Radha a/p Devandaran v Senthil Kumaran a/l Vijayan [2019] MLJU 371

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HIGH COURT (SHAH ALAM)

HAYATUL AKMAL ABDUL AZIZ, J

SAMAN PEMULA NO: BA-24F-399-11/2018

10 May 2019

M.Navamani (Ganeson Gomathy Fadzlin M. Nava & Co.) for the Applicant Wife.
Ramesh Sivakumar a/l R.Ramaveloo (Nurul Afiqah Latif with him) (Goik, Ramesh & Loo.) for the Respondent Husband.

Hayatul Akmal Abdul Aziz J:

JUDGMENTINTRODUCTION

[1]Enclosure 1 was filed by the Applicant Wife ("AW") against the Respondent Husband ("RH") seeking an order for custody, care and control of the children of their marriage to be given to AW and RH be given supervised access (*akses terkawal*) every two weeks for four (4) hours at a public place in the presence of AW or her representatives. She further prayed that RH is barred from taking or absconding with the children of the marriage without the prior consent from AW. RH however, in his affidavit in reply, denies and contest the averments of AW and pray that the said OS be dismissed with cost and have instead prayed that he be granted the custody, care and control of the said children while AW be given reasonable access to the said children. Or alternatively, if custody, care and control of the children is given to AW, RH is given weekly access to the children of the marriage where AW is to send the said children to RH at 7.00pm on Friday and RH will send back the said children to AW at 10.00 pm on Sunday.

[2]The relevant cause papers and written submission, are as follows:

(a) Enclosure 1: Originating Summons filed on 12th November 2018;

(b) Enclosure 3: The AW's affidavit in support affirmed by Radha a/p Devandaran on 9th November 2018;

(c) Enclosure 8: RH's affidavit affirmed by Senthil Kumaran a/l Vijayan on 14th December 2018;

(d) Enclosure 9: AW's affidavit in reply affirmed by Radha a/p Devandaran on 31st December 2018;

(e) Enclosure 10: Affidavit in support for AW affirmed by Sairah Banu binti Mohamed Hussain on 2nd January 2019;

(f) Enclosure 14: RH's affidavit in reply affirmed by Senthil Kumaran a/l Vijayan on 22nd January 2019;

Submissions/submissions in reply by AW and RH.

[3]This application was heard before me on 12th November 2018 and after perusing the cause papers filed, written submission of parties, I allowed the said OS with variations regarding access, whereby RH is given access to the children of the marriage every fortnight (first week and third week) of every month, RH is to fetch the said children at 7.00pm Friday and to them send back to AW at 6.00 pm on Sunday. Dissatisfied with this order regarding access RH had filed this appeal and my reasons are as follows:

BRIEF FACTS

The brief facts disclosed from the cause papers are as follows:

[4]AW and RH were legally married on 1st December 2014 and are blessed with two (2) children, i.e. Krsna Jagannatha a/l Senthil Kumaran (3+ years old) and Ram Baladeva a/l Senthil Kumaran (2+ years old) ("the said children"). They resided at No.46, Jalan Mutiara Indah, 47100 Puchong Selangor. However, allegedly due to RH's volatile temper, AW claimed that during the marriage she was always physically abused even in front of the said children and RH has always threaten to kill her and her family if his demand was not followed or complied with. RH had threatened to kill himself and the children of the marriage if AW ever filed a divorce petition against him. As she cannot endure the abuses anymore, AW left the matrimonial home with the children of the marriage and is now staying with a relative. AW had also lodged several police reports against RH [exhibit "RD-3" - (Encl.3)].

[5]RH in his reply, denies the averment of AW and argued that the various police reports lodged by AW was done in bad faith with the intention of chasing him out of the matrimonial home and to deny him access to the said children of the marriage. RH denies that he was abusive as he took good care of his children and family. RH admitted that he and AW did quarrel but he was never physically abusive to her and put AW to strict proof of the alleged physical abuses. RH alleged that AW is always surfing the internet, watching movies on her handphone and has failed to take good care of the said children while also having other bad habits. In his affidavit in reply (enclosure 8) RH is seeking for AW and the said children to return back to the matrimonial home or in the alternative RH and AW be given joint custody care and control of the said children or further in the alternative if custody, care and control of the said children be given to AW than RH is given access to the children of the marriage every week where AW is to send the said children to RH on Friday at 7.00pm and RH will send back the said children on Sunday 10.00 pm.

[6]Eventually, custody care and control of the children was awarded to AW while RH is given access to the children of the marriage every fortnight (first week and third week) every month where he is to fetch the said children at 7.00pm on Friday and to send them back to AW at 6.00 pm on Sunday. It is against this order for access that RH is not satisfied and has filed this appeal. In writing this ground of judgment, I will only confine the legal reasoning to the issue of access as pronounced in open court.

THE APPLICANT WIFE'S CASE

[7]It is the averment of AW that when the said children were with her, RH was given free access to them but he elected to abuse that right by absconding with the said children on 16th December 2018 and since then he had refused to give AW any access to the said children. It is the averment of AW that the said children are still very young and therefore custody, care and control of the said children be given to her. Due to the alleged fact that RH had always threatened her that he will kill her and the said children if his demand was not met coupled with the alleged physical abuse he commits on her person. AW had suggested that RH be given supervised access (by her or her representatives) to the said children for four (4) hours only every fortnight at a public place.

