



# CHILD CUSTODY AND ITS RELEVANCE UNDER HINDU LAW IN INDIA

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## INTRODUCTION

In India, custody between husband and wife is always joint custody, not in one parent's hand. One parent got the right to keep the child along with him/her, and the other parent will get the visitation right to meet the child. After divorce or separation, there are chances that most of the children become depressed, irritated, less socialized, and have no emotions towards their parents and family. Such children are more prone to indulge in immoral activities. To protect the child, the court decided to share the child's custody and maintain proper check and balance on a child with care and protection from both parents.

After the divorce, the question is, where will the child stay? Furthermore, the child's opinion is taken into consideration by seeing the child's maturity level. In India, there are three types of custody. The physical custody is awarded to only one parent, such as the parent becoming the child's guardian, and the other parent renders the visitation right.

In Joint custody, both parents have the right to keep the child by turn and within an interval of time. Whereas in legal custody, the divorce became so complex that later the court granted custody only to one parent, there is a fragile difference between physical and legal custody.

As per the Hindu minority and guardianship act, 1956, as per section 6, if any minor girl is unmarried or boy of minor age, the right over custody of the minor child would be given to the father and then mother. Nevertheless, if the minor is less than five years of age, then a mother would be responsible for taking custody of the child. As the child needs care and nourishment can only be done by the mother.

Section 17(3) of the guardian and ward act of 1980, the minor preference is not considered an essential element of the statement but taken as the court's factor as a custody question.

In India, there is no right with the child to get the claim in custody. Only the parents have the right to custody of the child, the absence of parents due to insanity, death, or imprisonment. In such a situation, the child's grandparents on either side can apply for the custody of the minor child.

In every court order, the court mentioned the type of custody awarded to either parent and any other type of custody as stated by the judge during passing judgment or decree by the court.

The parent whom the court grants custody has the responsibility towards the child. Such a single parent is responsible for protecting the child and in building ethical values in the child. It's the responsibility of the single parent to make the child socially active and good in character and behavior. The child's guardian must be economically stable and self-sufficient with financial backup to provide a good standard of life. The guardian must take all the necessary steps towards child education, the parent assisting the child after custody must take all the beneficial aids to give better education towards the child.

### **Hindu marriage act 1955-**

As per section 26 of this act, only the Hindu parents married according to Hindu ceremony or after marriage converted into Hindu either male or female. The custody of the minor can only grant to a Hindu guardian, and no custody can grant to a person belonging to any other religion.

### **Particular marriage act, 1964-**

Section 38 of this act, the spouse married to each other by the provision of a particular marriage act, granted by the court.

### **Hindu minority and guardianship act, 1956-**

The parents who seek the custody of the minor must be Hindu, but the parents must be biological parents of the child and not step-parents.

### **Muslim law-**

Under Muslim law, only the Muslim woman has the right towards the child's custody, and in case the woman does not want to keep the child custody or found misconduct in such a case. The custody of the minor transfer to the father, the father in such cases became the natural guardian.

In case the father, after a divorce or during separation, married to another woman. In such cases, the court will give custody to only the natural mother. The custody of the minor cannot be given to the stepmother due to specific reasons of love and affection towards only the biological child. Then in such cases, the step-child suffers from no love and affection from the stepmother. Even if the natural mother is not earning money or is economically weak, the court would only reward a court to the natural mother.

## BACKGROUND

Petitioner is the mother of 12 years old girl Ritwika; she filed a special leave petition in the apex court challenging the high court's judgment.

The high court gave the verdict to visit the child at the father's home, and the girl will remain under the father's possession. The mother of the child has no right to take her outside the premises of the father. The Appellant is not allowed to meet her daughter in June, jolly, and august, for which the petitioner demanded to meet her child respectively in these months. Both were separated. After living in the matrimonial home, the petitioner never visited the home of her husband. The family court of Thrissur granted divorce to both parties in 2003.

On 30 April 2003, the family court's order, the Appellant only to meet her daughter for two days in May, June, and July.

First, the court decided that a woman can meet her daughter with the father or any person who is the Appellant and respondent's mutual friends.

Later, the Appellant approaches the court, and the court fixes that during June, July, and august, the Appellant allowed meeting the daughter at the father's house. Nevertheless, this Appellant cannot agree to the decision of the lower court.

The family court then decided to make moderation and allowed the petitioner to meet the daughter at court, with the counselor present in the room.

Petitioner has not agreed with the modification granted by the court and again requested the court to grant her permission to meet her child at the respondent's house. On 30 April 2004, the family court denied making changes as per the request of the petitioner.

