

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

DATED THIS THE 9<sup>TH</sup> DAY OF AUGUST, 2021

BEFORE

THE HON'BLE MR.JUSTICE S.R. KRISHNA KUMAR

WRIT PETITION NO.101082/2021 (GM-CPC)

BETWEEN:

SMT JYOTI PRIYA D/O.S.PETER,  
THEN WIFE OF PAUL GOODWIN,  
AGE-41 YEARS, OCC-HOUSEHOLD WORK,  
R/O.BHAGYAVILLA BHAVANI NAGAR,  
KESHAWAPURA HUBBALI-580 023.

- PETITIONER

(BY SRI SHRIKANT T.PATIL AND  
SRI ROHIT S.PATIL, ADVOCATES)

AND :

SHRI PAUL GOODWIN J.,  
S/O.M.X.JAMES PHILIPS,  
AGE-ABOUT 47 YEARS,  
OCC- SERVICE, R/O.N.A.-837 BEL,  
COLONY JALAHALLI, BENGALURU-580 013.

- RESPONDENT

(BY SRI ANJANEYA M., ADVOCATE)

THIS PETITION IS FILED UNDER ARTICLE 226 AND 227 OF THE INDIAN CONSTITUTION PAYING TO ISSUE A WRIT OF CERTIORARI BE PASSED IN QUASHING THE ORDER PASSED ON I.A.NO.6 DATED 01.03.2021 IN G. AND W. NO.5/2018 ON THE FILE OF THE PRL. JUDGE, FAMILY COURT, HUBBALLI VIDE ANNEXURE-G & ETC.

THIS PETITION COMING ON FOR ORDERS, THIS DAY, THE COURT, MADE THE FOLLOWING:

ORDER

This petition is directed against the impugned order dated 01.03.2021 passed on I.A.No.6 in G & WC No.5/2018 on the file of the Prl. Judge, Family Court, Hubballi, whereby the said application filed by the respondent was partly allowed by the Family Court.

2. Heard learned counsel for the petitioner and learned counsel for the respondent and perused the material on record.

3. The material on record indicates that the petitioner herein is the wife of the respondent, their marriage having been solemnized on 21.01.2005 at Bangalore. From out of the wedlock, they have a son, Nikhil Abraham, who was born on 02.11.2005 and a daughter Nathasha Joanna, who was born on 17.08.2012.

4. In the year 2015, respondent -husband filed the aforesaid petition on the file of the Family Court under Section 6, 7, 17, 25 and 26 of the Guardians and Wards Act, 1890, for declaration that he was the guardian and custodian of the

minor children and for other reliefs. The said petition is being contested by the petitioner – wife. In the said proceedings, respondent filed the instant application seeking visitation rights and interim custody of the minor children. The said application having been opposed by the petitioner – wife, the Family Court proceeded to pass the impugned order partly allowing I.A.No.6 and making an interim arrangement with regard to the interim custody and visitation as can be seen from the operative portion of the impugned order, which is assailed by the petitioner – wife in the present petition.

5. Though several contentions have been urged by both sides in support of their respective claims including making allegations counter allegations against one and another, a perusal of the impugned order passed by the Family Court will indicate that the Family Court has taken into account the well settled principle of law that in matters relating to child custody, welfare of the child is of paramount consideration and having regard to the fact that the minor children were presently in the custody of the petitioner –wife, the Family Court has proceeded to pass the impugned order making certain interim

arrangements with regard to custody and visitation rights in favour of the respondent – father by adopting the principle of shared parenting which is essential for the well being of the children. Upon reconsideration and re-evaluation of the entire material on record, I am of the considered opinion that the impugned order passed by the Family Court does not suffer from any illegality, or infirmity, which has occasioned failure of justice warranting interference by this Court in the present petition under Article 227 of the Constitution of India.

6. Accordingly, I do not find any merit in the petition and the same is hereby ***dismissed***.

7. Before parting, it is necessary to state that there has been substantial increase in matrimonial cases over the last three decades and invariably, in every case where minor children are involved both spouses fight bitter battles regarding guardianship, custody and visitation. So also, in every case, applications are filed by the non-custodial parent for interim custody during the pendency of the litigation between the spouses. The Family Courts and Courts dealing with

matrimonial matters are flooded not only with disputes between husband and wife, but Courts are also called upon to adjudicate upon interlocutory applications filed for interim custody and shared parenting, which has now become the norm compared to earlier times when custody of the minor children would remain only with the custodial parent and the non-custodial parent would be deprived of the company of the minor child which would impact and affect the welfare and overall well-being of the minor child.

8. While the principles relating to custody and guardianship of minor children are well settled by several decisions of various courts including the apex court and this court, invariably, in all matrimonial disputes where the question/issue regarding child custody is also in dispute, either both parties file applications seeking interim custody/visitation rights, in respect of the minor children. Due to several reasons, the family courts and the trial courts are not in a position to consider and dispose of the said interlocutory applications in relation to child custody and such applications are usually decided after a long lapse of time during the pendency of matrimonial proceedings. In this context, it is

relevant to state that since the welfare of the child is of paramount consideration and the court functions both as the guardian and custodian of minor children involved in a matrimonial dispute, it is imperative that all courts should endeavour to make interim arrangements with regard to interim custody/visitation rights during the pendency of proceedings, irrespective of whether any interlocutory application for interim custody/visitation/shared parenting has been filed or not by either party. It is also to be stated that the existing statutory provisions in relation to interim custody of minor children do not provide sufficient guidance for the trial courts in dealing with interim custody or visitation rights or shared parenting.

