

CASE NO.:
Special Leave Petition (civil) 4230-4231 of 2003

PETITIONER:
Kumar V. Jahgirdar

RESPONDENT:
Chethana Ramatheertha

DATE OF JUDGMENT: 29/01/2004

BENCH:
Shivaraj V. Patil & D.M. Dharmadhikari.

JUDGMENT: Dharmadhikari J.

In these two appeals, the subject matter of dispute between the married couple, now separated by decree of divorce obtained on mutual consent under the provisions of Hindu Marriage Act, 1955, is their rival claim to the exclusive custody of their daughter Aaruni who is now little above 9 years of age and is prosecuting her education in a well-known school in the city of Bangalore where the parties reside.

After obtaining divorce on mutual consent, the wife Smt. Chethana Ramatheertha is re-married to Mr. Anil Kumble, a Cricketer of national and international repute. The Family Court of Bangalore by its judgment dated 20.4.2002, after considering the evidence led by the parents of the child, came to the conclusion that as the wife is re-married to a famous cricketer and is leading a different style of life involving frequent tours with her second husband for attending cricket events, there is likelihood of child developing distance and dislike for her natural father. The exclusive custody of the child was directed to be given to the natural father with only right of visitations to the mother on every week on Sunday between 10 A.M. to 8 P.M. and to keep the child with her overnight on two Sundays in a month with prior intimation to her former husband.

The High Court, in appeal, by its impugned judgment dated 27.1.2003, has, however, taken a different view and reversed the judgment of the Family Court. On the basis of evidence on record, the Division Bench of High Court has formed an opinion that in the absence of compelling reasons and circumstances, the mother cannot be deprived of the company of the child to the detriment of the interest of the child. The High Court, therefore, set aside the judgment

of the family court and directed that the mother should continue to retain exclusive custody of the child with visitation rights to her former husband. The former husband is allowed to keep the child on week ends either on Saturday or Sunday from morning till evening and he can also be with the child during half the period of vacations in the school. The stay of child with each of them during half of the vacations, is to be shared by the two parents under mutual agreement. The father is also allowed to visit the child as and when he likes with the prior intimation and mutual arrangements with the mother. The parties are also given liberty to seek necessary modifications in the arrangement evolved by the High Court.

For deciding the controversy regarding the custody of the child, only few more facts are relevant and required to be stated.

The parties were married in the year 1986 at Mysore and had a married life for more than 12 years. The child Aaruni was born to them on 07.12.1994. When the child was little about two years old, the wife took a job in Trans Oceanic Travels. Their marriage broke down in the year 1998 when the wife left her matrimonial home and sent a notice through her lawyer that she was unwilling to live with her husband. On a joint petition, filed by the parties in the Family Court for dissolution of marriage by mutual consent, a decree of divorce was passed on 17.4.1999. The separated parents, in accordance with the conditions of divorce by consent, agreed to their appointment as joint guardians with periodic custody of the child. They also agreed to keep the child alternatively in every week. As per the mutual arrangement agreed between the couple, the wife took custody of the child for a week in the year 1999. She soon thereafter got re-married to famous cricketer Mr. Anil Kumble on 1st July, 1999 and went out of the country with her second husband leaving the child under the custody of her former husband. On return from abroad with her second husband, she filed an application in the Family Court on 12.8.1999 seeking exclusive custody of the child. The Family Court rejected her application and the High Court, in revision, only granted liberty to the parties to approach the Family Court for alteration or modification of the terms of consent decree of divorce. Thereafter, the wife moved a petition again to the Family Court for altering the conditions of divorce. During pendency of those proceedings, with the permission of the Family Court, she took the child with her while on tours with her second husband.

A counter application was filed by the present petitioner/her former husband Shri Kumar V. Jahgirdar for exclusive custody of the child on the ground that he being the natural guardian and having remained unmarried with sole aim to bring up the child in congenial

atmosphere was better suited to be entrusted with her custody. It was stated that the re-marriage of the wife is detrimental to the welfare of the child.

