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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CASE COMMENT ON VASUDHA SETHI V. KIRAN V. BHASKAR [2022 SCC ONLINE SC 43]

AUTHORED BY - ANURAG AGARWAL¹

I. INTRODUCTION

The problem of child custody usually comes after the divorce or judicial separation is finalized, and it is one of the most legal crucial matters to be decided by the courts. Custody of a kid refers to the legal right granted to a parent to care for the child (in case the child is below 18 years of age). The parent with custodial rights is expected to look after the child's capital adequacy, and upkeep in terms of suitable lifestyle, health, psychological, bodily, and medical growth. The other parent has only the right to access and visit the child.

When the family courts award custody to one of the parents, the verdict is made to ensure the best potential outcome for the kid in issue. The issue of well-being is decided by four separate parameters, which are as follows:

- The youngster in issue is being raised in an ethical manner
- Assured safety of the child
- Providing a high-quality education
- The guardian in whose hands the custodial rights are conferred must be financially secure²

When it comes to custody rights in India, the court will use one or more of the three methods described below³:

1.1 The child's physical custody

When a parent is granted physical custody, it implies that the kid will be under the parent's guardianship, and the other parent will be granted permission to visit the child regularly. This type of

¹ Law Clerk – cum – Research Associate, Supreme Court of India

² Asha Bajpai, *Child Rights in India: Law, Policy, and Practice* (Oxford India Paperbacks 2006).

³ James Stewart, *The Child Custody Book: How to Protect Your Children and Win Your Case* (Impact Publishers 2000).

guardianship is the most common way to guarantee that the kid receives all the advantages of family and has the greatest possible upbringing.

1.2 Adjudication of Shared Custody

In circumstances of joint custody, both parents have custody rights, permitting them to keep the kid alternately. Despite popular misconception, joint custody does not imply that the divided couple must continue to live in the same house even after the courts have approved their divorce. Because of two factors, shared custody is one of the greatest alternatives in a custody struggle. The first and most important point is that neither parent feels disadvantaged. Custody rights, by whatever name, cannot be equated to access rights. One of the benefits of shared custody is that the kid receives equal love from both parents. This method guarantees that the child receives an equal amount of attention from both parents.

1.3 Exclusive legal custody

In the instance of sole custody, one biological parent has complete custody rights over the kid. Because of a family record of violent behaviour, or because they are unable to be useful to the kid in any manner, the other parent is fully excluded and denied any rights to the child.

Custody of a kid under the age of five is normally granted to the mother. In the case of older males, dads are usually granted custody, whilst mothers are usually granted custody of older girls. The minor's viewpoints are considered while deciding who should have custody rights over the child.⁴

The Guardians and Wards Act of 1890 (hereinafter 'GAWA') governs custodial rights for the Parsis. The Hindu Minority and Guardianship Act of 1956 (hereinafter 'HMGA'), section 26 of the Hindu Marriage Act of 1955 (hereinafter 'HMA'), and section 38 of the Special Marriage Act of 1954 (hereinafter 'SMA') establish the norms and procedures for the transition of a minor's custody rights following separation.

The custody rights of a child upon the separation of a Christian parent are governed by the laws

⁴ Enakshi Ganguly Thukral, *Every Right for Every Child: Governance and Accountability* (Routledge India 2011)

outlined in Section 41 of the Divorce Act of 1869. The well-being of the kid is critical because the parents must demonstrate that they are competent in raising the child. If the court is not pleased with the parents' skills, it may refuse custody.

According to Muslim Law, the mother has biological custody of the child until the kid attains the age of seven, at which point the father is regarded as the natural guardian. The age restriction is set at seven because the age of becoming a major is strongly related to the onset of 15 years.

II. FACTUAL MATRIX

Appellant no.1 and respondent no.1 wedded on 13.01.2011, in New York, USA. A child was born to them on 21.01.2016 and is a US citizen. Both parties signed and executed an agreement for the minor's journey to India with one legal guardian. Respondent No. 1 agreed to the kid visiting and residing in India until 26.09.2019. To date, there has been no communication between the appellant no.1 and respondent no.1 regarding the revision of the said consent. Dr. Anurag Krishna performed surgery on the little son on 14.03.2019. The respondent no. 1 came to India at the time of surgery and thereafter returned to India. Dr. Anurag Krishna provided a certificate on 17.09.2019 stating that he evaluated the minor on 12.07.2019 and determined that the youngster was doing well. There is no formal proof on file to prove that the child's attendance in India for additional medical care is required. Respondent no.1 had filed a habeas corpus petition for the release of the minor child from the clutches of the appellant no. 1 before the Punjab & Haryana High Court. The child has spent more than 2 years in India which was beyond the permissible period as per the consent agreement for travel. Respondent no.1 has a status of permanent resident in the USA which is valid up to 16.08.2031. There are no processes active between the parties save for the case filed by respondent no.1 in USA Court about custody of the youngster which the circuit court of Benton County, Arkansas, USA via its interim order handover the custody of the minor child to the respondent no. 1. According to the welfare report dated 17.12.2019 of the US Embassy's Visiting Consular, the appellant no.1 stated that her aunt takes up the young kid from school, brings him home, and remains with him during the day whilst mother and grandparents are at work. Furthermore, a domestic assistant is caring for the kid's requirements, indicating that appellant no.1 is not dedicating her entire day to taking personal care of the minor and being responsive to the needs of the child. Respondent no.1 has submitted an affidavit stating that he has the alternative to continually work from home and that his mother has a proper visa to reside in

the United States until 23.02.2024, and has indicated readiness to care for the young kid in the United States.