The request is forwarded to the high court by the Appellant to visit the respondent's house to meet her daughter, but during that time, the respondent ultimately must not be present at home. The Appellant can take her daughter for an outing. Only the respondent's sister must present during the visitation of the

Appellant to his home. The time allotted to meet was not sufficient from 10 to 5 P.M. that must get extended. The Appellant is not allowed to keep the girl at her house overnight.

The Appellant requested to meet Ritwika during the Onam festival celebrated in August. The girl Ritwika renders official holidays for seven days to celebrate Onam. The petitioner is demanding to meet the child for three days a week and take her to outings. The petitioner gave his consent during the time of the outing to meet her mother.

The Appellant was not happy with any of the lower courts' decisions, so she filed the special leave petition to extend the dates of visiting the minor. Because her plea in the previous court was rejected by the lower court, the Appellant is seeking remedies to listen to Apex court's grievances to modify the judgment of lower courts.

## **CASE ANALYSIS -SHEILA B DAS V/S SUGASREE-**

### **CONTENTION ON BEHALF OF THE APPELLANT**

Appellant was not happy with the lower court and high court's decision, and both gave the verdict to transfer custody right to father. As per the Appellant, the minor girl will soon be at a tender age and needs assistance and guidance from her mother. At the age of puberty, a child became emotionally and physically weak and needed the care and protection from a mother, not from a father. The Appellant by profession is a doctor and knows the responsibility of the minor girl. When the minor girl was born, the respondent was not earning, and she raised the girl single-handed without any financial assistance and help from the minor.

Respondent was busy in court and engaged in work all day and later after coming home spent most of the time in the farmhouse and even on weekends he spent most of the farmhouse. He is not attached to his daughter and has no time to talk to her. A girl will soon attend puberty, and she will be alone to face such a situation, affecting her mental situation.

When she left home with her minor girl and moved to Calicut, at that time, she was happy with the Appellant. Nevertheless, after granting custody to the respondent, the minor suffers from parental alienation syndrome. The respondent brainwashes the minor mind against her mother, so the minor tender age agrees to stay with her father rather than the mother.

The father did not show any interest in the matter relating to the child. The girl's upbringing at such a tender act must be the mother's responsibility, as she is financially stable and caring towards her daughter.

***Hoshie Shavaksha Dolikuka v/s Thirty Hoshie Dolikuka Jose<sup>1</sup>***

In this case, the minor's father was disinterested in taking custody of the minor child, so the court decided to take the mother's custody.

***Kurian C. Jose v/s Meena Jose<sup>2</sup>***

The father of the minor was involved in an extramarital affair with her wife's cousin's sister; in such a case, the court granted the mother's right of custody as the father is not entitled to get custody to be involved in another relationship.

***Kumar v Jahgirdar v/s Chethana Ramatheertha<sup>3</sup>***

The custody of the minor is given to the mother; the girl is attending her puberty age. She needs her mother's assistance and guidance to fight mentally, emotionally, and physically at puberty age.

The references mentioned in this case, that Ritwika needs assistance from her mother as in her tender age if the custody is with father, the father will be busy in court and later after coming to the home; the respondent has no time to talk with a minor. The minor needs assistance from the mother, not from the father. If custody remains with their father, she will be alone at home and no one to share her thoughts and feelings. She needs the assistance of her mother in her adolescence.

**CONTENTION ON BEHALF OF RESPONDENT**

Respondent at the time of childbirth was financially weak, but it does not mean that he deprives his responsibility. He contributes a minor portion of the money to the basic needs of the child. Nevertheless, now he is well settled and a reputed person; he saved money in fixed deposit for her daughter and many life insurance policies that will help her daughter for her whole life.

The respondent objected that if the respondent wants, she can meet her daughter. However, only at home can she not take the minor girl with her when living in Calcutta, as the distance between Calcutta and Thrissur is vast, the respondent may not be able to connect her for a long time.

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<sup>1</sup> AIR 1984 SC 410

<sup>2</sup> 1992 (1) KLT 818

<sup>3</sup> (2004) 2 SCC 688

The Appellant raised the question and raised the complaint regarding not allowing her to meet her daughter outside or any other place. Both parties' daughter wants to live with her father (respondent), not with her mother as previously interviewed by the high court and family court. The respondent must protect the child as the permission of custody was given to the respondent.

