

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3078 of 2016

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India is filed challenging the Order dt.11.04.2016 in I.A.No.62 of 2015 in OP No.1296 of 2013 passed by Judge, Family Court, Hyderabad, granting visitation rights to respondent No.1 herein, on every second 2nd and 4th Sunday of the month between 4.00 pm and 7.00 pm in the presence of revision petitioner/respondent No.1 therein, in any public place, according to their convenience.

2. The respondent No.1 herein/Petitioner being husband filed Petition under Section 10 and 25 of the Guardians and Wards Act,1890 (for short 'the G & W Act), seeking visitation rights of the minor child by name Master Adithya Alle once a week on weekends and holidays between 1200 hours and 1800 hours alleging that the minor boy—Adithya Alle was admitted in pre-school at London at the age of 2 years and he has much interest in brining up the boy and moulding a good career for him. The first respondent therein, who is the wife of the petitioner, has implicated him in a harassment case, which resulted in registration of a case in C.C.No.137 of 2011 against him before the Court of XIII Addl. Chief Metropolitan Magistrate, Hyderabad and the petitioner has been deprived of love and affection as father of minor child and he is even prevented by his wife and her family

members from at least visiting the minor child. Hence, he sought permission for grant of visitation rights.

3. The respondent No.1/revision petitioner filed Counter resisting the claim of the petitioner, denying the material allegations, *inter alia* contending that the petitioner harassed her physically and mentally and also humiliated her demanding additional dowry and for her salary during pregnancy. She and her child under a constant life threat at the hands of the petitioner and the petitioner has not initiated any legal steps to take back the respondent and at the same time, he did not evince any interest till today regarding the welfare of the child and if the interim custody of the child were given to the petitioner, the child's life would be spoiled and also there is a constant life threat to the child. Now the child is studying III Class in a reputed school and the entire expenses are being borne by the respondent. Therefore, the minor child is living with secured family atmosphere and that the petitioner is not entitled to seek interim custody or even the visitation rights and prayed for dismissal of the petition.

4. The Judge, Family Court, Hyderabad, upon hearing learned counsel for both the parties, recorded a specific finding in para No.7 of the Judgment that when the child Master—Aaditya Alle was examined in the chambers privately, he has clearly expressed his disinclination to go to his father and that the petitioner has forcibly tried to take him into his company much against his wish. However, the petitioner happens to be the father of the child and he would have attachment and concern of the child, at least to

some extent and accordingly, granted visitation rights permitting the petitioner to visit the child as foresaid.

5. Aggrieved by the Order passed by the Judge, Family Court, Hyderabad, the present revision petition is filed reiterating the grounds urged in the Counter and during hearing Smt D. Pramada, learned counsel for revision petitioner, would contend that in view of the previous conduct of the petitioner, custody cannot be given to him since there is a constant threat from the petitioner to the life of the child and, so also, the respondent and he made an attempt to take away the child forcibly on one occasion and the Judge, Family Court, while making such serious observation ought not to have permitted the petitioner to visit the child, as aforesaid, more particularly, when the child refused to have a company of his father and granting of such visitation rights is against the will and wish of the minor child-Aditya Alle. Therefore, the Order under challenge is illegal and contrary to the will and wish of the minor child since the welfare of the child is paramount consideration for granting visitation rights and drawn the attention of this Court to a judgment reported in **Gaytri Bajaj v. Jiten Bhalla**¹.

6. Sri C. Ramachandra Reddy, learned counsel for respondent No.1 while supporting the Order passed by the Judge, Family Court, requested this Court to fix any convenient place. In support

¹ (2012)12SCC 478

of his contentions, he placed reliance on a judgment reported in **Ruchi Majoo v. Sanjeev Majoo² and Lekha v. P. Anil Kumar³**.

7. Now, the point that arise for determination is:

“whether the Order passed by the Judge, Family Court, Hyderabad, granting visitation rights in favour of respondent No.1 herein permitting him to visit the child on every 2nd and 4th Sunday between 4.00 pm and 8.00 pm in the present of revision petitioner in any public place according to their convenience is bad under law?

8. The relationship between the parties is admitted fact and it is a case of fight between wife and husband for the custody of a child, who is a minor aged 9 years 4 months. But, strangely during life time, the Grand Mother of the child filed a Petition for custody of the minor child and also for appointment as guardian to the minor child—Adithya Alle.

9. The main grievance of the learned counsel for revision petitioner/wife is that criminal litigation is pending on the file of XIII Addl. Chief Metropolitan Magistrate, Hyderabad in C.C.No.137 of 2011 between the revision petitioner and the respondent No.1 herein complaining harassment for dowry etc,. But, respondent No.1 herein allegedly made an attempt to take away the child when he was going to school and the child expressed his disinclination to have a company with his father when he was examined by the Judge, Family Court, Hyderabad, separately, in

² AIR 2011 SC 1952

³ (2006)13 SCC 555

compliance of Section 17 of G & W Act, which is a basic requirement for passing an Order for grant of custody of the minor child. According to Section 4 © of Hindu Minority and Guardianship Act, 1956(for short 'HMG Act'), "natural guardian" means any of the guardians mentioned in section 6 of the Act. Section 6 of HMG Act specifies the natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property or in the case of a boy or an unmarried girl-the 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. The other two Clauses are not relevant to decide the controversy between the parties now. Thus, respondent No.1 is a natural guardian within the meaning of Section 4 © r/w 6 of HMG Act. Therefore, father being a natural guardian is entitled to custody of a minor child unless the Court satisfied that he is not competent to act as guardian for the minor due to incapacity.

