

Madras High Court
G.K.Chenthil Kannan vs Sathyabama on 21 August, 2009
DATED 21.08.2009

Coram

The Hon'ble Mr.Justice K.CHANDRU

O.P.No.584 of 2007 and

A.No.5052 of 2007

G.K.Chenthil Kannan ... Petitioner

Vs.

Sathyabama ... Respondent

Petition filed under Section 25 of the Guardians and Wards Act, 1890 to direct the respondent to deliver the minor child Aditya Abhishek to the custody of the petitioner.

For Petitioner : Mr.Ashok Menon

For Respondent : Ms.K.Sumathi

ORDER

The main Original Petition was filed by the petitioner under Section 25 of the Guardian and Wards Act, 1890 for directing the entrustment of the custody of the minor child to the petitioner. A.No.5052 of 2007 is filed by the applicant/husband against the respondent/wife seeking for grant of interim custody of the minor son Aditya Abhishek, pending disposal of the Original Petition.

2. It was stated in the OP that the marriage between the petitioner and the respondent took place on 05.03.1999 at Hyderabad and the minor child was born out of the wedlock on 23.11.1999. The petitioner and the respondent soon after their marriage had adopted a minor girl child Chandhini, who was the daughter of the petitioner's sister G.K.Chithra with the consent of the respondent. The said adoption took place on August 1989.

3. It was submitted that the respondent had become a computer Engineer after her marriage, she had to make frequent trips abroad. The petitioner advised her not to go to USA since the child was too young required her constant attention. Notwithstanding the advise of the petitioner, the respondent proceeded to USA during 2003 and 2005 and it was the petitioner, who was taking care of the child. The respondent stayed in USA from March 2003 to May 2003 and from May 2005 to June 2006. At that time, the child was only four years old and was taken care of by the petitioner. On 28.02.2007, the respondent in the pretext of visiting her mother took away the minor child from the petitioner and refused to come back to live with him.

4. On 10.05.2007, a legal notice was sent by the respondent, to which the a suitable reply was given by the petitioner. Thereafter, the respondent issued a notice on the divorce application pending before the Family Court. It was stated that in the best interest of the minor child, the custody should be with the petitioner. He is also employed in the L & T company and drawing a good salary. The respondent, being a Software Engineer, having a heavy work schedule hardly finds time to take care of the minor child. Pending this OP, the interim application was also filed.

5. During the pendency of the OP, several interim orders were passed by this Court on 24.09.2007, 22.11.2007, 08.01.2008 and 14.05.2008. The Court recognised petitioner's right to have visitation.

6. Opposing the application for interim custody, the respondent had filed a detailed counter affidavit running to 30 pages. It was claimed that the respondent is fully responsible for bringing up the child and the minor child is now seven years old. She is completely attending to the requirements of the minor child.

7. When the matter came before this Court on 24.07.2009, it was adjourned to 30.07.2009. On 30.07.2009, the petitioner filed a memo stating that the custody of the minor child Aditya Abishek may be granted to the respondent and he may be given visitorial right. Paragraphs 1 to 8 of the memo reads as follows: "1. As submitted to this Hon'ble Court, the custody of the minor son Aditya Abishek may be granted to the Respondent/mother.

2. The petitioner/father may be permitted to bring the minor son to his residence every alternate Saturday and Sunday in the event of there being no school for the child on Saturday, and there being no examination for the child on the following Monday.

3. On such Saturdays, the Respondent/mother may be directed to drop the minor child at the residence of the Petitioner/father by 10 a.m., and the Petitioner/father shall return the child to the residence of the Respondent/mother by 6 p.m., on Sunday evening.

4. Until the child attains majority, the Petitioner/father may be permitted to take the minor child to his house on every alternate birthday of the minor child, which falls on 23rd November.

5. During the long school holidays like the summer vacation, Dasara vacation, Christmas Vacation and Pongal vacation, the Petitioner/father shall be permitted to bring the minor child to his residence, for half of the duration of the holidays.

6. The petitioner/father shall be permitted to see and bless the minor child on New Year's Day; 2nd February being the birthday of the Petitioner/Father and on the Festival Days of Deepavali ; Sri Krishna Jayanthi and Vinayaga Chaturthi.

7. The name of the minor son shall be retained as C.Aditya Abishek in all official records.

8. The Petitioner/father shall be permitted to meet the authorities of the school where the minor child is studying, whenever he so desires."

8. In opposition to the memo, the respondent filed a reply dated 03.08.2009. It was stated that the petitioner took the custody of the minor child on several occasions. The respondent had never refused to send the minor son with him and that the respondent could not comply with the requests only on one or two occasions and that too in view of the examination the child had to attend. The attempt by the petitioner to retain the custody of the minor child for overnights will have a far reaching impact and it was stated that the request of the petitioner should be rejected. However, the respondent is agreeable for visitation rights as was being done now.

9. Considering the fact that the petitioner being the father has given up the right to have the permanent custody and only seeking visitation right, the said request cannot be considered to be either improper or unjustified. The Courts have always granted visitation rights to either of the parent of the minor child. Even though on earlier occasions, this Court had granted visitation right only during day time it was only an interim arrangement.