3 ISSUES

3.1 Whether returning to the USA will be in the best interests of the minor child as per the facts and circumstances of the present case?

3.2 Whether the parent's right to have custody of the child have priority over the welfare of the minor child?

3.3 Can a writ Court compel the parents to leave India and go abroad to accompany their child?

4 SUBMISSIONS

4.1 By Appellant

4.1.1 *Need for constant medical care*

After surgery, the youngster needs ongoing medical attention. Any lapses may be exceedingly dangerous to the minor's life. The surgeon who treated the infant recommended a severe care regimen for the youngster.

4.1.2 *The mother is the primary caregiver*

A woman cannot be fully removed in custody proceedings in the interest of the child's wellbeing. The woman's rights should not be violated.

4.1.3 *Right of autonomy of the appellant*

To force the primary caregiver, that is, appellant no. 1, to travel to the United States under the greatest advantage of the child rule would be a breach of her basic right to autonomy, which is part of the fundamental right to privacy.

4.1.4 *Departure from the best interest of the child theory*

Heavy reliance was placed on an article titled Beyond the Welfare Principle by Mr. John Ekelaar. A child's nationality has nothing to do with the well-being concept.

4.1.5 The right of mothering of a woman cannot be refused

Denying a woman, the right to motherhood is tantamount to refusing to accept and respect a fundamental social and biological existence. If the kid is put in the care of respondent no.1 because appellant no.1 is unwilling to travel to the United States, the child would be relegated to the status of a commodity.

4.2 By Respondent No. 1

4.2.1 Breach of Foreign Travel Authorization

The minor is still being held in her illegal possession in India since appellant no. 1 has not returned along with him to the United States. No revisions to the consent form were even considered between the parties after it was signed. By the overseas trip consent form, departure tickets for 26.09.2019 were also bought.

4.2.2 Order of the High Court should not be interfered with

According to the High Court's interim ruling of June 10, 2020, respondent no.1 has been engaging frequently with his minor son via videoconferencing, and they have a very healthy and strong father-son connection. Respondent No. 1 has said in the visa invitation letter that he will cover appellant no.1's tour expenditures in the United States, including round-trip airline, food, accommodation, and healthcare insurance. the High Court's ruling is a highly equitable decision that is in line with the law established by the Apex Court

5 OBSERVATIONS BY THE HIGH COURT

It was held that the summary inquiry was appropriate in the circumstances of the case. The youngster has lived in the United States for more than three years and two and a half years in India. As a result, it is not possible to claim that the kid has been completely integrated into the social, psychological, cultural, and intellectual environments of either the United States or India. After reviewing the documents on file, it was determined that appellant no.1 had not produced any additional medical report demonstrating that the minor child requires additional regular medical treatment in addition to the usual periodical evaluation, and thus a periodical review could be arranged in the USA itself for the child.

Additionally, the High Court appointed an *amicus curiae* whose report was considered extensively by the High Court. Respondent No. 1 has the financial means to support appellant no.1 and the young kid in the United States. The High Court ruled that the alteration in travel plans was not communicated and agreed upon by both parties.

The fact that the kid is a US citizen with higher future chances if he or she returns to the US was also taken into consideration. It has been noted that the gradual phenomenon of polishing the surroundings of his nation is essential for his overall growth. Returning to the United States is in the child's best interests and well-being. The High Court did not consider the order of the United States District Court to be decisive.

6 OBSERVATIONS BY THE SUPREME COURT

There was not even a single conversation between the appellant no.1 and the respondent no.1 about changing the consent till today. Respondent No. 1 admitted that the time of travel specified in the permission was not expanded. The appellants have not filed any medical certificates from the treating doctor indicating that the kid requires additional medical care in India.

The Circuit Court of Benton County, Arkansas, USA issued an *ex-parte* ruling granting custody to respondent no. 1 on 03.02.2020.