10. The petition was filed under Section 10 and 25 of G & W Act by paternal grand mother of the child for appointing as guardian to the minor child. Section 17 of G & W Act deals with 'Matter to be considered by the Court in appointing guardian'. Clause (3) is relevant to decide the present controversy. According to Clause 3 of Section 17 of the Act, if the minor is old enough to form an intelligent preference, the Court may consider that preference and at the same time, Clause 3 says that welfare of the minor child is paramount consideration to appoint a guardian, the

present Petition is filed only claiming visitation rights and not for appointing him as guardian of the minor child-Adithya.

11. A similar provision is contained in Hindu Minority and Guardianship Act, 1956, which obligates the Court to examine the child to know the wishes of the child. But, in the present case, admittedly, the minor child-Adithya Alle expressed his disinclination to go with his father, respondent No.1 herein. In such case, whether visitation rights can be permitted or not is the question to be decided by this Court.

12. Learned counsel for revision petitioner has drawn the attention of this Court to **Gaytri Bajaj's** case, referred above, wherein the Apex Court held that interest and welfare of the minor child will be best served if they continue to be in the custody of the father and welfare of the minor is the paramount consideration for granting custody of a child despite expressing disinclination to go with his father or to live with mother.

13. In the present case, the child refused to go with his father, respondent No.1. If the principle laid down in the above judgment is applied to the present facts of the case, the custody cannot be given to the father.

14. The issue involved in the present matter is with regard to visitation rights and not for custody of the child. Section 17 of G & W Act deals with the matters to be considered for appointing a guardian and Clause (3) is pertaining to intelligent preference of the minor to appoint a guardian of the minor child. Therefore, the

wishes of the child are relevant only while appointing a person as guardian to the minor if he is able to exercise intelligent preference. In the present case, the minor boy was aged 9 years 4 months and continuing in custody of revision petitioner and such boy naturally will be under the influence of the mother because of his age and even otherwise, the wishes of the minor are relevant only for appointing a guardian and not for visitation rights.

15. A similar question came up for consideration in **Shri Kirtikumar Maheshankar Joshi v. PRadipkumar Karunashanker Joshi**⁴, wherein the Apex Court held that:

“ when children categorically stated their unwillingness to live with their father and are happy with their maternal uncle, custody of children cannot be given to father but permitted him to meet the child”.

16. In one of the judgment of this Court reported in **R. Venkata Subbaiah v. M. Kamalamma**⁵, this Court while considering the parameters for appointing a guardian of a minor child held that paramount consideration is welfare of the child can be viewed from another stand point. There was a controversy about the custody of the child without reference to the welfare of the child is not sustainable in law. Child is a person within the meaning of Article 21 of the Constitution of India. It has therefore, a right to life as guaranteed in Article 21 of the Constitution of India. The word ‘Life’ should be understood in this context as expansively as it has been understood in other context as comprehending more

⁴ 1992(1) the LS (SC)

⁵ 1982(2) APLJ (HC) 89

than mere animal existence. The theory that father has an unlimited and unrestricted right to the custody of the minor child even to the limit of disregarding the welfare of the child would be theoretically inconsistent with this constitutional provision.

17. In view of the law declared by this Court, custody of child cannot be given against his wishes so as to allow him to live as per his wish when he is happy with the mother or some other person. But, so far as visitation rights are concerned, father cannot be denied such right to visit the child though the child expressed his unwillingness to have a company with his father, the reasons best known to him.

18. Learned counsel for revision petitioner contended that if the visitation rights are not workable, such right cannot be given to the father and she also pointed out that the alleged attempt made by respondent No.1 herein to take away the child without the consent of the mother—revision petitioner, but that is not the basis to deny visitation rights and if in future, it is impossible to implement the orders of the Judge, Family Court regarding visitation rights or it is not workable due to other contingencies, the petitioner may move appropriate application before the Judge, Family Court. But, at this stage, visitation rights cannot be denied to respondent No.1 herein. Hence, I find no illegality in the order passed by the Judge, Family Court. However, there is a dispute between the place of convenience to visit the child. To avoid any complication regarding place of visit, I find it is a fit case to change the place of visit of the child by respondent No.1 i.e., in

the presence of Secretary, District Legal Services Authority, City Civil Court, Hyderabad, which is outside of the premises of the Court or according to their convenience of both parties.

19. With the above modification, this Civil Revision Petition is disposed of. No costs.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 21-09-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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Dt. 21-09-2016

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