9. Under these circumstances, I deem it just and appropriate to issue the following broad guidelines to all family and trial courts while dealing with issue relating to interim custody and visitation rights of minor children.

10. In cases dealing with the custody of the child in divorce proceedings, the law is well established, with the multiple courts including the Supreme Court deciding on such matters. The

following are important cases to be noted regarding the principles and directions to be adhered to, for custody of minors:

- YashitaSahu v. State of Rajasthan (2020) 3 SCC 67
- AmyraDwivedi v. AbhinavDwivedi and Anr. (2021) 4 SCC 698
- Gaytri Bajaj v. JitenBhalla (2012) 12 SCC 471
- Gaurav Nagpal v. SumedhaNagpal (2009) 1 SCC 42
- MoitraGanguli v. JayanthGanguli (2008) 7 SCC 673
- HoshiamShavakshaDolikuka v. ThrityHoshieDolikuka (1982) 2 SCC 577
- Soumitra Kumar Nahar v. ParulNahar(2020) 7 SCC 599
- Kumar V. Jahgirdar v. ChethanaRamatheertha (2004) 2 SCC 688
- Mohan Kumar Rayana v. Komal Mohan Rayana (2007) 14 SCC 357

However, the courts have not laid down decisive directions on interim custody applications and the principles to be followed in such situational circumstances.

11. In light of the same, the present order shall be supplemented with directions to be followed by the family courts, so as to ensure smooth, effective and speedy disposal of such interim custody applications.

12. The following legal principles have been enunciated in various cases before the Apex Court and other High Courts and shall serve as guidelines for interim custody orders by the family courts:

1. The separation of the minor from the parent during the pendency of the case is detrimental to the welfare of the child.
2. Notwithstanding allegations made by either party, interim custody applications must be decided on the sole basis of the welfare of the child.
3. There exists no indefeasible right to deny custody of either parent of the minor.
4. Whenever such interim custody applications are filed, the respective family courts must dispose of such cases within a reasonable time period of not more than thirty days.

13. The first principle encompasses the basic human right of the minor to have the love and affection of both parents. A young child cannot be denied the care, affection, love or protection of either parent solely because the parents are at wit's end with each other (filing for divorce). He/she cannot be tossed around from one parent to the other as this may have traumatic and psychosomatic effects on the child. Sufficient visitation rights (if



they are in the same town or city)/contact rights (if they live in different states or countries) are to be granted to the parent who is not given interim custody of the minor, because it is important in ensuring that the minor does not lose social, physical and psychosocial contact with this parent who is not in interim custody. It is in the best interests of the child for the parents to equally share parental responsibility while determining the best interests of the child. This principle of the importance of both parents for the minor has been cited in various cases including *Yashita Sahu v. State of Rajasthan*, *Amyra Dwivedi v. Abhinav Dwivedi and Anr.* and *Vikas Agarwal v. Geeti Mathur*.

14. With respect to the second principle, the Supreme Court has laid down that the only consideration when it comes to the custody of the minor is his/her welfare. The court shall have to deal with conflicting demands from either parent but insofar as the interim custody order is concerned, the rights of either parent are not relevant in such custodial adjudication and neither are their allegations against one another.

15. Per contra, what is of paramount importance while exercising the court's jurisdiction, is the welfare of the child. The

welfare and interest of the child becomes the determining factor for the court's granting of custody. This includes the child's contentment, health, education, intellectual development and favourable surroundings which are to be given due weightage, but the child's moral and ethical values are as important, if not more so, than the aforementioned physical comforts. Application of this principle must exist in interim custody orders to protect children in broken homes and ensure that they are looked out for.

16. This principle that prioritizes the welfare of the child has been cited in various cases including but not limited to *Gaytri Bajaj v. Jiten Bhalla*, *Gaurav Nagpal v. Sumedha Nagpal*, *Moitra Ganguli v. Jayanth Ganguli* and *Hoshiam Shavaksha Dolikuka v. Thrity Hoshie Dolikuka*.

17. The third principle rejects the idea of an indefeasible right to deny a parent custody of the minor. The view of one spouse alone, cannot be the only thing taken into consideration. Only in extreme circumstances can a parent be denied visitation rights/contact and the reasons must be assigned for the same. No one parent can claim a superior right to retain custody of the minor

as such generalizations harm the needs of the child which is to have both parents in their life. During the pendency of the case, interim custody must be shared, in that visitation/contact rights to the party not in interim custody cannot be arbitrarily rejected. This principle is enunciated in the aforementioned Amyra Dwivedi and Yashita Sahu cases, Soumitra Kumar Nahar v. Parul Nahar, and Kumar V. Jahgirdar v. Chethana Ramatheertha.