The wife from her side filed repeated applications in Family Court seeking permission to take the child to foreign countries on tours with her second husband. The Family Court granted such permissions but on certain conditions.

The wife went up by revision petition to the High Court and the High Court directed that the child should be placed in the custody of mother for a continuous period of one year. When the present petitioner/her former husband appealed, this Court, after hearing the learned counsel appearing for the parties, by order dated 18.4.2003 made an interim arrangement pending final orders on the pending applications of the parties before the Family Court, Bangalore. The mother was allowed to retain custody of the child with visitation rights granted to the former husband every week on Saturday and Sunday. It was also directed that during pendency of the cases before the family court, if the mother is required to go out of the country, she will not carry the child with her but leave the child in the custody of her former husband during her absence. The family court was directed to decide the case within four months.

The family court in its judgment dated 20.4.2002 granted exclusive custody of the child to the former husband with only right of weekly visitations to the mother on the grounds inter alia that the mother is re-married to a famous cricketer whereas the former husband is still unmarried and his nature of business as a Stock Broker is such that he is able to give required attention to the rearing of the child. The family court also, on the basis of apprehensions raised in evidence on behalf of the former husband, came to the conclusion that custody of child with natural father would rule out possibility of attempts on the part of the mother and her second husband to induce or create ill-will in the mind of the child towards her natural father. The family court also recorded that during long periods when the girl child lived with her natural father, she herself expressed satisfaction and happiness.

The wife appealed against the judgment of the family court to the High Court. The child was interviewed twice by the Hon'ble Judges of the High Court on 20.11.2002 and 05.12.2002. On the basis of interviews with the child who is school going and aged about 9 years, the High Court recorded in its judgment that the child expressed no dislike or negative feelings towards any of her natural parents or her step father. The High Court after examining the evidence on record

and interviewing the child, came to the conclusion that in the absence of any compelling or adverse circumstances, the natural mother cannot be deprived of the exclusive custody of a growing female child. The judgment of the family court has been upset by giving exclusive custody of the child to the natural mother with visitation rights on week ends to the natural father on timings mentioned in the order. Aggrieved by the order of the High Court, the former husband is, in appeal, before us.

Learned senior counsel, Shri S.S. Javali appearing on behalf of the petitioner/former husband took great pains by taking us through the record of the case and particularly the relevant parts of the depositions of the estranged couple and the second husband of the wife. He severely criticised certain general remarks and statements made by the High Court in the impugned judgment such as that 'mother has an absolute right to keep company of the child unless deprivation of it is required for compelling reasons'. It is argued that such an erroneous approach on the part of the High Court, has resulted in upsetting a just and very well-reasoned judgment of the family court.

From the arguments advanced on behalf of the former husband, what we have been able to gather as more important circumstances set up against allowing the wife to retain the custody of the child *inter alia* are that the wife is re-married to a cricket celebrity and has a style of life which requires frequent foreign tours, exposure to public life and media. There is also possibility of the child being brain-washed to keep distance from the natural father. On the behaviour of the child during her interviews on two occasions, as has been recorded by the High Court Judges, submission made is that it might have been so due to psychological counselling given to the child. It is stated that during one of her interviews, a psychologist was found to be accompanying her to the court before she child entered the Chamber of the Judges for interview. On behalf of the wife, the learned counsel stoutly denied any such happening during hearing in court.

On behalf of the former husband, learned counsel then very strenuously submitted that his client has remained unmarried with one single aim to rear and bring up his child in a congenial atmosphere of love and affection which he alone can guarantee. In the present status and style of life of his former wife, it is submitted that the former husband was rightly held by the family court to be a preferable parent to keep custody of the child. The father is also financially well-off and has already acquired movable and immovable properties as also deposited cash in the name of the child to ensure best of care and education to her.