The respondent has a good connection with the daughter. To his father and shares everything, to look after the daughter at puberty, the respondent appoints her widow sister. She fills the affidavit in high court regarding staying with a minor in the same house she is the school's retired headmaster. She made a good term with her aunt when the respondent was granted custody by lower courts.

There are no financial issues as the respondent is well settled and earning well. He can provide the daughter with all the necessities needed, including school fees, higher graduation, and good facilities. Appellant took the minor along with her and moved to Calicut, and the respondent went outside for business work. She took the minor without informing him, so the respondent filed the writ of habeas corpus in Kerala for bringing the child back to the respondent.

If Appellant wants, she can come and meet her during holidays and weekends and take her for an outing, but the minor has to live with her father, as she mentioned in previous interviews by the high court and family court of Kerala.

## **FAMILY COURT JUDGMENT**

Sheila b das and Sugasree were married, and after 11 years of marriage, Sheila, without informing anybody, left his home with a daughter to Calcutta. After knowing that wife left the house with the girl child, husband Sugaree filed the case in the family court of Thrissur.

Sheila and Sugaree married each other on 29 March 1989. Furthermore, Sheila was a pedestrian by profession, and Sugasree was a lawyer by profession. Within a few years, a girl child named Ritwika was born in June 1993.

As the respondent moved to the high court, Sugaree filed the writ petition in habeas corpus, his petition rejected by the high court on 24 March 2000. The contention filed by the respondent is taking away the child without the permission of the father.

The two application of respondent side's was taken into consideration by the family court as section 25 and 7 of guardians and ward act, 1890 and section 6 of family minority and guardianship act, 1956. On 27 April 2000, the family court of Thrissur agreed to entertain the suit of interim custody.

As per the minor girl, consent takes into consideration, and in her two interviews, she urges to live with her father and her custody grants to her father. The girl's opinion is that she was intelligent and mature enough to understand the situation.

As per the following contention, the district court agrees to conclude its judgment on both parties.

As per the girl's consent, the custody of the minor girl granted to the father was to live with the father (the respondent) and respondent being the natural guardian of his child after the summer break.

The father shall look after all the responsibilities of his minor girl with all the basic amenities like school fees, education in CMS School, food, water, shelter, and allow her to participate in extracurricular activities.

Appellant allowed meeting her minor girl at school or matrimonial home.

If the mother agrees to shift her residences within a radius of 10 km from school, the court allows her to meet the girl for three days a week, and the father cannot stop her child from meeting her mother.

The father and mother both have equal responsibility towards the minor girl. Father and mother would provide the girl with basic amenities. If the mother is also taking the initiative to provide basic amenities to the child, the father has no right to argue.

If the mother is not living within a 10 KM radius of CMS School, she can take the girl to her home, and the girl can stay with her overnight for two days in the weekend, ten days in summer, and two days in Oman holidays.

The court permits both parties to approach the court when other parties deny cooperating with another party.

## **HIGH COURT VERDICT-**

The appellant filed an appeal in the high court for disposing of the order of the lower court. By order of 21st may 2001, the family court's order was held at stay by the high court of Kerala.

The respondent applies to a review petition in the high court for disposing of the stay on the said order given by a family court of Thrissur. The high court allowed Calcutta's family court to interview the minor girl and record her statement. On 5 July 2001, the records of the girl were submitted in the high court.

The statement contains minor girls' relevancy regarding living with either parents, and the girl chooses to live with her father. Considering the girl's statement shows that the girl would like to live with her father and not with her mother.

On 25 July 2001, the high court of Kerala removed the stay on the judgment of the family court of Thrissur.



As per the appeal submitted by Appellant, the high court-appointed psychiatrist named Dr. S.D Singh, he interviewed both husband and wife and recorded their respective statements in the records.

As per the report submitted to the judge, the judge submitted the report on 31 May 2002. The high court passed the same judgment as to that of the family court and granted custody of the minor to the respondent (herein) husband.

The high court's judgment indicates that the child's custody belongs to the father, and the mother is allowed to meet the girl on the 1st Sunday of every month. The minor is not allowed to move outside the premises of the father's house. If the mother wants to meet her child, she can meet on the father's premises.

Respondent (husband) in June 2002 filed the suit for divorce in the family court of Thrissur and pending in court.

Appellant filed a special leave petition in the high court for removing the said order given by a high court that grants the right of a girl to father. On 9 September 2002, the Appellant's petition was disposed of by the high court of Kerala.

The appeal filed by the Appellant was disposed of by the high court demanding the lower court order, as the respondent previously filed the case in the lower court for custody of the minor child but was disposed of on 16 June 2003.

on 28 June 2003, the divorce was granted by the high court to both parties.

