

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5403 OF 2015

Tushar Vishnu Ubale ... Petitioner

Vs.

Archana Tushar Ubale ... Respondent

Ms.Rajani Iyer, Sr.Adv. a/w Yogesh Pawaskar i/b V.S. Kapse for the
Petitioner

Mr.U.P. Warunjikar i/b Ms.P.H. Gada for Respondent

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **15th JANUARY, 2016**

ORDER:

1. The order dated 27.5.2015 passed by the learned Judge of the Family Court, Mumbai, in respect of directing the joint parenting plan by handing over six months custody of the child to each parent is challenged in this appeal.

2. The petitioner/father is a Surgeon and the mother is working as a nurse. They got married on 10.10.2008. It was an intercaste and a love marriage, which was not approved by the parents of the mother. The child Mukta was born on 8.10.2009.

3. Ms.Iyer, the learned Senior Counsel for the Petitioner, submitted that the Court in its order had directed the parents to submit a joint parenting plan. She argued that the adopting joint parenting plan is a voluntary act of the parents. It cannot be directory. However there was a specific direction given by the Court so a joint parenting plan was submitted by both the parents and therefore the learned Judge ought not to have construed that the submission of such joint parenting plan was a consensual act of the parents. She submitted that the correct method was not adopted by the learned trial Judge to take forward the idea of joint parenting plan which is based on the report of the Law Commission submitted on 25.5.2015. It is submitted that the learned Judge has described the Law Commission report which was published on 25.5.2015 as an oven fresh report. However, after going through the Law Commission report, it appears that the learned Judge could not give himself time to deliberate upon it as the order was passed immediately i.e., on 27.5.2015.

4. The learned Senior Counsel pointed out various suggestions of the Law Commission which are mentioned therein and referred to in the order. In clause 5.8, the Law Commission has stated about crystallisation of the Rules as per the requirement of the child. It has proposed amendments in the Guardians and Wards Act. Then, in Chapter 11A of the Law

Commission report, parameters are given by the Law Commission in respect of the custody issue of the child. These are also referred to in para 14 of the judgment. She submitted that though these are referred to, they are not properly considered by the learned Judge. She further pointed out paragraphs 106, 107 and 108 and also clauses 3.3.4 and 3.3.5 and in paragraph 3.5, in which the Law Commission has expressed that considering the prevailing distribution of roles assigned to the parents by the Indian society, the idea of shared custody may not be possible and the Court needs to weigh the circumstances accordingly. She pointed out that the learned Judge has straightaway divided the custody for six months between the father and the mother which is not at all good for a healthy upbringing of the child, who is more attached to the father. It is necessary for the Court to consider a degree of comfort of the child which is completely ignored by the learned trial Judge. The Law Commission has expressed that if at all the non-custodial parent relocates himself / herself where the school of the child is situated then it would be the material fact for considering joint custody. In the present case, the learned Senior Counsel submitted that the mother has relocated herself and has started residing at Chembur near the school of the child and the residence of the father. However, the Family Court should have considered what is the duration of the relocation, whether it is on the leave and licence, whether that residence is going to be available to the mother so that the child can

stay there comfortably with the mother, etc. The suggestions of the parenting plan are required to be read in proper perspective. The Law Commission never intended shifting custody directly by 50% between the parents. While granting the custody, the Court has to consider the element of stability so also the element of inter-spacing with both the parents.

5. She further submitted that the learned Judge has shown concern about making financial provision for the child. However, the arrangement made by the learned Judge is troublesome. As per the order, joint account of the parents is to be opened. The father is going to deposit Rs.10,000/- and the mother will deposit Rs.5,000/- per month and thus, the child will have Rs.15,000/- per month in her account and for withdrawal of the said amount, the parents will have to come to the Court and seek permission of the Court. She submitted that this is not workable. She further pointed out that the learned Judge has directed that in order to take care of the mental and physical health of the child, one mediator, who is a psychiatrist is appointed, so the child is to be referred to the Psychiatrist on the issues of dispute between the parents and the Mediator will have to report ultimately to the Court and seek the advice of the Court. She argued that approaching the Court for each and every decision or action is not feasible for the parties. The order of the access is given, however, if at all there is a default in giving the access, then, the defaulter is directed to pay cost of

