

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 21ST DAY OF DECEMBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.16885 OF 2021(GM-FC)

BETWEEN:

MOHAMMED MUSHTAQ G K,
S/O KHADER HUSSAIN,
AGED 39 YEARS,
R/AT OVAIS HOUSE NO.23,
1ST MAIN, 1ST CROSS,
SOMESHWARANAGAR,
JAYANAGAR 1ST BLOCK,
BANGALORE – 560 011.

... PETITIONER

(BY SRI. MALLANGOUDA H,ADVOCATE)

AND:

AYESHA BANU,
W/O MOHAMMED MUSHTAQ G K,
AGED 37 YEARS, R/AT BIG BUILDING,
GROUND FLOOR, 2ND CROSS,
SHANTI NAGARA, ELLAMMA NAGAR,
RING ROAD, JAYADEVA CIRCLE,
NEAR BHOOTAPPA TEMPLE,
DAVANAGERE DISTRICT – 577 002.

... RESPONDENT

(BY SRI.NAYEEM PASHA S, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH ANNEXURE-E DATED 17.12.2018, PASSED BY 4TH ADDL.FAMILY JUDGE BANGALORE ON IA NO.3, IN G AND WC NO.77/2017 IN SO FAR AS IT RELATES TO THE REFUSAL OF THE INTERIM CUSTODY OF THE CHILD TO THE PETITIONER IS CONCERNED AND ETC.,

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This is a legal battle between the estranged spouses for the custody of a minor child. petitioner, being the husband of respondent is knocking at the doors of Writ Court for assailing the order dated 17.12.2018, a copy whereof is at Annexure-E whereby, the learned IV Addl. Family Court Judge, Bangalore, having rejected his application in I.A.No.3 for custody of the child in his G & WC No.77/2017; however, has accorded visitation rights to the petitioner.

2. The operative portion of the impugned order reads as under:

“ORDER

I.A.No.3 filed by the petitioner under section 12 of Guardians and Wards Act is rejected.

However, the petitioner is granted visitation rights/parenting time on 1st and 3rd Saturdays of every month from 11.30 a.m. to 3.30 p.m. at Bengaluru Mediation Center in respect of the minor child Mohammed Shakraan Hussain.

The respondent is directed to bring the child to Bengaluru Mediation Center on 1st and 3rd Saturdays of every month and handover the child to the petitioner at 11.30 a.m. The petitioner after exercising his visitation rights/parenting time, shall return the child to the respondent at 3.30p.m.”

3. After service of notice, the respondent wife having entered appearance in person, opposes the Petition making submission in justification of the impugned order and the reasons on which it has been structured; she also narrates several tormenting acts allegedly perpetrated by the petitioner and the same eventually leading to the breakdown of marriage, despite there being a pretty child.

4. BRIEF FACTS:

(A) Parties are Sunni Muslims; both they are highly educated; they have a greater exposure to the outer world; petitioner – husband, is well placed in the employ of an MNC namely Honeywell Technology Solutions, at Bangalore; their *nikah* was solemnized on 30.4.2009 at Bangalore; a child is born on 1.8.2013 and it is named as Mohammed Shakraan Hussain; however, because of the apparent temperamental differences, their marriage has broken down and petitioner's suit in O.S.No.154/2016 for the decree of its dissolution is pending; it hardly needs to be stated that petitioner's suit for dissolution of marriage being pending, it is open to the respondent – wife to file a Counter Claim too.

