

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3655 of 2016

ORDER:

This is a civil revision petition under Article 227 of the Constitution of India by the husband assailing the orders dated 27.05.2016 of the learned Principal District Judge, Mahabubnagar District, made in IA.No.1750 of 2015 in GWOP.No.17 of 2015 filed by the husband under Section 12 of the Guardian and Wards Act, 1890, read with Section 151 the Code of the Civil Procedure, 1908, for grant of interim visiting rights, as per the interim visitation access list attached to the petition, to see his children who are in the custody of the respondent on such terms and conditions, except at respondent's house, or as the Court deems fit and proper in the circumstances of the case and the larger interests of justice.

2. I have heard the submissions of *Mrs. Goda Ramalakshmi*, learned counsel for the revision petitioner/ husband (hereinafter, 'husband') and *Sri B.Mohan*, learned counsel for the respondent/ wife (hereinafter, 'wife').

3. The husband had filed the original petition against his wife under Sections 7, 10 and 25 of the Guardians and Wards Act, 1890, seeking the following reliefs:

1. To grant the custody of minor children namely A.Manikanta and A.Srilaxmi to petitioner.
2. And costs of the petition may be awarded to the petitioner in the interest of justice.
3. And pass such other order or orders as this Hon'ble Court deems fit and proper in the circumstances of the case.

The said petition is being resisted by the wife by filing a counter. During the pendency of the said petition, the husband had filed the subject interlocutory application with the aforestated prayer for interim visitation rights to enable

him to see his children who are in the custody of the wife, pending final disposal of the main case. The wife had resisted the said interim request of the husband also by filing a detailed counter. However, on merits, the trial Court dismissed the petition and had refused to grant visitation rights to the husband. The operative portion of the impugned order reads as under:

‘Manikanta the son of the petitioner and respondent, who is aged 12 years, is very intelligent boy. When I interviewed him, he tried his level best to convince the petitioner to come to the house and to live with them. The children preferred to live with their mother than to their father. As the respondent who is a teacher can provide good education to her children, so there is no necessity for the petitioner to provide coaching or tuition to the children during night times. If really, he is interested in the welfare of the children, he can support the respondent by sending money and material. But the petitioner is stating that if the children are sent to him during night hours, he will provide education to them. In this petition, he is requesting to send his children during the festival days. But the children are not willing to go during the holidays and in other days.

Now a days, when there is a strained relationship in between the parents, it is becoming dangerous to send the children to one of their parents with whom the children are not willing to live. In many cases, father or mothers are killing their children due to strained relations with their spouse. In these circumstances, I am not inclined to allow the request of the petitioner in this petition and consequently, this petition is liable to be dismissed.

In the result, this petition is dismissed”

[Reproduced verbatim]

4. Aggrieved thereof, the husband filed this revision petition.
5. The case of the husband as set out in the pleadings filed before the trial Court and as per the submissions made before this Court, in brief, is this:

The petitioner and the respondent are blessed with two children, viz., (i) Manikanta, and (ii) Srilaxmi. As on the date of his application they are aged 12 years and 11 years respectively. The petitioner is their natural guardian. He has made multiple requests to the respondent during the past one year to allow him to at least see his son and daughter, who are in her custody; but the respondent denied even that request of the petitioner. The petitioner is worried about the health, welfare and education of the children. The petitioner is continuously visiting his children’s school to know their academic