18. The need for speedy disposal of such interim custody applications is emphasized in the fourth principle. In the interests and welfare of the minor, the interim custody applications must be disposed of quickly by the family courts so as to reduce the burden and emotional toll on the minor. Delay in such decision-making causes a deprivation of the rights of the child of love and affection his/her parents, where the child pays a heavy price for not fault of their own, which cannot be compensated for monetarily or otherwise, at any stage. Such expeditious disposal helps ensure that there is clarity in the terms of interim custody and visitation/contact rights during the pendency of the case. Keeping this in mind, the family courts are to dispose of such interim custody applications within a reasonable time period of

30 days. The principle of expeditious disposal of interim child custody application cases is highlighted in the case of Mohan Kumar Rayana v. Komal Mohan Rayana, the Soumitra Kumar Nahar case and Amandeep Randhawa v. Jehangir Salim Abdulla.

19. While considering the interim measures, especially when parents are residing in 2 different states, it would be advisable to permit the non-custodial parent to have physical visitation rights at-least once in 15 days for at least 2 days including a day/night exclusively with such parent. In this regard, certain restrictions may be imposed on non-custodial parent such as not to take the child away from jurisdiction of the Court without the permission of the Court. This will enable the child to maintain its connect/reconnect to the kith and kin of the non-custodial parent. Of course, in cases of non-custodial parent living abroad, various kinds of contact right such as speaking over phone/video can be adopted.

20. The rights of the non-custodial parent is intertwined and integrated with the rights of the child and therefore, the child has the right to be with the non-custodial parent for equal number of days as with the custodial parent during holidays, festivals,

birthdays and other important family functions. The child may also be permitted to accompany the non-custodial parent if they are residing outside the state/ country with an undertaking to submit travel plan.

21. The Court being the *parens patriae* (parent of the nation) has onerous duty to ensure that the right of the child is not abused and to protect the right of the child and ensure that the custodial parent does not use the child as a pawn to gain any advantage against the adversary in the litigation. The approach of the Court has to be holistic wherein emotional, physical, psychological and social development of the child has to be considered since the health of the child is paramount.

22. We have also heard instances where the custodial parent transgressing on the video interaction right of the non- custodial parent in not allowing the child to interact with the parent with free will. This would frustrate the rights of the child as well and in this regard. In such circumstances, the Family Courts should oversee the modalities of the contact rights of the child and ensure that the same is accomplished by directing the custodial parent to appear at a fixed time before the mediation centres and

take the assistance of mediators in facilitation of this exercise. It is true that, the child may be involved in other activities in these hours, but that right will have to give way to the more important right of the child which is to be in contact with non-custodial parent.

23. It is a well-known and a well-settled principle that character building is an essential part of a child's growth and in this process, parents are the facilitators and in the absence of any one of the parent interacting with the child, the child would become that much unfortunate and deficient.

24. In this general factual scenario, the Division Bench of our High Court has held in *Savitha Seetharam vs. Rajiv Vijayasarathy Rathnam* (2020 SCC OnLine Kar 2747 in M.F.A. 1536/2015 c/w M.F.A. 137/2015 decided on 11.09.2020) regarding recognizing the rights of the child in various nations and laid emphasis on various facets of parenting plan such as preference of the child, visitation and custody of children and upon referring to catena of judgements, indicated the sustainable growth of the child and further recognized the equal parenting rights including visitation rights and came to the ultimate conclusion that parenting plan is

very much required. In fact, the Division Bench also exclusively interviewed the child and passed necessary orders thereon.

25. It is also submitted at the Bar that, some custodial parents are taking advantage of the pandemic situation and denying the rights of the child with non-custodial parent by adopting dubious methods to distance the child from the non-custodial parent which ultimately may result in catastrophic consequences. It is in this regard that, the Family Courts are directed to ensure that the custodial parent does not misuse the situation and deny the rights of others having regard to the long pendency of the Family Court matters and the gaps between the hearing dates. The Family Courts shall notice these irregularities of the custodial parent, if the same is brought before the Court and pass suitable orders in the interest of the child.

26. The Family Court shall also explore the possibility in suitable cases upon preliminary enquiry to handover the interim custody of the child to the non-custodial parent, who could conveniently carry out online classes from other destination so that the rights of the child are well exercised and protected. This methodology has to be exercised as extraordinary innovative

method to protect the right of the child and is also the need of the hour in extraordinary circumstances. Of course, all these measures are to be adopted and implemented keeping the peculiar facts and circumstances of the case. This kind of arrangement is also favoured by the Apex Court vide judgement dated 23.09.2020 reported in (2020) SCC Online SC 928 Sri. Nilanjan Bhattacharya vs State of Karnataka, wherein, it is held that the child can travel outside India even during pandemic and father can very well take care of his welfare and well-being of the child by ensuring its safety.

27. I may add that the aforesaid broad guidelines are only illustrative and not exhaustive and it is for the Courts to take necessary steps and pass appropriate orders depending on the facts and circumstances of the case.

Registry is directed to circulate copy of this order to all Family Courts in the State as well as all trial Courts and appellate Courts dealing with matrimonial disputes.

bvv

SD/-  
JUDGE