(B) Respondent-wife alleges dowry harassment and claims to be an abject victim of physical assault & mental cruelty; several civil & criminal cases filed by the parties against each other are pending; their long list is as under:

- (i) *“Divorce petition in O.S.No.154/2016 pending before 6th Addl. Family court at Bangalore.*
- (ii) *G & WC.No.77/2017 pending before 6th Addl. Family Court at Bangalore.*
- (iii) *C.Misc.53/2017 pending before 6th MMTTC at Bangalore.*
- (iv) *Defamation Suit O.S.No.8743/2017 pending before CCH-65 at Bangalore.*
- (v) *C.C.No.27620/2018 pending before 2nd ACMM at Bangalore.*
- (vi) *C.C.No.29577/2019 pending before 4th ACMM at Bangalore.*
- (vii) *C.C.No.26059/2018 pending before 32nd ACMM at Bangalore.*
- (viii) *Cri.Pet.No.721/2019 before this Hon’ble High Court of Karnataka at Bangalore.”*

(C) It is also relevant to state that after the marriage, this couple had resided in the State of Arizona in US for some time; petitioner is extensively traveled; he has espoused a second lady and that a child too is begotten from the second marriage; admittedly, he has been residing with the second wife and a female child begotten from her; he admits that he is happily living; the second spouse has given an Affidavit that the child from the first marriage should come & stay with this family.

(D) Petitioner has filed the subject G&WC seeking exclusive custody of the child *inter alia* contending that it is desirable to bring up the child in his exclusive custody

since “he is in a better position to take care of his child from a financial perspective and provide him the best upbringing education and a complete family environment”; he also contends “the respondent has neglected her duties towards the minor child and the petitioner”; some wild allegations are also made against her, which she has stoutly denied in her Objections; she has made counter allegations, is also true; petitioner’s claim for interim custody of the child although has been rejected, the learned Family Judge has granted visitation rights to him; aggrieved by the denial of custody, petitioner is before this court; the respondent appearing in person opposes the petition.

5. Having heard the learned advocate for the petitioner and the respondent party-in-person and having perused the Petition Papers, this court declines indulgence in the matter for the following reasons.

(a) In a society like ours, the disputes relating to child custody by their very nature are complex, regardless of religion or faith to which the parties belong; at times they become complicated when the husband contracts another marriage taking shelter under the umbrella of personal law, i.e. Mohammedan Law or the like; the

complication escalates to the higher level when a child is born from the second marriage, and the husband starts residing with the second family to the exclusion of the first wife who is bringing up the child all alone; all this has happened in this case, as borne out by the record.

(b) Petitioner's civil suit in O.S No. 154/2016 seeking dissolution of marriage with the respondent is pending before the learned VI Addl. Family Court at Bangalore; the respondent has filed her written statement resisting the same; as already mentioned above, petitioner has been happily residing with the second wife & a pretty daughter begotten from her; however, the respondent - wife still continuing to be his first spouse, has been residing separately and bringing up her son; of course there is some assistance from her brother, **Mr.Chaman Shariff**, is appreciable; from the long & multiple interactions with the parties and the child, this court gathers an impression that the child is being well groomed by the respondent; child too wished to continue in the custody of the respondent; petitioner all these days had not cared to pay any amount for the maintenance of child, although he has now paid Rs.70,000/-; his contention that he is financially well placed and educationally superior

does not make much difference to the custody issue, when all necessities of the child are duly met by the respondent-mother.

(c) Petitioner's main case i.e., G & WC No.77/2017 is still pending before the learned Family Judge; the impugned order is only by way of interim arrangement and thus obviously subject to outcome of the main matter; learned Judge of the court below in his accumulated wisdom & discretion has granted visitation rights to the petitioner; in such circumstances a writ court exercising a limited supervisory jurisdiction constitutionally vested under **Article 227** (petition quoting Article 226 being irrelevant) cannot undertake a deeper examination of the matter; if the custody of child is given to the petitioner-husband as claimed, the respondent-wife would be all alone whereas the petitioner will have two children at his hands along with 2nd wife, as well; this offends the very sense of justice, to say the least.