performance and regular attendance to the school. After such visits, the petitioner is not satisfied about his children's education. In fact, he is thinking of giving IIT level basics by play way method to his children. The petitioner discharged his duties in International schools before joining the Government job. The petitioner is requesting permission to take children between 5 PM and 8 PM daily to make it possible to give good basics in such education to his children. The petitioner made arrangements with a kirana & general store to enable his children to buy whatever they needed from the said stores. The petitioner used to continuously meet the shop owner and pay the amounts due towards the purchases made by the children as per the arrangement. But, the petitioner noticed that during the last two months, the children did not buy any items from that shop. This clearly shows that the children are in the forceful custody and control of their mother. Actually, the children are having utmost affection for their father. The petitioner sent crackers to his children through his friend on the occasion of Diwali festival; but, the respondent questioned his friend as to who he was and why he came to them, and asked him to go and give that crackers to his friend, the petitioner, by saying that the petitioner would sell those crackers and that money realised on such sale would be useful for the petitioner to drink cheep liquor and smoke cigars. The respondent uttered those words to the petitioner's friend in front of the children and thus insulted the petitioner. She always used to do likewise unmindful of the situation and place. After that also the petitioner tried to send some food items to his children through his friend. But she refused to accept the same citing the behaviour of the petitioner as a reason. As a result of the adamant attitude of the respondent, the petitioner went into great depression and is always thinking about what he could do for his children. After this incident, the petitioner sent dictionary, gift articles and food items by courier. The petitioner is every time spending huge amounts on food items. The respondent is using her innocent children as tools of vengeance and is

subjecting the children to severe emotional and psychological abuse. Further, any enquiry being made by the petitioner about his childrens' well-being either by phone or any other means is being falsely converted into an attempt or incident of threat and the respondent is lodging reports with the police and implicating the petitioner in multiple litigations and using legal machinery for her unlawful ends. The petitioner received secret phone calls from his children during last two months prior to this application, and during such conversations on phone the children expressed their intention to live with him. In the Court premises also, the petitioner's son is showing his hands secretly to the petitioner. The Law Commission of India in its Report No.257 also said that 'joint custody and equal rights of both the parents' is good for the minor children. Minor children without father may go into depression and they will face psychological problems in future. All this may result in punishing the innocent children for no fault of them. The petitioner made all efforts to have a glimpse of the child; but, the respondent has denied the said request also. The petitioner is having a legal right to see his children and share his love and affection. The petitioner and the children are emotionally attached. The children being minors are not able to express the same feeling which they are having. The petitioner wants to live under one roof with his children.

6. In the counter, the wife specifically denied each and every allegation made by the husband in his affidavit filed in support of the petition. Apart from the denial of the case of the husband, the case of the wife as set out in her pleadings filed before the trial Court and as per the submissions made before this Court, in brief, is this: The husband filed the main OP on 27.08.2015. However, the subject application was filed in January 2016. The allegations now made in support of the present petition were not made in the original petition. The present allegations in the subject petition are developed and made for the purpose of this petition. The petitioner never cared for the

children, their welfare and their education and also the welfare of the wife. If really, the petitioner intends to provide such IIT coaching and intends to educate the children by other modes, he is always welcome to provide such education at home but not outside the home. He neglected the children by not coming to his own family house and by making false and untenable allegations against the respondent and her children. Keeping in view the welfare of the children which is of paramount consideration, necessary orders which will make the children happy may be passed. This respondent never objected to the petitioner coming home and maintaining the children and for living with them along with the wife. The petitioner is not discharging his duties as a husband and as a father but is only claiming rights before the Court. He has a right to live with the children at the house owned by him; and, he can do so; but, he is not doing so. Since the children are studying and are preparing for final examinations, it is not possible to send them out of home as sought for by the petitioner and as per the schedule annexed to his petition. He can come home and live with the children and his wife and lead happy family life. The children will also be happy if the parents live together along with them. Hence, the petition may be dismissed.

7. The learned counsel for the petitioner-husband made the following further submissions:

The respondent hardly lived with him. He provided a house worth Rs.30,00,000/- to the respondent and the children. The respondent is living in the said house along with his children. He is regularly providing maintenance and education to his children and made several attempts to bring back his children. But the respondent is avoiding his company and also instructed the school authorities not to allow him to see the children. The respondent is addicted to bad vices; and she used to quarrel with him for silly reasons. He wishes to see the children on public holidays and festival days as mentioned in

