

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26th DAY OF AUGUST 2019

BEFORE

THE HON'BLE MR. JUSTICE ALOK ARADHE

Shabana received a B.S. -v/s Kevin Joseph Selvadorai

WRIT PETITION NOS.21735 OF 2019
AND 22449 OF 2019 (GM-FC)

ORDER

Mr.Ashok Haranahalli, learned Senior counsel for
Mr.Ravi Shankar A., learned counsel for the petitioner.

Mr.M.U.Poonacha, learned counsel for the
respondent.

2. The petitions are admitted for hearing. With
consent of the learned counsel for the parties, the same
are heard finally.

3. In these petitions under Article 227 of the
Constitution of India, the petitioner has assailed the
validity of the order dated 22.04.2019 passed by the
Family Court, Bangalore by which application seeking
vacation of interim order granted by the Family Court
has been rejected.

4. Facts giving rise to the filing of the petitions
briefly stated are that the parties got married on
19.08.2005. The respondent admittedly has one girl child
from the previous marriage. From the second marriage, the
girl child namely Christine Zara was born on 14.01.2014. It is
the case of the petitioner that the child was taken away from
school by the respondent on 03.08.2018. Thereafter, he
initiated a proceeding under Section 12 of the Guardian and

Wards Act, 1890 seeking interim custody of the minor girl child. Thereupon, the Family Court by an ex parte order granted interim custody to the respondent who is the father of the minor girl child. The petitioner who is the mother thereupon filed an application seeking vacation of the ad interim order. The aforesaid application has been disposed of by the Family Court by the impugned order dated 22.04.2019, by which the petitioner has been denied the custody of the girl child. However, she has been granted visitation rights and interim custody during Summer, Dasara and Winter Vacations. In the aforesaid factual background, the petitioner has approached this Court.

5. Learned Senior counsel for the petitioner submitted that in the application filed under Section 12 of the Act by the respondent, it is stated that mother, family members and maid of the respondent will take care of the girl child. It is also submitted that the mother of the respondent resides in Chennai and the impugned order has been passed in a cryptic and cavalier manner. It is also submitted that the welfare of the child is of paramount consideration and normally the custody of the girl child has to be given to the mother until and unless compelling circumstances are brought to the notice of the Court. In the instant case, no such material has been placed before the Court. It is also

pointed out that the mother is already taking care of the girl child from the first marriage. It is also argued that mere financial affluence of the father cannot be the governing factor and in suitable cases, the father can be granted to bear the educational expenses of the child. It is also submitted that the petitioner was an investment banker. However, she has left the job to enable her to look after her minor daughter. In support of aforesaid submissions, reliance has been placed on the decisions of Supreme Court in '*GAURAV NAGPAL Vs. SUMEDHA NAGPAL*' (2009) 1 SCC 42, '*VIVEK SINGH Vs. ROMANI SINGH*' (2017) 3 SCC 231 AND '*NITHYA ANAND RAGHAVAN Vs. STATE (NCT OF DELHI) AND ANOTHER* (2017) 8 SCC 452.

6. On the other hand, learned counsel for the respondent submitted that the order which has been passed by the Family Court is based on sound principles of law and has been passed taking into account the welfare of the child. It is also urged that the rights of the petitioner has been protected as she has been granted interim custody during vacation and visitation rights. Learned counsel for the respondent has further pointed out that the circumstances under which the

respondent took away the custody of the girl child has been mentioned in para 12 of the application. In support of his submission, learned counsel for the respondent has relied on the decisions of the Supreme Court in '*GAYATRI BAJAJ Vs. JITEN BHALLA*' AIR 2013 SC 102 and '*BINDU PHILIPS REPRESENTED BY HER POWER OF ATTORNEY P.T.PHILIPOSE Vs. SUNIL JACOB*' AIR 2017 SC 1522. It is further submitted that in case an order is passed directing custody of the child entitled in favour of the petitioner, the child will be traumatized.

7. I have considered rival submissions and have perused the record. In *HALSBURY'S LAWS OF ENGLAND*, 4th Edn., Vol. 24 Para 511 at p.217, it has been held as under:

"511. ... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect

of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

In *AMERICAN JURISPRUDENCE*, 2nd Edn., Vol.39, para 31, p.34, it is stated as under"

"As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield."

8. The Supreme Court has taken note of the aforesaid principles with regard to the custody of the child under the English Law as well as American Law in the case of *GAURAV NAGPAL*, supra and has held that mere financial affluence of the father cannot be a ground to deny the custody of the child to the mother and in appropriate cases, direction can be issued to the father to pay educational expenses in addition to maintenance. In '*MAUSAMI MOITRA GANGULI Vs. JAYANTHI GANGULI*' AIR 2008 SC 2262, it was held that principles of law in relation to custody of minor

child are well settled. It is trite law that while determining the question as to which parent the care and control of the child should be committed, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under the statute. In '*SHYAMRAO MAROTI KORWATE Vs. DEEPAK KISANRAO TEKAM*' 2010 AIR SCW 6107 the Supreme Court referred to the guiding ingredients which determine the issue with regard to custody of the child. Similar view is taken in '*GAYATHRI BAJAJ Vs. JITEN BHALLA*' AIR 2013 SC 102. In *VIVEK SINGH*, supra, it has been held that a child who has not seen or experienced or lived the comfort or company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. It has further been held that only when a girl child is exposed to the environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of her mother or in the company of her

father. It has further been held that role of the mother in the development of a child's personality can never be doubted. In *NITHYA ANAND RAGHAVAN*, supra, it has been held that custody of the girl child who is aged about 7 years ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in the custody of her mother.

9. In the backdrop of aforesaid well settled legal position, facts of the case in hand may be examined. In the instant case, the order has been passed by the Family Court in a perfunctory manner which suffers from the vice of non-application of mind. The Family Court has merely held whether or not the respondent has forcibly removed the child from the custody of the petitioner, it has to be considered after regular trial and at this stage, the only thing which is required to be considered is whether mother is entitled to the interim custody of the minor child. It is further been held that it is just and proper to grant visitation rights and interim

custody during summer, Dasara and winter vacation to an extent of 50% during second half to meet the ends of justice. The impugned order is not only cryptic but suffers from vice of non-application of mind. The well settled legal position that while deciding the issue with regard to the custody of the child, the welfare of the child is of paramount consideration, has not at all been considered by the Family Court. The child is a girl child and is aged about 5 years. Therefore, her custody is required to be granted to her mother, in view of the law laid down by the Supreme Court. However, the aforesaid aspect of the matter has not been considered by the Family Court. It is pertinent to note that while passing the impugned order, the learned Judge has nowhere narrated the compelling circumstances warranting deviation from the well settled legal proposition that the custody of the minor child should always be with the mother. No compelling circumstances is narrated while directing custody of the girl child to the father. Ordinarily, this Court would

have remitted the matter to the Family Court afresh for decision in accordance with law. However, in the peculiar fact situation of the case, since the law laid down by the Supreme Court has not been taken into account by the Family Court, therefore, the order passed by the Family Court is per incurium. Therefore, the impugned order not only suffers from jurisdictional infirmity but error apparent on the face of the record. The impugned order is therefore, quashed and set aside and the respondent is directed to handover the custody of the girl child to the petitioner who is the mother of the child.

Accordingly, the petitions are disposed of.