(d) **Mother, step-mother & child:** The submission of learned counsel for the petitioner that his client has the 2nd wife who has filed an affidavit that petitioner & she would take care of the child, is true; this is too poor a solace to the biological mother; experience working on

reason tells that ordinarily step-mothers would not be able to take care of and show affection to the children which their biological mothers instinctively would show; more than a century ago (1911) in **T.N.MUTHUVEERAPPA CHETTY vs. T.R.PONNUSWAMI CHETTY, 13 IND CAS**

16, what the Madras High Court observed is pertinent:

“...It would make it the duty of the Court to come to its own conclusion as to what would best promote the minor’s interests. It does not appear that, excepting the respondent’s wife, there is any female relation living with him competent to take proper care of the child. It would be hardly safe to presume that his wife, the child’s step-mother, would be willing to do so... There is good reason for believing that the maternal relations have strong affection for the child...”

This is not to cast any aspersion on step-mothers in general and the 2nd wife of the petitioner in particular; when it comes to welfare of the child, one has to err on the safer side, raising a presumption u/s. 114 of the Evidence Act, 1872 *“...regard being had to the common course of natural events, human conduct ...in their relation to the facts of the particular case”*, than to put a tender child to the possible risk of “step-motherly treatment.” What a biological mother means to a child cannot be better explained than by quoting **“To my Mother”** (1849) the poem penned by an American poet Edgar Allan Poe:

*Because I feel that, in the Heavens above,
The angels, whispering to one another,
Can find, among their burning terms of love,
None so devotional as that of 'Mother' ...*

(e) **Islamic law, juristic view & child custody:**

Islamic jurist **Asaf A.A.Fyzee** in his **Outlines of Muhammadan Law**, 5th Edn. Oxford at page 161 writes:

"The custody of an infant child belongs to the mother". He quotes the following from another scholarly work ie.,

Baillie I, 435:

"The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted".

Mulla's Principles of Mahomedan Law, 20th Edn.,

Butterworths, at page 439 quotes **Hamilton** Volume I, page 385:

*"If a separation takes place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother because it is recorded that the woman once applied to the Prophet, saying: 'O Prophet of God; this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own 'care' to which the **Prophet replied** 'thou hast a right in the child prior to that of thy husband. So long as thou does not marry with a stranger'. Moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child..."*

(f) **Second marriage and diminution of child custody rights of husband:**

Now it has been well settled that the act of a Muslim in espousing a second wife during the subsistence of first marriage *per se* amounts to cruelty and that not only the first wife can stay away from the matrimonial home but seek divorce too on that ground vide Division Bench decision of this Court in **SRI YUSUFPATEL vs. SMT.RAMJANBI, ILR 2021 KAR 746**; if the wife can stay away from the matrimonial home on the ground of second marriage, it goes without saying that she can normally retain the exclusive custody of her minor child; an argument to the contrary would permit an unscrupulous husband who contracts another marriage, to pressurize his first wife to continue in the matrimonial home, eventually retaining the child in his exclusive custody; this Court is of a considered view that even the visitation rights of such a father will diminish to a great extent, subject to all just exceptions, reasons having already been stated above; this court hastens to add that such a diminution in no way absolves him from providing sustenance to the child.

6. Before parting with this case, a brief account of what transpired in the in-camera proceedings needs to be stated: this court interacted with the parties and the child on several occasions hoping that long time invested might yield an amicable settlement; however, that did not happen; the respondent wife graciously agreed to give up all allegations made against the petitioner, for buying peace; she also agreed to put an end to criminal cases as well and asked this court to quash them straightaway; however, petitioner was unjustifiably adamant and stuck to his guns, though he has been happily residing with the second wife and the child begotten from her; the respondent has been bringing up the child single handedly, though facing the cases filed by the petitioner; more is not necessary to specify.

In the above circumstances, this writ petition being devoid of merits is dismissed with a cost of Rs.50,000/- (Rupees fifty thousand) only which the petitioner shall pay to the respondent within one month, failing which all his visitation rights granted by the impugned order stand suspended.

The learned Judges of the Courts who have been dealing with the cases enlisted *supra* are requested to try & dispose off the same preferably within a period of nine months and report compliance to the Registrar General of this Court.

**Sd/-
JUDGE**

Snb/