the list appended to the petition. The Court below failed to appreciate the fact that an application under Section 12 for visitation rights has to be adjudicated. The Court below while dismissing the interlocutory application with observations, which are unwarranted, has almost foreclosed the adjudication of the issues involved in the Original Petition. The Court below even without giving an opportunity to adduce evidence in the main petition resorted to final adjudication of the Guardian OP while deciding the interlocutory application. The Court below failed to appreciate the fact that matters like custody are sensitive issues involving emotions of the parties concerned and that it was the duty of the Court to strike a balance between the emotions and the welfare of the minor. The Court below ought to have seen that the respondent, who is working as a teacher, cannot give 100% attention to her children. The respondent after coming home from her work has to attend to her daily chores and also complete any official work assigned to her at home and as such she will not be in a position to concentrate on the welfare and education of the children. The Court below ought to have taken this aspect into consideration and ought to have given visitation rights to the petitioner at least for 2 to 3 hours per day for educating his children and taking care of them. The Court below erred in dismissing the petition in entirety and in not considering the oral submissions and written arguments filed on behalf of the petitioner. The Court below ought to have considered the judgment of the Apex Court in Bimalender Kumar Chatterjee v. Dipa Chatterjee, wherein it was held that humanitarian approach is necessary for solving disputes regarding custody and guardianship. Therefore, the Court below ought to have seen that even if the custody is to be retained with mother, the right of father to see the child at intervals cannot be ignored. The Court below failed to appreciate the fact that the children were not against staying with father. The Court below ought to have taken the minors' interests into consideration before deciding the issue of interim visitation rights. The Court below erred in

rejecting the petitioner's request on surmises and conjectures. It is not a case where the children are reluctant to see the father or stay with him. The Court below failed to appreciate the emotional attachment of the petitioner with the children and made certain observations, which wounded the sentiments of the petitioner. It is nobody's case that the petitioner was cruel towards his kids. The Court below made observations, which are extraneous to the case and which have no basis in the contentions of the parties and exceeded its jurisdiction and the scope of enquiry in the interlocutory application.

8. On the other hand, the learned counsel for the wife while reiterating the contentions of the wife and supporting the orders of the Court below would submit that when the rights of the parties/ spouses are yet to be decided in the main petition after full fledged trial, it is not just and proper to grant an order for interim visitation rights and unless the evidence is adduced it is not possible to adjudge the aspect of welfare of the children and that in the facts and circumstances of the case, the order of the Court below, which is a well reasoned order needs no interference.

9. In support of the contentions of the husband, the learned counsel for the petitioner placed reliance on the following decisions: (i) Ruchi Majoo v. Sanjeev Majoo¹; (ii) K M Vinaya v. B R Srinivas²; (iii) K M Vinaya v. B R Srinivas³; (iv) Manoj Ansem Rebeiro v. Candace Elizebath Rebeiro⁴; and, (v) Samuel Stephen Richard v. Stella Richard⁵

10. I have gone through the pleadings of both the parties. I have given earnest and thoughtful consideration to the submissions. I have gone through the decisions referred to supra.

¹ (2011) 6 Supreme Court Cases 479

² 2013 Law Suit (kar) 1557

³ 2015 Law Suit (SC) 683

⁴ 2016 Law Suit (SC) 512

⁵ AIR 1995 MADRAS 451 (V.42, C.123 Aug)

11. Now the point for determination is as to whether the husband had made out valid and sufficient grounds calling for interference with the order impugned?

12. POINT:

Both parties traded serious allegations in their respective pleadings in the main proceeding and also in the interlocutory application. The issues raised for consideration in the main petition will have to be resolved finally on merits, after full fledged trial; and no observations which will have a bearing on the merits of the main matter need be made at this stage in this order. While considering the interim request of the husband/ petitioner the Court is concerned primarily with welfare of the children and the limited relevance of the impact of the conflict between the parents on their welfare.

12.1 There is no dispute about marital relationship between the parties. The children are of the couple is also not in dispute. The children are now with the mother and being 12 and 11 years of age are attending to school and are pursuing education. Both the parents are teachers. During the pendency of the main petition filed for custody of the children, the husband, who is father of the children, is seeking interim visitation rights as per the schedule annexed to his petition. The contents of the said schedule with regard to the days and periods during which visitation rights are being sought may be summarised as under: '24 Public Holidays mentioned in the list of the schedule, festival occasions like Holi, Rakshabandhan, Janmastami, Ugadi, five days during ten days of Ganesh Chaturdhi festival, four days out of Navaratri festival, Dussera vacation, three days for Diwali, new year day, Telangana formation day, access for three hours each twice a week, weekends with overnight stay, 50% of days with him on school holidays and long vacations for the school etcetera.'