Rs.1,000/-. Such rigid order cannot be passed in a custody issue but to make it workable, some flexibility is required. The father has submitted a parenting plan and mother has also given her parenting plan and as per the parenting plan of the mother, it is suggested that the custody of the child is to be given in alternate week to each parent. She argued that shifting of custody on alternate week is not a good suggestion but enhanced access can be substituted for the same. In respect of staying of the child in vacations such as Summer, Diwali and Christmas as also on festivals and some special days such as birthdays, can be worked out by consent. She submitted that since June, 2015, till today, the child has stayed with both the parents though the custody has remained with the father and the child is fine and mentally healthy and has the same attachment with the mother.

6. Mr.Warunjikar, supported the order passed by the learned Judge of the Family Court. He read over the relevant paragraphs from the judgments of the Supreme Court. He relied on the judgments in **Smt.Anjali Kapoor vs. Rajiv Baijal¹; Gaurav Nagpal vs. Sumedha Nagpal²; Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam³ and Vikram Vir Vohra vs. Shalini Bhalla⁴.**

1 (Civil appeal No.2628 of 2009) decided on 17.4.2009

2 Civil Appeal No.5099 of 207 decided on 19.11.2008

3 Civil Appeal No.2817 of 2008 decided on 14.9.2010

4 Civil Appeal No.2704 of 2010 decided on 25.3.2010

7. He also relied on the report of the Law Commission. He submitted that the Family Court has relied not only on the Law Commission report but also a draft of the parenting plan which was approved by the High Court and which is put on the website of the Family Court. He further submitted that alongwith the Law Commission and the draft parenting plan approved by the High Court, the learned Judge of the Family Court has also another document for his assistance and that is the report of the marriage Counsellor of the Family Court. The objection raised by the counsel for the petitioner that the learned Judge of the Family Court without interviewing the child has passed the order in respect of parenting plan, is not sustainable because the marriage counsellor has interviewed the child and has submitted the report. So, the learned Judge of the Family Court is fully justified in passing order with the help of guidelines and other suggestions in the report of the Law Commission. He submitted that the order of the appointment of the Mediator is also very innovative method and shows a sound approach of the learned Judge to enable to keep the follow up of the custody. The order passed by the Family Court is to be considered in its totality. Mr.Warunjikar argued that upon such consideration, it would have to be seen whether the welfare of the child is considered properly after weighing of the available resources and prevailing circumstances in the present case. He further submitted that

the child is very happy with the mother and the mother has relocated herself to Chembur. Her mother is also staying with her. So being a nurse, whenever the mother has to go for work, the grandmother attends to the child and due to the order passed by this Court on 7.8.2015 and 1.10.2015, the child could establish rapport with the maternal grandmother and also now is happy in visiting both the parents.

8. In reply, Ms.Iyer, the learned Senior Counsel, submitted that the cases cited by the learned counsel for the respondent are to be considered in the light of their facts. Joint Parenting is different from joint custody. The Court has to consider the meeting of minds of the child and the parents. The Law Commission's report is not only on joint parenting plan but the suggestions are given in respect of changes in Guardian and Wards Act and custody. The Law Commission has laid down a number of aspects which the Judge has to take into account in respect of custody of a child and one of them is the joint parenting plan. However, she pointed out that in Clause no. 3.3.5 of the Law Commission Report, the Law Commission has expressed that they are not in favour of law placing presumption in favour of joint custody. It is necessary to take into account para no. 3.3.1 which speaks of the reasons for adopting the joint custody. The reason given is of simultaneous association of both the parents with the child.

