

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION Nos. 3941 of 2016

O R D E R:

This Revision under Article 227 of the Constitution of India is filed challenging the order dated 1.7.2016 in I.A.No. 468 of 2016 in O.P.No. 754 of 2016 whereby interim custody of the child by name Sagari Pakala aged 6½ years was granted to the respondent herein on the application filed under Section 151 CPC.

2. Undisputed facts are that the petitioner and respondent are the husband and wife, a child was born out of their wedlock. Both husband and wife are living separately. The minor child, Sagari Pakala, was with the revision petitioner. Respondent filed a petition, under Section 7 of the Guardians and Wards Act read with Section 13 of Hindu Minority and Guardianship Act, 1956, to declare the petitioner as guardian of the minor child Sagari Pakala and for the custody of the minor child raising several contentions. However, the undisputed fact is that the child is under the custody of the revision petitioner prior to passing of the order and even on the date of filing of the main petition.

3. The revision petitioner resisted petition on several grounds but they are not necessary in view of the order passed by the trial Court. The trial Court passed the order under challenge only on the ground that the revision petitioner did not comply the directions issued by the Court on 1.6.2016 and 10.6.2016, as discussed in paragraph 7 of the order under challenge.

4. The petition under Section 151 of CPC is not maintainable when there is a specific provision i.e., Section 12 of Guardians and Wards Act. Moreover, the revision petitioner is a natural guardian under Section 6 read with Section 4(2) of Guardians and Wards Act but the respondent sought declaration that she is the natural guardian. However, this is an issue to be decided in the main petition.

5. For grant of custody there are certain parameters laid down by the Apex Court and this Court and at the same time under Section 13 of Hindu Minority and Guardianship Act, so also Section 17 of Guardians and Wards Act. The Paramount consideration for ordering custody and appointing guardian of minor ward is the welfare of the child which is the prime consideration. The same parameters can be applied even to pass order under Section 12 of Guardians and Wards Act as held by this Court in ***Md. Zafarullah Khan vs. Yasmmeen***¹ where a Single Judge of this Court while deciding the application under Section 12 for interim custody of minor child, pending consideration of an application under Section 7 for appointing or declaring a person as guardian of person or property of a minor concluded that “in considering the question of interim custody of minor child though regard should be had to the sentiments of the parents and the preference of the minor, yet the determining factor should always be the welfare of the minor subject to provisions of Section 17 and consistent with his personal law. It cannot be disputed that normally children need company of both the parents, enjoy visiting both the maternal as well as paternal relations and that for healthy growth of the minors they should not be cut off or deprived of any of the parents and their relations,

¹ 1988 (2) ALT 708

which is possible only when the parents are united, not when they are separated. In the circumstances like that of the case on hand endeavour should be made to provide for the minors environment as akin to a normal home as practicable for that alone will be in their welfare”.

6. A similar view is expressed by the Apex Court in *Athar Hussain v. Syed Siraj Ahmed*² and held though “in matters of custody, as well-settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, court must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.”

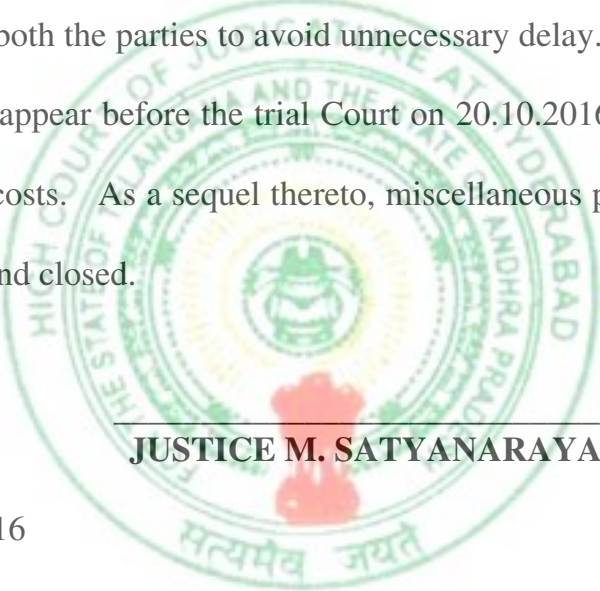
7. Thus, the parameters for granting interim custody of the minor during pendency of the main petition for declaration of the respondent herein as guardian and for custody of a child, the Judge Family Court is supposed to record reasons for granting such relief as interim measure during pendency of the main petition. But strangely, the Judge Family Court passed interim order only on the ground that revision petitioner did not comply the interim orders dated 1.6.2016 and 10.6.2016, which is contrary to the settled principles of law in the judgments referred to above.

8. When the order of the trial court is bereft of any reason as required under Section 12 read with Section 17 of Guardians and Wards Act and under Section 13 of the Hindu Minority and Guardianship Act, the order is liable to be set aside and accordingly, the order is set aside. However, the trial Court is directed to decide the petition for interim custody in

² AIR 2010 SC 1417

accordance with law declared by the Apex Court and this Court in the judgments referred supra afresh after affording an opportunity to both parties.

9. In the result, the Civil Revision Petition is allowed setting aside the order dated 11.7.2016 passed by the Judge, Additional Family Court, City Civil Court, Hyderabad in I.A.No. 468 of 2016 in O.P.No. 754 of 2016 remitting the matter exercising power under Order 41 Rule 23-A CPC with a direction to decide I.A.No. 468 of 2016 on the file of Additional Family Court, City Civil Court, Hyderabad afresh after affording reasonable opportunity to both the parties to avoid unnecessary delay. Both the parties are directed to appear before the trial Court on 20.10.2016. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, pending if any, shall stand closed.



JUSTICE M. SATYANARAYANA MURTHY

Date: 13.10.2016
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Note: Furnish copy in three days.