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Evolving Concept of Shared Parenting in the Matters of Custody

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ABSTRACT

The paper examines the concept of custody and evolving concept of shared parenting. In this paper the author have highlighted the age old concept of custody in which either of parent in matter of matrimonial disputes were given responsibility to raise the child. With the change in nature of society and for benefit of child, there is an evolving concept of shared parenting which has been used by the court to resolve the matter. The author had primarily highlighted the concept of custody, on what ground the custody matters are determined by the court and the evolving concept of shared parenting.

Keywords: Custody, Shared parenting, Welfare, Matrimonial Disputes.

I. INTRODUCTION

Children are probably the worst victims of divorce. Perhaps the most stressful circumstance for a child is seeing one's parents split. It is definitely an unfortunate circumstance for a child to be the continuous subject to hardships and an emotional turmoil within his or her parents. As for a child he or she loves both parents, being away from one of them will hamper their Physical as well as their mental peace. Traditionally, at common law the father was considered the sole and natural guardian of person and property. Mother did not have any authority over children since she does not have any independent status and often her identity was substitute with that of the identity of her husband.² As divorce become possible and mother began to have independent status and legal existence and their claim to have custody of children was recognized by the court.³ The concept of custody comes into place when the parents are separated. There are various laws and act to protect the interest of children such as Hindu Minority and Guardianship act 1956, Guardians and Wards act. Section 7 and Section 17 of Guardians and Wards act provided that court should act in welfare of children whereas Section 19 of same act provide the supremacy of father of custody but the same was rectified through

¹ Author is a student at Bennett University, India.

² Nadir Modi, Child Custody – Mother or Father, 1994 3 SCC J-42

³ Ibid.

2010 amendment.⁴ It is in Hindu Minority and Guardianship act, 1956 that welfare of minor shall be of paramount consideration superseding all other factors.⁵ The court has interpreted the laws case to case basis. Concept of Custody is complex in itself as its not like that court will hand over the children to one of the parent and deny other parent of his/ her right on the children. The rights and liabilities are distributed among the parents and apart from this the court consider other factors also such as when the parent other than the one to whom the custody is given can meet the children and under what circumstances the other parent will have no right over children . It is not always court who decides the paramount interest of children, sometimes when the children are mature enough to decide the court in such a situation go with the decision of children but this also in complex itself.

II. DIFFERENT LAWS RELATED TO CUSTODY

“A child cannot be tossed like a shuttle cock between the parents”. Justice R.M. Lodha and Rohinton Nariman.⁶ Children are the victim of disputes between the parents which often result in mental trauma. There are various types of custody – Physical custody, Joint Custody , Legal custody, Third party custody. Physical custody when awarded to one parent mean that minor will be under the guardianship of that parent while the visitation rights are provided to other parent.⁷ Joint custody means that both the parent will share the responsibility of child. Legal custody is different from physical custody in the sense that it does not entails the child to live with the parent whom the legal custody has been granted.⁷ Legal custody basically means that parent to whom the legal custody is granted takes every decision for the child. Third party custody means that neither of the biological parent are given custody of children. The law governing the custody of children is closely linked with that of guardianship.⁸ Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor.⁹ The term custody is nowhere in any Family law. The term ‘guardian’ is defined by the Guardians and Wards Act, 1890 (hereinafter, GWA) as a “person having the care of the person of a minor or of his property or of both his person and property.” Another term used by the law is ‘natural guardian,’ who is the person legally presumed to be the guardian of a minor and who is presumed to be authorized to take all decisions on behalf of the

⁴ Arun Kumar, Guardianship and Custody of a person , 17 JILI 1975 299

⁵ Ibid.

⁶ N Sivaraman, Court trend in child custody

⁷ Child custody laws in india, available at <http://www.legalserviceindia.com/legal/article-710-child-custody-laws-inindia.html>, last seen 2 April 2020 ⁷ Ibid.

⁸ Law Commission Report No. 257, Reform in Guardianship and custody laws in india

⁹ Ibid.

