

4.7.13/1353

Before the Maharashtra State Commission for
Protection of Child Rights.

Enquiry, under section 13(1) & 14 of the
Child Rights Protection Act, 2005

Case No.54 / 2012-13

Shri. Premnawaz Dharamraj ... Applicants

V/s

V/s

Smt. Alefia Premnawaz ... Respondent

Background

This matter came before the Commission by filing a complaint, by Mr. Premnawaz Dharamraj hereinafter called Complainant against his wife Ms. Alefia Premnawaz alleging that his two children Miss Maheeka and Master Armaan are being harassed, tortured and abused by his wife who is alcoholic and having extra marital relations. In the complaint, it is requested to save the children from tyranny of his wife i.e. respondent. Complainant has attached a letter in the complaint written by child Maheeka, addressed to police officer. The Commission took cognizance, issued notices and heard matter on 12/3/2013, 7/5/2013, 4/6/2013, 23/7/2013, 1/3/2014, 3/12/2013, 7/1/2014 and 11/3/2014. Respondent appeared before the Commission and filed her written submission. Miss Maheeka appeared along with Complainant. Child Maheeka has confessed before the Commission that she is being tortured by her mother and expressed her desire to remain with her father to save from the tyranny of her

mother and to live her life peacefully. It is stated by child Maheeka that how she and her brother are suffering from rusty behaviour of her mother. Respondent Smt. Alefia contended, statements, made by child Maheeka, alleging her husband i.e. complainant for tutoring Maheeka against her. The Commission has tried to settle the issue by mutual consent and directed parties to sort out problem in the interest of their children.

2. Both complainant and respondent have agreed and assured to settle their problem however during the next hearing, it is informed by the complainant that matter is unsettled and requested to provide protection to his children.

Complainant has placed photographs showing that child Maheeka has got bruising on her body and also stated that bruising has been caused by the respondent i.e. his wife. In the written statement, Maheeka has expressed her desire to live with her father i.e. complainant. The Commission has appointed its expert Dr. Samir Dalwai, to interact with Maheeka. Dr. Dalwai interacted with Maheeka and submitted his report. The contents of report are as under :

"Miss Maheeka Raj, 9 year old female child was seen by me at the Maharashtra State Commission for the Protection for Child Rights on the morning of 4.6.2013, as advised by the Honourable Commission.

My interaction with Miss Maheeka lasted over a period of 30 minutes in presence of a lady member of the staff.

Miss Maheeka narrated examples and incidents which related to various incidents of inappropriate behaviour on part on her mother and her maternal grandparents.

She did not wish to stay with her mother.

She wanted to stay with her father and paternal relatives.

Throughout this interaction, Miss Maheeka appeared to be composed and coherent. She seemed to be aware of what she was saying. She did not seem to be lying or saying anything but seemed under duress from any one, but seemed like she was very clear about the situation.

In conclusion, Miss Maheeka seems to be a intelligent child who has strong reservations about staying with her mother on the basis of numerous examples she narrated coherently and prefers to stay with her father."

The report submitted by Dr. Dalwai was furnished to their parties, directing to submit their reply. Commission has also deputed District Child Protection officer to visit place of report. According to District Child Protection officer submitted his report. Observation of District Child Protection officer is as under.

महिका या केसमध्ये जिल्हा बाल संरक्षण कक्षाचे मत :-
अरमान आणि महिका यांचे व्यवस्थित पालन पोषण व्हावे, त्यांना भविष्यामध्ये सामाजिक आणि आर्थिक प्रतिष्ठा मिळावी त्यासाठी त्यांचे व्यवस्थित शिक्षण आवश्यक आहे. पण आणि पालन पोषण व्हाणे आवश्यक आहे. पण तसे न होता कौटुंबिक तसेच मानसिक खच्चीकरण होत आहे.

- एम. जे. पेटिशन नंबर ए. 670 of 2013 अंतर्गत अलिफियाने प्रेमनवाज राज यांच्या विरुद्ध कौटुंबिक हिंसाचार आणि इतर केसेस दाखल केल्यामुळे सदरील केस ही बांद्रा येथील कौटुंबिक न्यायालयात न्यायप्रविष्ट आहे.
- बाल न्याय बालकांची काळजी आणि संरक्षण अधिनियम 2000 (2006) नुसार संबंधित दोन्ही बालकांच्या हिताचा निर्णय व्हावा.

4. The Respondent i.e. Alephia has refuted contents of report submitted by District Child Protection officer and Dr. Dalwai and alleged that Master Armaan is happy with her and Maheeka is also happy with her but since Complainant Premnawaz is wealthy man and used to offer costly gifts to Maheeka i.e. why Maheeka is against her. She has further mentioned that she want to leave her service and want to stay with both the children provided that the monthly expenses are given by Complainant. She refuted the charges as levelled against her for torturing her daughter. Respondent has contended that letter which has been written by her daughter is false and under duress. Respondent has submitted a Pen Drive, showing that she has been harassed by complainant. In this regard a police complaint has been already filed by her. The Complainant has also submitted some documents, showing that children are not being looked after by his wife, therefore requested to allow children to remain with him.