9. The 257th report of the Law Commission of India is on guardianship and custody laws in India. The words 'guardianship' and 'custody', needless to say, are two different terms. Chapter III is on the concept of joint custody and in Chapter V, the Law Commission has mentioned and discussed the considerations for deciding child custody cases. These considerations are as follows:

- a. Factors to consider for best interest and standard
- b. Determining the preference of the child
- c. Access to records of the child
- d. Grandparenting Time
- e. Mediation
- f. Relocation
- g. Decision making
- h. **Parenting Plan**
- i. Visitation

10. These are the recommendations given by the Law Commission and that is not law and is not binding. The intention of the learned Judge of the Family Court to adopt these suggestions and also the High Court rules and chalk out a Parenting Plan is undoubtedly admirable. It shows that he was keen to experiment these new methods and apply to this case. However, the learned Judge has used a mathematical formula in deciding

the custody issue, which needs to be modified. The Law Commission wants the Judges working in the Family Court or handling the issues of guardians and wards to refurbish their fixed ideas and to have a makeover in their perceptions. In detail, various aspects are considered in the report. On the point of joint custody, in para 3.2.1, it is mentioned that joint custody is not specifically provided for in Indian law. It is necessary to highlight the important observations and suggestions on the point of joint custody in para 3.3.5 which is thus:

3.3.5 In the legal systems of several Western countries that we have reviewed in this chapter, there is a presumption in favor of joint custody, and sole custody is awarded only in exceptional circumstances. We have already referred to the inequalities in parental roles, responsibilities and expectations that exist in our country. Therefore, we are not in favour of the law placing a presumption in favour of joint custody. As opposed to the case of guardianship, where we have recommended shared and equal guardianship for both parents, in this case, we are of the view that joint custody must be provided as an option that a decision-maker can award, if the decision-maker is convinced that it shall further the welfare of the child.

(emphasis added)

11. Thus, shared and equal guardianship is recommended by the Law Commission. However, joint custody is provided as an option. Therefore, the Judges, who are working on the family laws and the issue of custody, should not hold a view that once the Law Commission has given the suggestion of a Parenting Plan, it is binding in all the cases to adopt the same. The parties are not to be compelled to give such plan which

amounts to illegality. Parenting Plan is an option for both the parties.

12. It is to be kept in mind that the ideas of custody have changed due to economic, social developments. The notions of responsibilities and the roles attributed to men and women cannot remain static throughout. In the last few decades women stepped out and are educated, so also are economically independent. Women cannot be treated as inferior or second guardian in the family. The mother is an equal partner of the father, who shares equal responsibilities in bringing up the child. Earlier, she had no role in taking decisions in the child's education, career or other development. She was supposed to feed the child, take his care physically and fulfill the child's emotional needs. Undoubtedly, all these perceptions and social norms have financial dynamics. Who earns more is a better guardian was the simple rule. However, gradually, the legal world discovered the myth in this rule and the number of factors are found to have a bearing over the custody issue. The divorces are increasing in the society so more and more children are subjected to the trauma of choosing custody.

13. In the custody matter, the child, mother and the father are the main stakeholders and the law repeatedly has emphasised as a settled position that the welfare of the child is the paramount consideration. However, one has to take note that today, the families are nuclear and the couple

restricts the family to one or two children. The society is becoming complex and the parents have to struggle hard to run the household and give better future to the child. Under these circumstances, alongwith the welfare of the child, it is necessary for the Courts to consider sympathetically the financial, physical, mental stress the parents carry and the emotional plight of the parents while awarding custody. If the parents are psychologically stable, positive and happy, then, they can provide a healthy atmosphere to the child. Usually, the child is not a problem child but the problem lies in the parenting.

14. Not all the parents have sound financial condition. If it is one child then, each one of them showers gifts and love on the child so much that the child becomes selfish and demanding. This is also a warning to the warring parents that they should not try to purchase the love of their child. The Judge has to use his/her worldly wisdom to find out at the time of interviewing the child whether child is a victim of the attitude of blackmailing parents emotionally.

15. For spouses, who are styng away from each other and fighting for the child, the word 'custody' connotes inherent crisis of sharing. To get company, love and affection of both the parents means a shared custody. A child wants to share his joys and sorrows, failures and success, with its parents simultaneously. Such simultaneous association is required for the

healthy upbringing of the child. A father and a mother have different responses towards the child's sharing, which is also necessary. The child must get a sense of belonging and social security and he should not feel that he has a broken family and should not develop self pity. The child may become a centre of either curiosity or comments, staring or sympathy from his friends, classmates and relatives. Peer pressure has negative impact on the tender and impressionable mind of the child. In the absence of simultaneous association with both the parents, the child misses completeness of his relationship. Therefore, shared custody may be an option open for the court to offer parents and make them aware of not only their child's needs but also the child's rights. As argued by the learned Counsel for both the sides, the 257th report of the law commission is not only about shared parenting, but these are the recommendations on guardianship and custody laws in India, wherein under different chapters, the Law Commission has penned down its concept of joint custody, mediation in child custody cases and, also in chapter V, the considerations for deciding the child custody cases. Number of factors are to be taken into account in custody cases in the best interest of the child and parenting plan is one of these considerations.