We have also heard learned senior counsel, Shri Gopal Subramaniam appearing on behalf of the wife, who has supported the impugned judgment of the High Court and submits that the past conduct of the wife and her second husband throughout the proceedings in these cases belies the apprehension of the former husband that the child's mind would be poisoned against him. The apprehension is stated to be completely baseless and imaginary. Learned counsel assures on behalf of Mr. Anil Kumble, the second husband of the wife, that he would continue to extend same love to the child and cooperation to the natural parents as he has been doing throughout in the past so that the child gets the best of care, affection and education for her proper upbringing. It is submitted that as has been desired by the High Court with the conditions imposed in its orders, the parties would faithfully and sincerely continue with the existing arrangement without any detriment to their mutual interests and the interest of the child.

After hearing the learned counsel appearing for the parties at sufficient length and having bestowed our careful consideration to the observations and conclusions reached by the family court and the High Court in their respective judgments, we do not find any ground to substantially upset the judgement of the High Court containing the arrangements made therein for the custody of the child and the rights of visitation granted to the natural father.

We make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of mother as parent to be always a preferable to the father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made. We, however, do not find that the judgment of the High Court is based solely on one consideration that between two parents, the mother always can claim superior right to retain the custody of the child. The High Court has taken into consideration all other relevant facts and circumstances to come to the conclusion that female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification for it. The conclusion of the High Court seems to be just and proper in safeguarding the interest of the child.

Without going into the allegations, counter allegations and misapprehensions expressed against each other, on the paramount consideration of best safeguarding the interest of the child, in our opinion, the judgement of the High Court giving exclusive custody of the child to the mother and visitation rights to the natural father

deserves to be maintained with little modification for the following reasons :-

1. The child is, at present, 9 years of age and on advent of puberty. This is the age in which she requires more care and attention of the mother. Mother, at this age of the child, deserves to continue to keep the custody of the female child. She is reported to have given up her service and now leading life of a house-wife. The progress report of Aaruni from the Sophia High School, Bangalore, indicates that she is very good at studies and has a bright educational career.
2. It is reported that the wife is presently on the family way. The prospect of arrival of the second child in the family of the wife is another circumstance which would be in favour of the present child.
3. The petitioner lives alone with his father. There are no female members living jointly with him although he may have female relations in the city but that would not ensure constant company, care and attention to the female child.
4. The petitioner/natural father is a busy Stock Broker allegedly carrying on his business with aid of on-line computer but it cannot be said that in the course of his business, he has not to remain out of residence for attending his office and other business engagements.
5. The apprehension expressed against the second husband that he might poison the mind of the child and create ill-will towards natural father is not borne out from the evidence on record. On the contrary, the second husband in his deposition has made statements evincing a very cooperative and humane attitude on his part towards the problem of the estranged couple and the child. We find that apprehension expressed against the second husband is without foundation. The parents of the child have separated by mutual consent without making any vicious allegation against each other. They also agreed under the express terms of the consent decree of divorce to take responsibility of bringing up their child as her joint guardians. This gesture of decency and cooperation in jointly looking after the child has to continue. In this mutual agreement of separated couple, on behalf of second husband, it is assured to us that he would continue to give his unreserved cooperation and help and would do nothing as to spoil the relationship or intimacy of the child with the natural father.
6. The visitation rights given to the natural father, in the present circumstances, also do not require any modification because with

the passage of time, the growing child should eagerly wait for the company of his father as a happy and enjoyable moment rather than treat it as a part of empty ritual or duty. To make visitation rights of natural father effective and meaningful for proper growth of the child, active cooperation of both the parents and her step father is expected and we hope it would not be found wanting from any one of them.

7. Since the mother of the child is married to a famous cricketer, as and when she leaves the country on tour with her husband during school days or vacation period of the child without taking the child with her, in stead of leaving the child to the care and custody of some other member of the family, the custody of the child during her absence from her home shall be given to the natural father.

With the above observations and modification, we maintain the judgment of the High Court. The two appeals are, thus, disposed of. As all the parties, before us, are highly educated, cultured, of modern outlook, well-off and having so far conducted themselves decently and courteously towards each other, we hope, in future as well they will continue same attitude and conduct for maintaining their cordial relationships and extend full cooperation in safeguarding the interest of the child in best possible manner.

Looking to the nature of the case and the position of the parties, they are directed to bear their own costs and expenses incurred in these appeals.