## **SUPREME COURT JUDGMENT**

When the high court heard no appeal, the Appellant became the victim as either court heard no grievances and urged to file the special leave petition in the supreme court demanding the interim rights to meet the child in August and September 2004.

The Supreme Court makes specific changes in the judgment of family law with modification and disposal of lower courts' judgment.

The respondent will be responsible for the girls' education and basic amenities, and he has to focus on the child's extracurricular activities.

The respondent will have to contribute to the Appellant's expenses. If the Appellant wants, she can also contribute to the child's expenses. The respondent cannot raise any objection on why Appellant is contributing to child expenses.



The Appellant is allowed to meet her minor girl at the respondent's house at that time; only the respondent's sister is allowed to stay at home, or as per the arrangement, the Appellant is allowed to meet her daughter at a friend's house. Every second Sunday of each month, she is allowed to meet her daughter. Additional timing to meet added by Apex court to meet her daughter means from 10 A.M. to 7 P.M. The Appellant must return the child at the father's home.

If the appellant shifts to the central city, she can meet her daughter every Saturday and stay overnight if her daughter agrees and returns her to father's premises the next day at 7 P.M.

The Appellant is allowed to meet the daughter after her school hours or between lunchtime in a week.

The court allowed the Appellant to take ten days of custody of her daughter during summer break.

In case of change circumstances, the parties are at liberty to visit the family court for changes

## ANALYSIS

It is rare in India for a child to choose father over mother. In this country, women are a homemade material and all the child's responsibility from the time when he/she is born to maturity the mother knows everything about the child and child shares special responsibility with the mother. Nevertheless, in this case, after several interviews, the girl child chooses father, and this shows that even if the mother is capable and has financially sound, it is of no use in the case where the child wants to live with father.

The family court and Supreme Court were correct in taking the child's consent and passing the decree of joint custody in favor of the father. When the child wants to live with the father, but the mother shares the time to take custody for two months after holiday breaks, the mother has the permission to meet the child after school or on Saturdays or Sundays with the allotted period. If the mother is living in the same city, she can take her child overnight and return to her father the next day. The mother can spend valuable time with the daughter to regain the bond between mother and daughter. After puberty, the girls suffer mentally and emotionally weak. The girl can take advice from her paternal aunt and mother's guidance and support from time to time. The mother can share her responsibility towards her daughter by giving her advice concerning the matter.

## CONCLUSION

After the divorce, the child suffers from depression and mental trauma. Most of the children cannot understand the reason behind the divorce. Child custody, in most cases, was shared jointly by the parents.

As in this case, the child's opinion to live with either parent is considered by the court; the court observed that the child is mature and intelligent enough to understand and take her stand while choosing the parents where she wants to live.

The preference of the child, even if the child is minor, must be taken into consideration.

As per observation, a woman can look after the child more carefully and in a protected manner, and at teenage age, the girl needs a woman as a friend or mother to share the thoughts. However, In this case, the girl is intelligent enough to make her own decision and chooses to live with her father when interviewed twice in the family court of Calicut.

The court, in this matter, gives more emphasis on maturity and statement of the minor child. The girl at such an age became mature enough to decide on a home.

As per the understanding, the Supreme's judgment is very accurate because it is crystal clear that it will not raise the dispute between the parties. The Apex court provides for the mother to hold the custody for ten days during vacation, and the absolute right to hold the custody of the daughter lies with the father. Women were granted the right to meet the daughter and take her for outings and even given the permission if staying in the same city can take the girl to stay at home overnight.

As per the court's decision, it is enough for a child to retain the love and affection from parents. The child gets support from parents from time to time. The decision of the supreme court was very appropriate and clear. The decision will not affect the child as the child will get the proper time with both the parents as needed.

After separation, it is not straightforward for the child to choose either of the parents. Even if the child can give their consent, the child must be mature enough to understand the situation and take the option to choose parents. Nevertheless, in some cases, even if the child is minor, but the child is mature enough to make his own decision, in these cases, the court chooses to take the consent of the minor but. In contrast, in-laws, it is not mentioned anywhere to prioritize the consent of the child but decide solely on court.

The apex court decision will be the last and foremost decision, and the lower courts cannot alter it. In these cases, the court but the heart and soul decide the custody between parents, the child's happiness is the matter of concern, and the child must not feel isolated, homesick, or depressed by being at home with a natural guardian after granting custody.

Suggesting the natural parents are compassionate issues. This issue cannot make everyone happy but a compromised state for both parties.

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