12.2 Thus, the husband is seeking visitation rights [with night stays with him] on holidays, on certain number of days during festival periods, on certain number of days during vacations for school, on certain week days, on days of family functions and on certain specified days like birth days, Father's day and Children's day etcetera. The wife is unwilling to part with the company of the children and give temporary custody to the husband even for few hours or a single day. According to the cause of action stated in the husband's petition the date of separation was 02.04.2003. The wife in her counter, while denying the said averment of the petitioner, alleged that the petitioner himself stopped coming to his own house since 15.05.2015. He filed the petition in August 2015 and the subject application at the end of December 2015 or in first week of January 2016. Thus, long time has elapsed from the said date and till the subject application was filed by the petitioner/husband. In deciding the question of granting custody or interim custody or visitation rights, the welfare of the minor is the paramount consideration. The welfare of the minor has been pointed out as the guiding factor in various precedents. The word "welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded. Age of the child, the character of the spouse seeking the relief, the capacity of such spouse and other factors unique to the case have to be considered. Where the minor is old enough, to make an intelligent preference, the wishes of the minor should be considered by the Court. No doubt, minor's preference is not conclusive on the matter. Further, the welfare of the child is not to be measured by money a spouse has or by physical comfort only which one spouse can provide. (See: Samuel Stephen Richard-5th supra). Even when such spouse is acrimonious towards the other spouse, it may not be a ground to deny the right of such spouse to see the children and continue to have the parental/paternal bond with the children.

(See: Manoj Anslem Rebeiro-4th supra). If the time lag between the date of separation and the date of request for the relief made by one spouse is considerably long and that on account of the said reason, if the minor children developed roots at their present place of stay with the other spouse, even in such a case, if the facts of the case warrant consideration of the request, then, instead of granting rights straight away, opportunity to have short meetings shall be created in the form of parenting time or short time visitation rights at Court hearings or some such other safe places as the Court may decide to enable the distanced spouse to slowly re-establish a bond. In all cases, except in cases involving out of the ordinary circumstances, to the extent possible, keeping in view the welfare and interests of the children, which are paramount considerations, the Court shall see that the children are not denied the love and affection of one of the spouses, be it the father or the mother.

12.3 Having regard to the contentions of the parties and the settled legal position, the trial Court ought to have passed a reasoned order having adverted to the question as to whether the petitioner/husband is entitled to any visitation rights of reasonable duration, if not as claimed in the schedule. Instead of examining the merits of the request of the husband/petitioner, the trial Court merely referred to some decisions. The trial Court did not even apply the settled principles to the case on hand before making the observations in the operative portion of the order, which are extracted supra. The said observations are undisputedly based on trial Court's surmises, speculations and suppositions and not on material facts borne out by record. Thus, a plain perusal of the order of the trial Court reflects that the trial Court passed the impugned order without considering the facts of the case and the legal principles applicable in proper perspective, but, by taking extraneous and irrelevant matters into consideration. Therefore, this Court finds that the said order is not justified and cannot be sustained.

12.4 Viewed thus, this Court finds that there is merit in the contentions advanced on behalf of the husband before this Court and that the request of the husband requires a fresh consideration by the trial Court based on material facts and settled principles of law and that therefore, the subject interlocutory application requires to be remitted to the trial Court after setting aside the impugned order.

13. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel IA No.1750 of 2015 in GWOP No.17 of 2015 on the file of the learned Principal District Judge, Mahabubnagar District, is remitted to the said Court for disposal afresh in accordance with the procedure established by law, however, after confining to the pleadings of the parties, contentions and rival contentions and not any extraneous and irrelevant matters. No costs.

Pending miscellaneous petitions, if any, in this revision shall stand closed.

19th December 2016
RAR

M. SEETHARAMA MURTI, J