

(2005) 06 KL CK 0055

High Court Of Kerala

Case No: M.F.A. No. 728 of 2000

Lekshmi

APPELLANT

Vs

Vasanth Kumari

RESPONDENT

Date of Decision: June 28, 2005**Citation:** AIR 2005 Ker 249 : (2005) 3 CivCC 259 : (2006) 1 DMC 114 : (2005) 3 ILR (Ker) 310 : (2005) 3 KLT 476 : (2006) 1 RCR(Civil) 255**Hon'ble Judges:** R. Bhaskaran, J; K.P. Balachandran, J**Bench:** Division Bench**Advocate:** B. Suresh Kumar and C.G. Preetha, for the Appellant; George Varghese, for the Respondent**Final Decision:** Allowed

Judgement

R. Bhaskaran, J.

This appeal is at the instance of the counter petitioners in O.P.(G&W) 85 of 1998 on the file of the Additional District Court, Alappuzha. The parties are referred to hereinafter according to their status in the District Court. Petition was filed by the grand mother of the third respondent Rahuldas (who was described as unmarried child in the petition) for appointing her as guardian of the child born to the first respondent. Originally the prayer was for visitorial right and subsequently it was amended for joint guardianship. Thereafter the petition was amended for appointment of the petitioner as guardian. The reason stated was that the mother got herself converted to Islam after marrying a Muslim. The first respondent's husband died in a motor accident. Thereafter the child was brought up by the mother. The petitioner before the Family Court is the mother of the deceased father of the child. The Family Court has appointed the petitioner as guardian of the child and directed custody to be handed over to her. According to the Family Court the mother has married a Muslim and therefore the mother will not be able to bring up the child as a Hindu. Since the first respondent and her husband were Hindus the Family Court thought that it would be desirable that the child also was brought up

as a Hindu. The Family Court further assumed that the members of the family of the new husband of the first respondent may not allow the first respondent to continue as a Hindu. Further the Family Court found that the first respondent had no substantial source of income. The conduct of the first respondent in marrying another person within two years of the death of the first husband also persuaded the Family Court to hold that the custody of the minor child cannot be given to her. However, it was also found that the second respondent mother of the first respondent was working in a college and since she had to travel about 60 to 70 kms. to reach the college from the house, she may not have any time to look after the child. On these grounds the petition was allowed.

2. In this appeal learned counsel for the appellant pointed out that the child was with the mother ever since his birth and he is now about ten years old. He is prosecuting his studies very well and is studying in CBSE School in 5th standard. It is also pointed out that if the child is displaced at present it may affect his studies and he may not be able to get accustomed in the new environment of his grand mother. The further argument is that mere marriage to a person belonging to another religion by itself is not a ground to take away the custody from the mother and give it to the grandmother. It is also argued that both the mother and the new husband have undergone a ceremony converting them to Hinduism and they are now Hindus and the apprehension of the Family Court that the child will be brought up as a Muslim is without any basis.

3. After hearing the learned counsel on both sides we find merit in the contentions of the learned counsel for appellants. The fact that the mother has married a person belonging to another religion by itself is not a ground to take away the custody of the child from the mother. We are of opinion that there is no substitute for the mother's affection and care for the child.

4. The question whether the mother will be deprived of the custody and guardianship of the minor child if she marries a person belonging to another religion was considered by other High Courts also. The Bombay High Court has in [Sheila Umesh Tahiliani Vs. Soli Phirozshaw Shroff and Others](#), held that conversion to a different faith is not a disqualification for custody of the minor. It is stated by Mehta, J. in that decision as follows:--

"In the society in which we live religion is a matter of one's personal faith and conversion cannot be regarded as a disqualification for the custody of the minor so long as the guardian is capable of providing a congenial, comfortable and a happy home for the minor".

In Budhan v. Bahadur Khan AIR 1942 Pes 41, after the death of a Hindu husband the wife married a Muhammedan. The mother's mother filed a petition for appointing her as guardian. The High Court held that the child was very young and was not likely to have any conviction on question of religion and the mother was entitled to

custody in preference to grand mother. The order of the trial Court that the grand mother must be the guardian after the child attained ten years old was wrong. But it was also held that if subsequently the child was brought up in any religion other than Hindu, the grand mother can then make an application for getting herself appointed as guardian.

