

(2008) 03 KL CK 0040

In the High Court Of Kerala

Case No : Matrimonial Appeal No. 150 of 2008

Anjali

APPELLANT

Vs

Pradeep Nambiar

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1)

Citation : (2008) 03 KL CK 0040

Hon'ble Judges : Kurian Joseph, J; Harun-Ul-Rashid, J

Bench : Division Bench

Advocate : O. Ramachandran Nambiar, for the Appellant; Johnson Abraham, for the Respondent

Final Decision : Allowed

Judgement

Harun-Ul-Rashid, J.—This appeal is filed by the respondent/wife against the order dated 15.12.2007 in O.P. No. 882 of 2002 on the file of the Family Court, Ernakulam. The husband/respondent herein is the petitioner in the Original Petition. The above Original Petition was filed to declare the petitioner therein as the guardian of his minor children Prameela Pradeep Nambiar and Aiswarya Lakshmy and to grant him permanent custody of the children. By the impugned judgment, the Family Court disallowed the request of the petitioner/husband and permitted him to have custody of his children during weekends, five days each during Onam and Christmas holidays and for 30 days during summer vacation. Parties to this appeal are hereinafter referred to as the petitioner and respondent as in the Original Petition.

2. The petitioner/husband also filed O.P. No. 966 of 2002 u/s 13(1) (ia) and (iii) of the Hindu Marriage Act for a decree of divorce. The respondent/wife filed O.P. No. 335 of 2003 for past and future maintenance. She also filed a counter claim in the divorce case praying for a decree of divorce on the ground of cruelty. The Family Court jointly tried the above three cases and held that the petitioner succeeded in proving that the respondent/wife had treated him with cruelty, so

also, the respondent/wife has succeeded in proving that the petitioner/husband had treated her with cruelty and that, therefore, it follows that the matrimonial relationship between the petitioner and the first respondent has broken irretrievably on the basis of the acts of cruelty by either of them. On the basis of the said finding, the Family Court held that the petitioner and the first respondent are entitled to a decree of divorce severing their marital relationship on the ground of cruelty against each other.

3. The third case, O.P. No. 335 of 2003 is filed by the respondent- wife and her two children claiming maintenance. The Family Court held that the first petitioner/ wife is conducting tuition classes and earning sufficient income to meet her expenses. The Family Court further held that the ends of justice will be met by awarding past maintenance at the rate of Rs.900/- per month to the second petitioner and at the rate of Rs.750/- per month to the third petitioner from 12.8.2002 till 15.12.2007. The Family Court also awarded future maintenance at the rate of Rs.1,500/- per month to each of the children from 15.12.2007.

4. The parties did not challenge the judgment and decree passed in O.P. Nos. 966 of 2002 and 335 of 2003. In this appeal, the parties are concerned only with the correctness and legality of the judgment and decree passed in O.P. No. 882 of 2002 granting limited custody of the children to the petitioner during weekends and holidays.

5. The marriage between the petitioner and the respondent was solemnised on 28.10.1992. Two female children were born in the wedlock. The eldest daughter is aged 13 years and studying in the VIII standard and the younger one is aged 11 years and studying in standard VI. The petitioner and the respondent are residing separately from September, 2002 onwards and since then the two children are under the protection and care of the respondent/mother. Evidence was recorded in O.P. No. 996 of 2002. The petitioner/husband was examined as PW.1 and two other witnesses were examined as PWs.2 and 3. Exts.A1 to A14 were marked on the side of the petitioner. The respondent/wife was examined as RW.1 and Ext.B1 was marked on her side. Exts.C1 and C2 are court exhibits.

6. The respondent/wife contended that the petitioner was immoral throughout and that he did not perform his duties and obligations towards the children as a father. She further contended that since 2002 the educational expenses of the children were being met by herself and her parents. According to her, the custody of the children to the petitioner during weekends and holidays will certainly affect their studies and extra curricular activities.

7. It is not disputed by either side that the children are very good in studies and other extra curricular activities. Both the children require the love, affection and protection of the mother. The trial court rightly held that the children have grown up and they require the care, assistance and protection of their mother and, therefore, it will not be reasonable to hand over permanent custody of the children to the petitioner/father. On going through the materials, we find that the

petitioner/father is not financially capable of looking after the affairs of the grown up children. We have also noticed, on going through the pleadings and evidence, that the petitioner was neither dutiful nor responsible and did not carry out the duties and obligations of a father for the up bringing of his children. Very many complaints of immoral conduct of the petitioner are also alleged by the respondent/wife. According to the respondent/wife, the petitioner is maintaining illegal relationship with other women. In the divorce proceedings, it is alleged that the husband had extra marital relationship with one Aswathy and that they resided together for three months in a rented house. It is also alleged that the husband maintained similar relationship with other women. Yet another allegation is that he had collected money amounting to several lakhs from persons offering them employment abroad and cheated them.

8. According to the respondent/wife, the impugned order directing custody of the children to the petitioner during weekends and holidays is not a workable formula considering the facts and circumstances of the case. The children are attending Karnatic music class and they are forced to stop attending the music class because of the impugned order directing them to spend the weekends with their father. It is also submitted that both children are talented in music and dance and have secured several prizes and awards in dance, group song, classical dances and elocution competition in the Sub District level. Details of the award secured by the children are mentioned in paragraphs 8 and 9 of the Appeal Memorandum. She contended that the above arrangement is affecting their practice in music and dance as well as their studies.

9. The respondent/wife has also submitted before us that the petitioner/husband has married another lady on 30.4.2004 at Sree Krishna Temple, Guruvayoor and is residing with her. According to her, a female child is born in the said marriage and the lady is again carrying.

10. On 18.3.2008, the petitioner, respondent and their two children were present. We have discussed their problems directly as well as through Adv. Smt. Suhara, conciliator-cum-mediator. We have also talked to the children. They told us that one aunt is residing with their father in his house. In the light of the subsequent events and considering the situation the children are facing due to the impugned order, we are of the view that the order under challenge requires modification. We have also ascertained the wishes of the children by direct interaction. We are convinced that the present arrangement is causing much difficulties to the children in attending their tuition classes and other extra curricular activities. Nowadays, children of the same age, as in this case, are busily engaged during weekends and holidays. They attend special tuition classes for different subjects and also classes for developing personality. Children have to bestow their attention to such activities. At the same time, we are mindful of the fact that the father of the children also should have the custody, love, care and affection of his children, provided that such custody does not affect the studies and other activities of the children.

11. In the result, we modify the order passed in O.P. No. 882 of 2002 and allow the appeal. The petitioner/husband is permitted to have custody of his children Prameela Pradeep and Aishwarya Lakshmi for one Saturday monthly from 10 a.m. to 5 p.m. and for three days each during Onam and Christmas vacation and for two weeks during summer vacation. The petitioner/husband shall take the children from the residence of the respondent/wife and bring them back to the house of the respondent on the respective days. The petitioner/husband shall make arrangements for the children to attend their classes during their stay with him.

The appeal is disposed of as above. There will be no order as to costs.