5. It is also placed that matter between complainant and respondent is going on in the family court under the Domestic Violence Act, 2005. The copy of order passed by Hon'ble judge of Family Court on 15/5/2014 has been

produced. The relevant paras of order dated 15/5/2014 are as follows :

“ 1. Application stands rejected.

2. Parties are directed to go through sample parenting plan annexed with this order, annexure-I and prepare their own joint parenting plan with appropriate modification / amendment.

3. Parties are directed to submit their joint parenting plan within 60 days from the date of this order ”

6. In the order passed by Civil Judge Family Court, the contents of report submitted by Dr.Dalwai has been mentioned.

7. Legal provisions in this matter :

In this matter four set of laws i.e. Commission for Protection of Child Rights Act, 2005, Hindu Guardianship and Minority Act 1956, Domestic Violence Act, 2005, Guardianship and Ward Act 1890 shall be applicable. Commission for Protection of Child Right Act is applied in the matter of violation of rights of child, other three laws are related with the custody of child. However in this matter parties have not submitted any records before the Commission, by which it can be judged that under which law this matter can be observed in term of Guardianship and Ward Act and Hindu Minority and Guardianship Act. So far Domestic Violence Act 2005 is concern, it is special law and having overriding effect.

Section 6 of the Hindu Minority and Guardians Act 1956, prescribe that :

“In the case of a boy or an unmarried girl-the guardianship will lie with father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”

Under Guardians and Wards Act 1890 in case of Muslim Shia and Sunni regarding guardianship and custody it is mentioned that

“The law of guardianship of person or custody or hizanath is different in the two schools of Mohammedan Law, the Sunni and Shia schools. According to Hanafi Law the mother is entitled to the custody of a male child until he attains the age of seven years and of female child until she attains the puberty. In the absence or on the disqualification of the mother, the custody of the child-until, being a male, he has attained the age of seven years, or being a female, she has attained puberty, belongs to the following persons in the order of priority in which they are mentioned below:

1. the mother's mother;
2. the father's mother;
3. the mother's grandmother howhighsoever;
4. the father's grandmother howhighsoever;
5. the full sister;
6. the uterine sister;
7. the daughter of the full sister howlowsoever;

8. the daughter of uterine she sister howlowsoever;
9. the full maternal aunts howhighsoever;
10. the uterine maternal aunt howhighsoever;
11. the full paternal aunt howhighsoever;

In the absence or on disqualification of the mother and other females mentioned above the father and other male relatives are entitled. The father becomes entitled to the custody of a male child after he has attained the age of seven years, and of a female child after she has attained puberty."

This means that under Hindu law minor in age of five years, custody lie with mother. In case of Muslim personal law custody of female child upto age of puberty lie with mother and in case of male child upto age of seven years."

8. Thus according to Muslim law custody of both shall be at mother until male child is not attained seven years and female child not attain age of puberty. As per Hindu Law custody of male and female child is vested with mother until the completion of age of five years. Under Section 21 of domestic violence Act, the respective magistrate before whom matter is being heard is entitled to decide case of custody. Section 21 says that :

"Custody orders : Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the persons making an application on her behalf and specify,

if necessary, the arrangements for visit of such child or children by the respondent, provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit."

9. Under these circumstances following questions are arising for consideration:

i) Whether matter related with the custody of child may be enquired by the Commission in the light of violation of right of child.

ii) Whether recommendation by the Commission can be made while matter is going on before the Court.

Answers regarding points raised as above are as follows:

Re : Question i) The Commission is recommendatory authority. Commission can make recommendation to appropriate authority only in the issue where rights of child are violated. If Commission feels that rights of child is being violated due to inaction / omission / commission by any person or persons then Commission can take appropriate actions, including issuing direction to Child Welfare Committee to take custody of child and action against violators, initiation of prosecution against violator, awarding compensation etc. It is appearing that child Maheeka and her brother are not happy with their mother. However it is not established that Respondent is giving mental and physical torture to Maheeka and her brother.

Re: Question ii) Under Section 13(2) of Commission for Protection of Child Rights Act 2005, the Commission can enquire any matter which is not pending before any Commission. However the said matter is going before the family court. The report of child specialist and District Child Protection officer has been brought before the Hon'ble Court. Therefore, Hon'ble Court which has discretionary power to decide the issue of custody under Section 21 of Domestic Violence Act, 2005 is appropriate forum to decide the issue of custody of children.

In view of legal provisions, questions raised and answer of the respective question, and documents produce before the Commission, the Commission's observation is as follows :

I) Matter is in the family court therefore court is appropriate forum to decide the issue of custody of children.

II) Finding of the Commission may be placed before the Hon'ble court.

By order and seal of the Commission.

(A.N.Tripathi)
I.F.S.
Secretary

Maharashtra state commission for protection of child rights

31
2.9.2014
(A.N.Tripathi)
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