5. In *Ma Juli v. Moola Ebrahim* AIR 1933 Rang 201, a Mohammedan divorced his Buddhist wife when their child was three months old. After nine years the mother married a Buddhist. The Rangoon High Court held that ordinarily the child should be brought up in the religion of the father. It was however held as follows:--

"The question which we have to decide is what is likely to promote the best interest of the minor, and it can hardly be in the interest of the minor to tear her away now from the custody of her mother with whom she has lived certainly since birth, xxxxxxxxxx On the whole I consider that the interests of the minor will be best promoted by leaving her in the custody of her mother".

6. The apprehension of the Family Court that the child's future will be in danger if he is not brought up as a Hindu is without any basis. It is not the name of the religion that matters but the way in which the child is brought up as a good human being and Hindu religion has no sectarian limits. Sri. Aurobindo stated the following about Hinduism:--

"Hinduism knew its purpose. It gave itself no name, because it set itself no sectarian limits, it claimed no universal adhesion, asserted no sole infallible dogma, Set up no single narrow path or gate of salvation, it was less a creed or cult than a continuously enlarging tradition of the godward endeavour of the human spirit. An immense, many-sided, many-staged provision for a spiritual self-building and self-finding, it had some right to speak of itself by the only name it knew, the eternal religion, Sanathanadharma. It is only if we have a just and right appreciation of the sense and spirit of Indian religion that we can come to an understanding of the true sense and spirit of Indian culture".

(India's Rebirth, 2nd Edn. which is a selection from Sri. Aurobindo's writings, talks and speeches)

In this case the father died even before the first respondent gave birth to the third respondent. The evidence shows that the 2nd respondent who is now a retired college principal is taking interest in the welfare of the child. She is admittedly a Hindu. In that respect also the apprehension of the petitioner is without much force.

7. The boy has been with the mother for last ten years and the mother is seen looking after his interest extremely well. He has accustomed himself to the atmosphere of his mother. He is prosecuting his studies very well. In the matter of appointment of the guardian the welfare of the child is of prime importance. Even in the contest between a father and mother for custody of minor child of tender years

his custody was given to the mother by this Court in Raman Konderan v. Panchali, 1959 KLT 280. A Division Bench of this Court has preferred the mother stating that the right of the father for custody is not inflexible and must give way where the minor's welfare demands otherwise. Law also recognizes guardianship of the mother in the absence of the father. When the mother is there she has to be appointed as guardian. The mere fact that she has married a Muslim even if the story of reconversion is to be disbelieved is not by itself a reason to take away the child from the mother.

8. With regard to the source of income of the mother to maintain the child, we find that the mother has money by way of compensation obtained in the motor accidents case apart from the amount obtained from the Life Insurance Corporation after the death of her husband. Moreover the second respondent who is her mother has now retired from service as Principal of a college and there is no reason to think that the mother will not be able to look after the minor properly. The educational background of the family also is important in appointing the first respondent as guardian since the second respondent is a retired Principal and will be able to mould the character of the child for his better future.

9. In this appeal the appellant has filed C.M.P. 1412 of 2002 producing seven documents. The documents produced are photographs containing the reconversion ceremonies of the first respondent and her new husband. Certificates are also issued by the All Indian Dayananda Salvation Mission stating that both the first respondent and her new husband Shaji are converted to Hinduism. They are annexures A2 and A3 in the petition. Annexures A4 to A7 are produced to show that the minor boy is having good marks in all the examinations and is prosecuting his studies absolutely well. The first respondent has filed a counter opposing reception of documents in appeal. The main objection stated in the counter affidavit is that the first respondent's case so far was that she was not converted to Islam and the fact that she is reconverted to Hinduism shows that she is already converted to Islam. It is also pointed out that this document requires proof and mere production of them in the appeal will not amount to proof. If we are to rely on new documents produced in appeal then necessarily they will have to be proved as required by law. So we are not relying on these documents for the purpose of disposal of this appeal.

For these reasons this MFA is allowed. The Original Petition filed before the Family Court is dismissed. The petitioner before the Family Court who is the first respondent herein will be allowed to have the company of the child during the three vacations, two weeks during summer vacation and four days each during Onam and Christmas holidays. The first respondent should go to the house of the mother and take the child if she requires his custody and the mother shall not make any objection for giving custody. The respondent shall bring back the child to the mother after the period is over.