not on the basis of legal rights of the parties, but on the sole criterion of interest and welfare of the minor. Consequently, Overruling the objections of the father, the Court held that 'after examining every possible angle in this respect, we have come to the conclusion that it would be in the interest and welfare of minor Soumya that she should be permitted to be in the custody of her mother Chandrakala'.

17. We find that the authorities are unambiguous when they declare that reliefs have to be modulated, conforming to factual situations in individual cases. Mr. Balakrishna Iyer, although refers to Section 13(2) of Act 32 of 1956, points out that there has been no adverse observations against the father so as to apply the sub-section in the case at hand. Any how, we would examine the issue more closely.

18. The Guardian and Wards Act, 1890 has in its bosom the principle of the State being the 'parens patriae' in respect of the class of persons, who might not be competent to take care of themselves because of their tender age. Section 7 of the

Act deals with the power of the Court to make an order as to guardianship. There can be a guardian of his person, or property or both. Section 17 lays down the parameters to be considered by the Court in appointing guardian. The law to which the minor is subject is relevant, and welfare of the child is to be given paramount importance. The content of the term 'welfare' has to be assessed, having regard to the age, sex and religion of the minor, character and capacity of the proposed guardian, his nearness of kin and the like. Section 19 cautions that the Court may not have discretion to appoint a guardian to a minor, when he has his father alive, if in the opinion of the Court is not unfit to be the guardian.

19. But the position does not stop at this, as far as a person who is Hindu. Act 32 of 1956 had been introduced by the Parliament, supplemental to Act 8 of 1890. The term 'Hindu' is to include Buddhist, Jain or Sikh, Virashaiva, Lingayat etc. Muslims, Christians and members of Scheduled Tribes are expressly excluded from its purview. Section 5 of the Act gives it an overriding effect, and any other law in force immediately before the commencement of the said Act was to have no effect, in so far as it is inconsistent with the provisions thereof. Natural guardian for a Hindu minor is his father, and after him the mother. But custody of a minor, who has not completed the age of five, can ordinarily be with the mother. Section 8 authorises a natural guardian to do all acts which are necessary or reasonable and proper for the benefit of the minor.

20. In respect of such proceedings, monitoring by the Court is as provided by Section 13. For the welfare of the minor, wide powers are given to the Courts. In fact, Section 13 reads as following:

13. Welfare of minor to be paramount consideration -

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor

21. As pointed out in Madhava Panicker v. Santhamma 1977 KLT 816, the age of the child is one of the most important aspect to be looked into. The Court held that:

Shobhanaisnow 11 years old. At this age it will be cruel to separate a child from her mother and this is especially so in the case of a daughter. The daughter needs the constant company of her mother who alone can advise her and guide heron matters of utmost personal importance to her.

22. Raveena here is aged about 10 and is situated like Shobhana, referred to in the decision cited above. Very shortly she might be in need of a close, personal guidance, including monitoring of her physiological changes. A mother's constant presence can instil in a minor's mind qualities of fidelity in life, and faith in the institution of marriage as well as solemn relations, essential for community life. In areas where lessons are to be imparted, for example in hygiene, grooming, selection of companions and the like, a father will be a poor substitute. An educated mother, who has made express offer, as could be seen from the order of the Family Court, for attending to her educational needs, according to us, is a more suitable person to be entrusted with custody, if not guardianship. In view of Section 13 of the Hindu Minority and Guardianship Act, it is not necessary for us to cast aspersions on the father at all.

23. Although Sri. Ramachandran very forcibly invited our attention to a Division Bench judgment in Kurian C. Jose v. Meena Jose 1992 (1) KLT 818, we feel it will be more appropriate to bypass the judgment, as far as this case is concerned. The decision predominantly relied on a circumstance that paramount consideration is the welfare of the minor and when the father there was living with his concubine, and that too the younger sister of the mother, Court held that this was a conduct which disentitles the father to act as guardian of the minor child. We feel that even without disqualifying the father or making aspersions against him in the discretion of the Court, of course after evaluating the relevant factors, an adjudicator may be entitled to nominate a person as the guardian or provide for an arrangement, where the minor is put in the custody of a guardian, after naming a person, who according to the Court, would be an ideal person to be reposed with such responsibility.

24. As referred to earlier. Act 8 of 1890 gives an indication as to what is meant by the expression 'welfare'. Age is a factor. Definitely the age and gender of Raveena, who has attained adolescence is a factor which requires the Court to opt her mother, contextually for acting as a governess. A Nair girl is presumed to be observing Marumakkathayam, and the reference to religion as a guiding factor also favours such a decision. There is no aspersions as of now at least, as against the mother. Viewed from these angles, custody of father here, will not be conducive for the welfare of the minor, and we feel he has to reconcile to the position, till such time Raveena is capable of taking a decision by herself.

25. Proximity or otherwise of a school and the like, we feel are not to be unduly emphasised, as we are expected to have a more holistic vision. As referred to earlier, the two enactments cover the entire population of India, and Act 32 of 1956 might be applicable to more than 75% of the people of this country. They have different life style, dialects, customs and ceremonies, and always the anxiety of the parents could be that children should be protected from exploitation and possible ill-treatment. While interpreting the provisions, we have to caution ourselves to be doubly careful to ensure that the legislative intent is not watered down. We have to note that the law governs the rich as well as the poor, a city dweller or a villager, a caste Hindu, and a person who is not so fortunate. The guiding principles of course cannot be strait-jacketted, but should be tailor-made so that the child is to be brought within a protective shield. On these premises, if the welfare of the minor Raveena is to be the paramount objective, we are sure, that custody of the child has to be given in favour of the mother.

26. Resultantly, we find nothing improper in the orders passed by the Family Court. The appeal is therefore dismissed. The interim orders will stand vacated. We notice that the petition before the Family Court confined to a prayer for custody of the child. The relief was granted. The acceptable position is that father continues to be the legal guardian of the child. But, in order to avoid further complications or embitterments, we declare that exercising the right of custody, the mother will have the privilege of submitting applications before concerned authorities in the matter of admission, or release of her ward, as may be appropriate, especially in the matter of education of the child. She will also be

entitled to exercise her discretion in any ancillary or subsidiary matters, without seeking consent or ratification of the appellant herein, but the details are to be furnished to him to keep him informed of the developments. We make no order as to costs.