THE RESPONDENT HUSBAND'S CASE

[8]RH denies being physically abusive to AW and in fact avers that he has taken good care of his children and his family. In his submission, he suggested that if the custody care and control of the said children is given to AW then he be given a liberal access to the said children. In his affidavit in reply (enclosure 8), RH has given three alternatives as follows (briefly):

(a) RH be given joint custody, care and control of the said children and AW be given right of access; or

(b) RH and AW be given joint custody care and control of the said children whereby AW and the said children has to return back to the matrimonial home; or

(c) If custody, care and control of the said children be given to AW than RH is given access to the children of the marriage every week where AW is to send the said children to RH on Friday at 7.00pm and RH will send back the said children on Sunday 10.00 pm.

THE LAW

[9]*Section 88* of the *Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("the Act")*, provides the power of the Court to make an order for custody. For ease of reference I reproduced as follows:

*"Section 88. **Power of the Court to make order for custody***

(1) *The Court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.*

(2) *In deciding whose custody, a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court should shall have regard-*

(a) *To the wishes of the parents of the child; and*

(b) *To the wishes of the child, where he or she is of an age to express an independent opinion.*

(3) *There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.*

(4) *Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently."*

[10]Section 88 (1) of the Act provides that the court may at any time by order place a child in the custody of his/her father or mother, or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person. Section 88(2) makes it mandatory for the court to consider the welfare of the child as being paramount. In *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, Raja Azlan Shah, CJ considered the phrase "paramount consideration" with respect of the welfare of children under the Act and stated the phrase "first and paramount consideration" does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration.

FINDINGS OF THIS COURT

[11]AW in her affidavit (enclosure 9) averred that when RH was given a liberal access to the said children he abused the said access by absconding with the said children without her consent and had used the said children as a bargaining tool by threatening not to return the said children to AW if she failed to withdraw this OS against him. It is against this backdrop that AW had suggested supervised access against RH. The two children of the marriage are only 3+ and 2+ years of age respectively.

[12]It is trite that in determining the issue of custody, the court is empowered to order for a child to visit a parent deprived of custody at such times and such periods as the court may consider reasonable and in this regard the court may also grant a parent deprived of custody the right to access the child at such times and with such frequency as the court may consider reasonable (section 89(2)(c) **of the Act**). This basic right of access will not be denied save and except in cases where it is proven that contact with such a person would be detrimental to the said child (see *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180). It is also to be noted that the court in any given circumstances of the case, have an unfettered discretion regarding the duration of access to the said children of the marriage depending on the nature of the facts presented before it (see *Re KO (an infant)* [1990] 1 MLJ 494; *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48,; [2000] 2 AMR 2072).

[13]RH in his prayers agree that in the event custody care and control is granted to AW (in which case it has been so ordered by this court), he prayed that he is given access to the children of the marriage every week by proposing that AW is to send the said children to him on Friday at 7.00pm while he will return the said children back to AW at 10.00pm on Sunday.

[14]It is my considered view that the aforesaid proposal by RH in the circumstances of the case is impractical and certainly unfair to AW and to the said children of tender years. Firstly, the proposal by RH that he returns the said children at 10:00 pm every Sunday after getting them on Friday at 7:00pm is not reasonable due to the tender years of the said children (3+ and 2+ respectively). The proposed hour of 10:00 pm for their return to AW is not suitable as it is way past their bedtime for children of such tender years and in such circumstance, it would not be not healthy nor practicable to ferry them from one house to the other late at night every Sunday of every week. There must be stability in their nurturing years as they continue to grow up and not to subject their growing up years in a

confusing nomadic displacement state which can adversely impact their development during this important and essential period of nurture. Reasonable sensibility and practicality must be the norm in this matter.

[15]Secondly, it is also my considered view that in the present case, both parents must be given an equal chance or opportunity to spend bonding time with the said children during this period of nurture. It is not disputed that both parties are working parents and the only bonding time they can constructively spend time with the said children is during weekends. Therefore, if only RH is allowed to spend time with the said children every weekend of the month then that would effectively deny AW the right to bond with the said children constructively during the weekends. As a working mother during the working days of the week she had to secure the assistance of her family members to care for the said children when she is out working. In such circumstances, I hold that even though custody, care and control of the said children had been given to AW but she nevertheless ought to be given time to bond with the children over the weekends too and all the more reason so as we are dealing with children of tender years. In the circumstances and with that in mind I had ordered that RH is given access to the children of the marriage every fortnight (first week and third week) of every month where RH is to fetch the said children at 7.00pm Friday and to send back the said children to AW at 6.00 pm on Sunday. Both parents now have sufficient time to equally bond with the said children and would best serves the welfare and interests of the said children which is of paramount consideration. In the circumstances of the case, it is my view that both parents ought to play an active and constructive role in the life of the said children so as to provide a balance in their upbringing and growing years.

[16]In determining the issue as to whether a parent not having custody of the child should have access, the prime consideration is always the welfare of the child. In *Yong May Inn Sia Kuan Seng* [1971] MLJ 280, it was held that the welfare of a child is not to be measured by money nor physical comfort only. The word welfare must be taken in its widest sense, where every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. Access is to be regarded as a basic right of the child rather than the basic right of a parent (see *M v M Child, Access* [1973] 2 All ER 81).

CONCLUSION

[17]In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed AW's applications (enclosure 1) with variations on access as stated above.

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