minor.¹⁰ The Guardians and Wards act, 1890 is a law dealing with the question of guardianship and custody of children irrespective of their religion.¹¹ Section 7 of GWA authorises the court to appoint the guardian of the person or property or both of the minor. Section 17 lays down the factors to be considered while appointing guardian such as court shall decide according to the welfare of the minor. Welfare of minor shall be determined by considering the age, sex and religion. If the minor is old enough to form an intelligent opinion, the court will consider his preference. Section 19(b) states that court is not authorised to appoint a guardian to the person of a minor, whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian. Section 19 was amended in 2010 and the above clause was made applicable to cases even where the mother is alive. Another law related to custody which is specifically applicable on Hindu is Hindu Minority and Guardianship act, 1956 (hereinafter refer to HMGA). The HMGA provides that father is the natural guardian of minor.¹² According to Section 6 HMGA, father is the natural guardian of minor boy or unmarried minor girl and after him mother . the custody of minor who has not completed five years of age shall ordinarily be with the mother. In *Gita Hariharan v. Reserve Bank of India*,¹³ the court held that word ‘after’ should not be interpreted to mean ‘ after the lifetime of father’ but rather mean in ‘ in absence of father’. According to Section 13 of HMGA the welfare of minor shall be of ‘paramount consideration’. The difference between HMGA and GWA lies in emphasis on welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA, the welfare principle is of paramount consideration in determining guardianship.¹⁴ Section 26 of Hindu Marriage Act, 1955 authorises the court to pass interim order with respect to custody, maintenance and education of minor children. Similarly under Section 49 of Parsi Marriage and Divorce act 1936, and Section 41 of the Indian Divorce Act, 1869, courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts. In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. The concept of Hizanat provide that of all the person, mother is best to have custody, both during the marriage and after its dissolution. The main principle which form the base for the custody is paramount welfare of children. The SC and HC in almost every custody dispute held that concern for best interest/ welfare of child supersedes even the statutory provision.¹⁵ As principle of welfare dominate domestic framework the same can be found in international

¹⁰ Ibid.

¹¹ Supra 4

¹² Ibid.

¹³ *Gita Hariharan v. Reserve Bank of India*, (1999) 2 SCC

human rights law. According to the United Nations Convention on the Rights of the Child (hereinafter, CRC), “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁴

III. APPROACH OF COURT IN DEALING WITH CUSTODY DISPUTES

The court is deciding the custody dispute is very cautious for the child. The court consider every factor from financial position of parents to preference of child in deciding the dispute. The leading principle in deciding the dispute is paramount interest of child as specifically mentioned in Hindu minority and guardianship act and Guardianship and wards act. In *Annie Beasent v. Narayanaiah*, the court held that welfare of child will be the prime consideration in deciding the custody cases.¹⁵ Whatever the legal position, the predominant consideration is always the welfare of the child. In *Shamsher Singh v. Jasbir Kaur*,¹⁶ there was the custody battle between grandfather and mother. In this case court considering all the circumstances such as age of grandfather, his income, health etc. held that that the appellant who is in the advanced age cannot be considered as best guardian of the parent despite the fact that he is attached to the child. So court handover the custody to mother and given visitation right to grandfather. Personal laws are somewhere given rise to complex situation but here also the position of law is settled. In *Poolakkal Ayisakutty v P.A. Samad*,¹⁷ principle of Islamic law was invoked in relation to custody. The court held that when the question of child custody is invoked, the primary consideration which weigh with the court is the welfare of the child and the personal laws would yield to the provisions of Guardians and Wards act. There are various instances where the court refuses to give the custody to either of the biological parents keeping in mind various factors and give to the third party such as grandfather. The parents cannot claim custody on the basis on their legal right. In *Kirti Kumar Joshi v Pradeep Joshi*,¹⁸ SC held that Even if the child is in custody of one who has no legal right thereto but the welfare of the child is reasonably taken care of, the legal guardian cannot claim the return of the child to his custody merely on the strength of his legal right or his financial or other capacity. Another major issue faced by the court is to whom the custody be granted – mother or father. In a significant judgement delivered by the Apex Court in 2008, the court emphasized that in deciding whether

¹⁴ Convention on the Rights of the Child, Art. 3, (1989).

¹⁵ *Annie Beasent v. Narayanaiah*, AIR 1914 PC 41

¹⁶ *Shamsher Singh v. Jasbir Kaur*, AIR 2012 HP 83

¹⁷ *Poolakkal Ayisakutty v P.A. Samad*, AIR 2005 Ker. 68

¹⁸ *Kirti Kumar Joshi v Pradeep Joshi*, AIR 1992 SC 1447

the custody should be given to the father or not it is not the “negative test” that he is “unfit” or disqualified to have custody but the “positive test” as to whether it would be in the child’s interest to give custody to the father, which is relevant.²¹ It is generally believed that mother is a person who can take care of the child to the best but this is not applicable in every case. Presuming that mother always has interest of child in her mind is not proper. In *Murari Lal Sidana v Anita*,¹⁹ the court granted the custody of the child to the grandfather instead of mother on the ground that it is for the welfare of the child. In *Smita Krishna Shetty v Vinay Shankar Shetty*,²⁰ court held that custody of the minor cannot be denied on the ground that mother is working as there is no presumption that mother would not be in the position to look after the child. The plea of continuity by not disturbing the child’s custody was upheld in *Vishnu v Jaya*,²¹ where the children were living with the father since several years and desired to stay with him. The court in various cases held that when it comes to welfare of child, the financial position will not dominate the case. It will be one the factor in deciding the case but cannot form the base for whole of the case. Welfare of child is not to be measured in physical comforts . The granting of custody to either of the parent doesn’t mean that other parent have no right over the child. The court give visitation right to other parent and denied the same only in exceptional circumstances. In all the cases related to the custody visitation right are given to parent for the welfare of the child. The same is held to be necessity only on two grounds - Owing to the fact that the welfare of the child is depends on his getting the affection of both the parents and that the child has the right to know and interact with the other parent.²² And To grant the parent his right to not lose the society and affection of the child.²³ While deciding the case, the court give due consideration to the preference and opinion of the child if he is mature enough to form the same which is followed by the court opinion regard