16. Consent thereto cannot be imposed. The submission of the joint parenting plan or shared custody is required to be suggested by the Court and so also by the Counsellors to the parents. It is necessary to give them

time to prepare themselves emotionally for such shared custody, which is difficult for the parents to digest initially. It is a matter of an attitudinal change. The Law Commission has elaborated the parameters in respect of the child custody but has also expressed that considering the roles attributed to the parents as per our social norms and behavioural patterns, the idea of 50% shared parenting may not be conducive in Indian society in all the cases. The Law Commission has voiced that the seeds of the globally accepted concept of shared custody can be sown and the saplings can be planted in the minds of the parents so that the fruits of the company of both the parents can be enjoyed by a child of the warring parents. The Law Commission has commented on the crystallisation of the roles and number of issues of the child in respect of the child's development. The Judges require to be active and sensitive while deciding issues of custody and access.

17. One of the tests to ascertain a healthy and happy mind of a child is whether the child has love, affection and equal respect towards non-custodial parent or not. If it is found that a child is not willing to go to the non-custodial parent and complains continuously about the other parent, then it can be inferred that the child's mind might be poisoned and the child is tutored. This indicator can be applied to ascertain the healthy upbringing of the child. It is to be remembered that to have access to both the parents is the right of the child which prevails over the privilege of the

parents to have custody or access. There is no statute granting any legal right upon any parent to have the child's custody in preference to or overriding the other. Therefore, the jurisprudence on the subject is taking into account the welfare of the "child" alone. In most of the cases, egos or incompatibility are the reasons for fights between the parents. They become selfish and the child is put to stake as a pawn by one parent to avenge the other. A person may be a bad husband or a bad wife, but he may not be a bad father or she may not be a bad mother. It is necessary for the fighting parents to understand and to bear in mind that the child loves both, needs both. Justice Roshan Dalvi of this Court in one of the workshops on child custody has defined rhetorically but aptly the word 'FAMILY' as '**F**ather **A**nd **M**other **I** Love **Y**ou'.

18. Separation is a shock for the child that his family has been destroyed. It gives rise to fear of the future as well as anger in the mind of children and they do not understand who should be blamed. There is a possibility of self blame and a feeling of guilt also. A majority of the children want contact with both the parents on regular basis and if it is denied, then, the children become hostile to the once loved but now non-custodial i.e., absent parent. If a custodial parent speaks badly about the the absent parent, the child tends to identify with that sentiment. Gradually a feeling that I can do without the absent parent develops and this gradual

parental alienation becomes a part of the child's life and which may lead to social alienation which is in fact a deep trauma and not a healthy or happy circumstance. Alienated children often show contempt and withdraw affection whenever they are in contact with the parent. Physical estrangement adds to emotional alienation.

19. Thus, Parenting Plan is a mutual arrangement of custody and access which is an outcome of matured parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then, the child has no option. However, when both the parents are available, their association with the child cannot be artificially denied only due to fights and hatred and vindictive approach of the parents. Hence, though it is not mandatory that all the parents should adopt a Parenting Plan, it is advisable that the family Court to invite a Parenting Plan in the cases found suitable upon the Law Commission which has taken formal cognisance of the legal right involved in joint parenting. This, of course, may be attuned to circumstances and must account for the special needs of the particular child.

20. It is necessary to buttress that the word used is "parenting plan" and not "custody plan". Custody is a narrow term and parenting is a wider terminology which implies joint responsibility. Hence, it does not only

contemplate physical handing of the child 50% to one parent and the other 50% to the other parent. A parenting plan must therefore take into account the “parental responsibility” as opposed to “parental rights” which are not statutorily granted. The aforesaid recommendations of the Law Commission must be read in that light. In the case of **Smt.Anjali Kapoor vs. Rajiv Baijal (supra)**, the Supreme Court has referred to the observations of the New Zealand Court in **Walker vs. Walker & Harrison reported in 1981 New Ze Recent Law 257**, which are as under:

...Welfare is an all encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.”