10. A Division Bench of our High Court in R.Kasthuri v. R.Raveendran reported in (2003) 1 M.L.J. 738 in paragraph 13 observed as follows:

"13.This Court in Indira Kumari v. Ramakrishnan, B.(1995)1 L.W.671, while holding that the custody of the child should be with the mother, also gave certain directions taking into account the fact that the father is the natural guardian and has some obligations towards the child and the father should discharge the same in spite of the fact that the father has not been given the custody of the child. Accordingly, the respondent/ father will have the custody of the boy, if there are holidays during Dussehra and Christmas for a period of three days each and during summer vacation for a period of 10 days. The father is entitled to the custody of the boy from the mother during those periods and we direct the appellant/mother accordingly. On the expiry of the stipulated period, the father shall hand over the custody of the boy back to the mother. If the father requires custody of the boy on any other specified date, it is open to him to move the District Judge concerned and the District Judge is directed to consider the same on merits. Though the permanent custody is not given to the father, there is no doubt that the father should discharge his obligations towards his son by taking care of his educational needs and he should help the boy in securing admission in educational institutions for a proper course of study, if any help is needed."

11. The Supreme Court after relegating the main dispute between the parties to the High Court with reference to the visitation right of the father dealt with the scope of interim custody vide its judgment in Mohan Kumar Rayana v. Komal Mohan Rayana reported in (2008) 3 MLJ 536 (SC). Paragraphs 14,16,17(ii,iii & iv) may be usefully extracted below: "14. Since these appeals have been preferred against the interim orders passed by the Bombay High Court in the two pending Family Court Appeals, learned counsel for the appellant, submitted that in these appeals the only grievance of the appellant was with regard to denial of complete access to his child. He prayed that the visitation rights which had been granted by the Family Court be restored during the pendency of the two appeals in the Bombay High Court.

16. After having looked through the materials on record and after considering the views of the parties and the minor girl, we are of the view that the appellant should not be denied complete access to his minor child, even if there has been a default in complying with the directions of the High Court and that pending the disposal of the appeals he should be allowed to have access to his minor child, at least to some extent.

17. (i).....Omitted

(ii)The appellant/father of the minor, will be entitled to have access to Anisha on weekends on Saturdays and Sundays and will be entitled, if the child is willing, to keep her with him on Saturday night. For the said purpose, the appellant shall receive the child from the respondent at 10.00 a.m. on Saturday from her residence at Bandra or from a mutually agreed upon venue and shall return the child to the respondent on Sunday by 2.00 p.m. In the event Anisha is unwilling to stay with the appellant overnight, the appellant will then make her over to the respondent on Saturday itself by 9.00 p.m; in that case, the appellant will be entitled to take Anisha out on Sunday also between 9.00 a.m to 5.00 p.m.; iii) Both the appellant as well as the respondent must co-operate with each other in making the aforesaid arrangements work. The respondent shall not prevent the appellant from having access to Anisha in the manner indicated above. Likewise, once Anisha is handed over to the appellant he too must honour the aforesaid arrangements and not keep Anisha with him beyond the time stipulated. In the event of either of the parties violating the aforesaid arrangement, the other party would be at liberty to pray for appropriate orders before the Bombay High Court in the pending appeals; iv) The aforesaid arrangement is being made so that the appellant can have access to his minor daughter and also to ensure that the child's education does not suffer in any way during the week."

(Emphasis added)

12. Very recently, the Supreme Court elaborately dealt with the custody issue of the minor children under the Guardians and Wards Act vide its judgment in Nil Ratan Kundu and another v. Abhijit Kundu reported in

(2008) 9 SCC 413. After reviewing of the case laws of various countries including the decisions of the Supreme Court, in Paragraphs 52 and 58, it was held as follows: "52. 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 therefrom. But such cases cannot be decided solely by 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 and is expected, nay bound., to give due weight to a child's ordinary comfort, contentment, health and education, intellectual development and favourable surroundings. But over and above physical comforts, 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.

58. Though this Court in *Rosy Jacob* held that children are not mere chattels nor toys, the trial court directed handing over custody of Antariksh "immediately" by removing him from the custody of his maternal grandparents. Similarly, the High Court, which had stayed the order of the trial court during the pendency of appeal, ordered handing over Antariksh to his father within twenty-four hours positively. We may only state that a child is not "property" or "commodity". To repeat, issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem." (Emphasis added)

13. Therefore, in the interest of the minor child and considering that the petitioner is the father, it is hereby ordered as follows:

i) The petitioner/father is entitled to have the custody of the minor son in the alternate Saturdays or Sundays when there is no school and no examination for the child on the following Monday.

ii) The respondent is directed to entrust the minor child at 10.00 a.m on such Saturdays or Sundays as the case may be and the petitioner shall return the custody of the child to the mother by 6.00 p.m in the Sunday evening. iii) The petitioner/father will have the custody of the boy, if there are holidays during Dussehra and Christmas for a period of three days each and during summer vacation for a period of 10 days. The father is entitled to the custody of the boy from the mother during those periods. On the expiry of the stipulated period, the father shall hand over the custody of the boy back to the mother. iv) The petitioner is also permitted to visit the minor boy on every birthday of the minor child on 23rd November.

v) The petitioner is also permitted to visit the boy on the New Year's Day and 2nd February, being the birthday of the petitioner.

vi) The name of the minor child shall be continued to remain as C.Aditya Abishek in the records.

14. In the light of the visitation rights being granted to the petitioner and the petitioner having given the permanent custody of the minor child to the respondent, the OP is disposed of in the above terms. Consequently, A.No.5052 of 2007 will stand closed. In case of any difficulties, the parties are at liberty to move this Court. svki