Apex Court has always adopted the notion that the welfare of the minor is the most important concern and that the claims of the parties to a custody battle are unimportant. In truth, section 13(1) HMGA states that when a guardian of a child is appointed or declared, the welfare of the minor takes precedence. When a Court determines that it is in the best interests of the minor to stay in the care of one of the parents, the interests of the other parent are sure to be impacted. According to Section 6 (a), HMGA, the biological guardian of a minor is the father, although custody of a youngster who has not reached the age of five years is generally with the mother. On a combined interpretation of Section 13(1) and Section 6(a), HMGA, if it is determined that the welfare of a youngster aged more than 5 years necessitates custody with the mother, the Court is required to do so. Similarly, if the best interests of the minor demand that custody of a minor not remain with the mother, the Court will be entitled to interfere with the mother's custody even if the minor is under the age of five years. In such

instances, the rights granted by Section 6 (a) to the father or mother, as the case may be, are obliged to be impacted. Orders for visiting rights are primarily issued for the benefit of minors and to defend their interests in being in contact with both parents. Such orders are not simply issued to defend the rights of parents. Considering the established legal situation, and with the welfare of the minor as the priority, the arguments based on Mr. John Ekelaar's article are rejected. The rights of the mother or father are not required to be preserved while implementing the welfare principle. The welfare of the minor must take priority above the parents' rights.

On 24.11.2021, the Court ordered the parties to arrive at an amicable solution; however, they failed to do so.

7 REFERRED CASES

7.1 Yashita Sahu v. State of Rajasthan⁵ and Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Another⁶

The child's well-being is the most important aspect. A child has a human right to both parents' love and affection. The significance of visiting rights and contact rights of parents who do not have custody of their children is addressed. The type, method, and circumstances of such parent's visit and contact privileges must be expressly defined by the court.

7.2 Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw and Another⁷, Lahari Sakhamuri v. Sobhan Kodali⁸ and Prateek Gupta v. Shilpi Gupta and others⁹

The child was sent back to his native state, that is, USA to his mother considering the facts and circumstances of the case. The Apex Court can invoke its extraordinary writ jurisdiction to protect the best interests of the child.

7.3 Nithya Anand Raghavan v. State (NCT of Delhi) and Another¹⁰

A key point for the High Court to assess is whether an order issued by a court of foreign

⁵ (2020) 3 SCC 67

⁶ (1984) 3 SCC 698

⁷ (1987) 1 SCC 42

⁸ (2019) 7 SCC 311

⁹ (2018) 2 SCC 309

¹⁰ (2017) 8 SCC 454

jurisdiction instructing the person in possession to present the minor before it would constitute the minor's custody illegal. Without a doubt, simply because such a ruling is issued by a foreign court does not render the minor's custody illegal.

7.4 Kanika Goel v. the State of Delhi through Station House Officer and another¹¹

Every case related to the custody of the minor has to be decided in light of the welfare principle.

7.5 K.S. Puttaswamy v. Union of India¹²

The right to privacy is a Fundamental Right under Article 21.

7 DECISION

A writ Court dealing with the question of habeas corpus cannot order a parent to leave India and travel overseas with their kid. If such directives are issued against a parent's desires, it will violate her/his right to privacy.

The appellant no.1 must be given the choice of returning to the United States with her little son, but she cannot be compelled to stay with the respondent. The respondent no.1 must make adequate accommodations for an appropriate house for the appellant no.1's pleasant stay in the United States. Respondent no.1 will be required to pay the appellant no.1 a suitable monthly stipend for her and the kid to live in the United States. Respondent No. 1 must take adequate procedures to ensure the child's enrollment in a school in the United States.

Appellant No. 1 will be allowed fifteen days from the date of the verdict to express to Respondent No. 1 her readiness to go to the United States with the kid. If she plans to visit the United States, she must disclose probable travel dates as well as her desire to do so. The dates should be no more than three months from the date the decision is issued. Upon receipt of the same, respondent no.1 shall arrange for flight tickets and make other arrangements for the appellant no.1 and the minor's pleasant stay in the United States. For the present, the respondent no.1 will send US\$ 5,000 to the appellant no.1 to facilitate expenditure in the United States. In addition, the respondent no.1 shall provide US\$

¹¹ (2018) 9 SCC 578

¹² (2017) 10 SCC 1

1,500 to the appellant no.1 for the welfare of the minor child in the United States. Respondent No. 1 would also be required to provide adequate medical coverage for both. Respondent No. 1 will also be obligated to take responsibility for the minor son's medical care. If the appellant no.1 does not indicate her readiness to go to the United States within fifteen days of the pronouncement of the judgment, respondent no.1 will be able to take charge of the kid. After respondent no.1 reaches India, appellant no.1 must pass over custody of the minor son to respondent no.1 so that respondent no.1 can take the minor son to the United States.

8 CONCLUSION

Custody of a minor is very delicate and complicated issues arise because of disputes amongst the parents. The custody is mostly governed by the center ground set by the judges in this respect. There have been quite severe disputes between the parents. However, the debate over the parent's right to the custody of the child should not jeopardize the child's future. While resolving various sections of the law, it should be recalled that the primary motivation for child custody is the kid's welfare as well as secured social security. As a result, any impediment produced by law in this regard should be addressed and then corrected.

Hence, this decision is a welcome step towards the concretization of the concept of the welfare of the child over and above parent's right to custody of the child.

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