21. Keeping all these relevant factors in the background, the issue in the present case can be determined. The child is 6 years old and she has been staying with the father throughout. The mother is not staying with the father since March 2014. However, she has started residing near the house of the father and near the school of the child. Thus, the dispute between the father and the mother is not old but is fresh and under such circumstances, a possibility of reunion of the parents cannot be denied. I found both the parents loving and mature. In fact, both the parents want

their family intact and are attached to their child. Reciprocally, the child has also similar feelings for her parents. When I interviewed the child in the Chamber, I found that the child is talkative, fearless and happy. She has no sense of insecurity in mind. The credit goes to both the parents, who though are living separate, did not poison the mind of the child against each other or the members of the family. Therefore, it was easy to grant access for a longer time to the mother, who was not residing in her matrimonial home.

22. The child is used to surroundings, friends and the relatives where she is residing at present. She is also getting familiar with the place where the mother is residing. She mentioned that she has more friends where she is residing at present but she has also got one friend where her mother resides. The father's mother is a very good attendant and is a great support to the child. The mother i.e., the respondent has also expressed her gratitude towards her mother-in-law for taking care of her daughter. Similarly, her mother has also shifted to her house and is readily looking after the child. Thus, in this case, the child is fortunate to have two caring grandmothers.

23. Considering the totality of the circumstances, I am of the view that the custody of the child shall at present essentially remain with the father because in this case, the child has stayed and has been brought up in the

house of the father. I found this case as the best wherein the order of shared custody can be passed and implemented without much fights and opposition by the parents. Since about past 7 months, both the parents are having a shared parenthood and more access is given to the mother time to time so that the daughter can get used to her mother's home. The mother is to be given a sufficient period of custody each month during which she would be responsible for the upbringing of the child. The mother shall pick up the child on the first day of each month and have custody of the child continuously for 9 days and on the 10th day after lunch or the school time drop the child at the father's house. The child shall live with the mother continuously during such period. The mother shall attend to the needs of the child. On the last day of such period, the child shall be sent either directly to the school or to the father. Thereafter, the mother will take the child on the third Wednesday of the month after school hours and will drop the child at the house of the father at around 1/2 pm or after lunch on the third Sunday. Thus, the child will not feel disconnected from the mother and there shall be continuous and simultaneous association with the mother. The child shall have the love, care and company of both the prents she loves for a reasonable stretch of days as also weekends. The school vacations shall, as is usual, be shared equally in this upon mutual arrangement and understanding between the parties. Besides absent parent may call the child on phone

morning and evening and may talk for 5 to 10 minutes. The parents shall have equal say on attending school meetings and on deciding child's education, day schedule, hobby classes without taxing child. The birthday of the child is to be celebrated together in the presence of the parents. In respect of the meeting of the other family members of both the sides and celebrations of important events in the family the both the parents being quite mature, will take the decision accordingly, keeping in mind the best interest of their child. Thus, complete flexibility in taking decisions on such issues is left to both the parents. In the event of dispute, the other party can approach the Court for necessary orders. This arrangement to continue till there is any drastic change of circumstance or dependency of psychological need of the child.

24. The idea of an order saddling costs on a defaulter parent is not correct but upon default compensatory access of the equal period in next access to the other side is to be ordered.

25. The arrangement of payment of Rs.10,000/- and Rs.5,000/- can be continued but there is no need to approach the Court for the purpose of withdrawal of the money. The amount can be withdrawn with the signature of both the parents. It should be a joint account under the joint guardianship, in the name of the child with both the parents as the first

account holder. The amount can be withdrawn with the signature of the both the parents and only for the purpose of her education and maintainance if necessary. I do not think it is necessary to appoint a mediator in this case because I found the child mentally and physically healthy. If at all in future, if unfortunately, the necessity arises, then, the trial Court is always empowered to pass the required order.

26. Writ petition is thus partly allowed.

27. The Writ petition is disposed of in terms of the above order.

(MRIDULA BHATKAR, J.)

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