IV. CONCEPT OF SHARED PARENTING

In a custody battle no matter on whose favour the court decide the matter, the ultimate loss is that of the child. But in the concept of Shared parenting both the parents have equal role in upbringing the child. The concept of shared parenting is new concept in custody jurisprudence. Shared parenting provide the healthy chance of giving normal life to children. Parenting is a joint responsibility.²⁴ A child needs mother in certain aspect of life and father in other aspects.

¹⁹ *Murari Lal Sidana v Anita*, AIR 2013 Raj. 100

²⁰ *Smita Krishna Shetty v Vinay Shankar Shetty*, (2005) 1 HLR 78

²¹ *Vishnu v Jaya*, AIR 2010 SC 2092

²² *Satish Mehra v. Anisha Mehra*, 70(1997) DLT616

²³ *Kaliappa Goundan v. Valliammal*, (1949) 1 MLJ 248

²⁴ *Caesar Roy, Shared Parenting system vis – a – vis custody of child* , CNLU LJ (6) 65 ²⁹ Ibid.

Separation from anyone of them would be harmful for the child. Shared parenting is a system for custody of child after divorce or separation where both the parents actively involved in raising and upliftment of the child.²⁵ In other words it is a responsibility shared by both the parents and child should not be deprived of love and affection of either of the parents. In India presently there are two acts dealing with custody law – Hindu Minority and Guardianship Act and Guardianship and wards act. Both the acts are silent on joint custody or shared parenting. In May 2015 law commission of India in its 257th report suggested several modification to custody framework in India. In this report the commission suggested the incorporation of shared parenting as postdivorce custody model within India.²⁵ The report states that there are two types of shared parenting model in contemporary family law. The first is shared responsibility parenting and second is shared access parenting. In former model, the non-custodian parent share economic and decision making power in child's life whereas in latter model , non- custodial parent is granted physical access to the child. The law commission gives three approaches to joint custody . The first is joint legal custody where both the parents share responsibility of child and have joint authority to make decision concerning the child. The second is joint physical custody where both the parents share physical and custodial care of the child . The third is any combination of joint physical and joint legal custody which the court deems to be in interest of child.²⁶ There are set of guidelines on 'child access and child custody' prepared by Child Round Foundation which is approved by various high courts. The guidelines pave a way toward the shared parenting i.e. visitation right, vacation etc.²⁷ Shared parenting is now recognized in India as can be evident from various judgements. In *K.M. Vinaya v. B.R. Srinivas*²⁸, High Court held that both the parents are entitled to get custody for sustainable growth of the minor child and has formulated the manner in which joint custody is to be effected such as The parents were directed to share equally the education and other expenditures of child hey, each parent was given Visitation rights on Saturday and Sunday when the child is living with the other parent, the child was to be allowed to use telephonic or video conferencing which each parent while living with other. In *A v. T*²⁹, Mumbai Bandra family court give interim child custody/ visitation order and asked both the parents to prepare shared parenting plan. The International Council on Shared Parenting (ICSP), is an international association

²⁵ Supra 9

²⁶ Ibid

²⁷ Child access and custody guidelines with parenting plan, available at <http://cja.gov.in/Important%20Instructions/Child%20Access%20&%20Custody%20Guidelines%2001.06.2015.pdf>, last seen 7th April 2020

²⁸ *K.M. Vinaya v. B.R. Srinivas* 2013 SCC 8269

²⁹ *A v. T*, Int. Application No 60 of 2015 in Petition No. A-932 of 2015

created for dissemination and advancement of scientific knowledge on needs and rights of children whose parents are living apart. Shared Parenting System is prevalent in other countries also such as US, UK, Canada, Australia etc.

V. CONCLUSION

Children are probably the worst victims of divorce. Perhaps the most stressful circumstance for a child is seeing one's parents split. It is definitely an unfortunate circumstance for a child to be the continuous subject to hardships and an emotional turmoil within his or her parents. The only principle which the court relies during the custody case is paramount interest of child. The concept of shared parenting is new concept in custody jurisprudence. Shared parenting provide the healthy chance of giving normal life to children. Parenting is a joint responsibility. A child needs mother in certain aspect of life and father in other aspects. Separation from anyone of them would be harmful for the child. Shared parenting is a system for custody of child after divorce or separation where both the parents actively involved in raising and upliftment of the child.
