

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No. 2094 of 2016

ORDER:

The revision petitioner is father of minor child by name Mohammad Afraaz Ahmed. The revision respondent is mother of the minor child. The marital tie of the couple is subsisting and pending adjudication in O.P.No.860 of 2015 before the Family Court, Hyderabad for dissolution of the marriage sought by the wife. The child is aged about 12 years by now, a student of 7th class, Little Flower School, Abids at Hyderabad. In the order of the Division Bench of this Court in F.C.A.No.373 of 2013 dated 08.04.2015, when impugned therein the order of the Family Court in FCOP No.1411 of 2010 dated 15.06.2013, by the father of the child, at the paragraph-19 of the operative portion, in answering point No.2 it was held as follows:-

In the result, the appeal is allowed in part while confirming the order of the lower court to the extent of visiting rights of once in a month on 4th Sunday at N.T.R. Park for the petitioner-father of the minor boy to spend; also given once in a year during May, for 9 days (both days inclusive) custody in Summer vacation. Any violation by any of the parties, the Judge, Family Court can be moved to enforce; besides liability for legal consequences of any disobedience. There shall be no order as to costs. As a sequel, miscellaneous petitions if any pending shall stand closed.

2. It is as a sequel to it according to the revision petition, he maintained I.A.No.663 of 2015 before the Additional Family Court, Hyderabad, mentioning under Section 151 CPC, for enforcement of the order, dated 08.04.2015 supra of the Division Bench, in regard to the visitation rights of the petitioner on the minor child. Leave about the several facts mentioned prior to the passing of the order not at all relevant but for subsequent events mentioned only of on 26.04.2015 and

26.07.2015 the petitioner/ husband allegedly issued notices to his wife/ mother of the child with whom the child is to provide visitation rights of the petitioner on the child as per the order dated 08.04.2015 supra to spend on every Sunday between 2 to 4 P.M. at N.T.R. garden, Hyderabad in saying the mother of the child is not bringing the child and violating the same disrespecting the orders of the Court.

3. The counter affidavit filed by the mother of the child as respondent to the application speaks that she has been complying the above orders but the petitioner suppressed the same. The petitioner absconded with the minor child several times after exercising visiting rights from the school and also kept the custody of the minor child beyond the 9 days custody granted to him and absconded with the minor child for 30 days which made the minor child lost his school attendance for 20 days and in this regard, she filed a contempt case against the petitioner in C.C.No.1017 of 2015 which is pending adjudication, hence she sought for cancellation of visitation rights. In this regard, the respondent/ wife also filed a complaint before police which registered as Cr.No.168 of 2015 dated 16.06.2015. The petitions filed by the petitioner alleging violation of Court orders vide I.A.No.385 of 2011 and I.A.No.437 of 2012 were dismissed on 11.03.2013 after contest against which the revisions filed by the revision petitioner in the Hon'ble High Court vide CRP Nos.2515 of 2013 and 2437 of 2013. For subsequent to the Division Bench order in FCA No.373 of 2013 dated 08.04.2015, the petitioner/ husband (father of the child) violated Court orders in not handing over the child back, there is Habeas corpus vide W.P.No.17983 of 2015 and a Cr.No.168 of 2015 dated 16.06.2015 also registered against the petitioner. The minor child was found in Kajipet railway station with him having been taken the child without permission of the Court beyond

the jurisdiction of the Court. It is also mentioned that the Hon'ble the then Acting Chief Justice in the in-camera proceedings after heard the child, observed of the child was taken to New Delhi; from the version of the child. Leave it as it is, a review petition filed by the husband of the Division Bench order in F.C.A.No.373 of 2013 dated 08.04.2015 was dismissed and it is the submission of the mother of the child (respondent herein) that she also filed a review petition before the Division Bench and the same was also disposed of by giving liberty to approach the family Court. It is her version that she filed such an application before the Family Court to modify the earlier modified order and the same is pending.

4. Leave it as it is, now the only point for consideration before this Court against the impugned order to sit in revision, is how to work out the order of this Court in FCA No.373 of 2013 dated 08.04.2015.

5. The order dated 08.04.2015 is undisputedly in force and both the parties are bound to that which is for the father of the child to have 9 days custody in Summer vacation every year and visitation rights on every 4th Sunday at NTR park, Hyderabad. However, the Family Court instead of deciding the same as to said order is in violation without giving visiting rights as complained, while reiterating the order of this Court, dated 08.04.2015 in force and both the parties are bound by it, observed that the petition is not filed under order XXI CPC for execution and thereby no action can be taken even the mother of the child(respondent) got obligation to comply said orders and in saying the order dated 08.04.2015 and while directing the respondent (mother of the child) to comply said orders and in saying the petition was to that extent allowed. Same is since impugned by the father of the child/ revision petitioner it is to decide said conclusion of the learned

Judge of the Family court is correct. In this context, it is necessary to mention that Section 25 of The Guardians and Wards Act, 1890 (for short, the Act') is very clear that [\(1\)](#) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

[\(2\)](#) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882)

Now 97 Cr.P.C. of 1973 of handed over the child to the custody of the guardian and for that the Court instead of dealing with the custody, exercised the power as if a Magistrate dealing with the Section 97 Cr.P.C., 1973 and Section 26 speaks '(1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general and may be defined by the order granting it.

Section 44 of the Act speaks that If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of section 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months and so far as penalty for contumacy, the Section 45 speaks that

[\(1\)](#) In the following cases, namely:—

[\(a\)](#) If a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under section 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under section 25, sub-section (1); or

[\(b\)](#) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under clause (b) of section 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (c) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (d) of that section;

[\(c\)](#) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under section 41, sub-section (3), the person, guardian or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five

hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement, or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.

6. Having regard to the above even for custody of the child, compliance not made by the guardian of the person, for any interlocutory order or interim custody order, the guardian of the person is liable for contempt and equally the person who is given intermittent custody or visitation rights if not returned back, under Section 45 of the Act, order imposing penalty and imprisonment can be passed under Section 44 of the Act, and this is applicable to both sides under Section 25 and 26 of the Act, as referred supra including for any non-compliance and for father of the child taking the child beyond the jurisdiction of the Court without permission of the Court. In fact, the learned Judge of the family Court has not drawn proper attention to these provisions, but stated that only execution of the order as provided under Order XXI CPC, is the remedy. In fact, Order XXI Rule 11 CPC deals with the execution under any of the 4 modes viz; **delivery** of property pursuant to warrant as per decree, arrest of J.Dr. or attachment and sale and attachment of immovable or movable property or salary of a public or private employee or the like. Here, the child is not practically to be within the meaning of property to invoke Order XXI CPC but for to invoke by the Family Court recourse to any of the Sections 25, 26, 44 and 45 of the Act. Thus, it is with the purport in passing the order by the Division Bench of this Court on 08.04.2015 in the operative portion referred supra by directed both the parties for enforcing the order and for liability for any disobedience with legal consequences, to approach the Family Court instead of approaching the High Court for everything. Thus the impugned order is liable to be set aside to re-determine by remand. However at this stage, both the parties, both the parties came to consensus to implement said

order in force (which may be subject to any further modifications if necessary for any competent Court to pass) to the effect that while keeping in force with no change in 9 days custody during Summer vacation, so far as once in a month visiting rights to spend with the child by the father concerned that instead of 4th Sunday at NTR Garden the mother of the Child agreed to produce the child by 1.00P.M. on Second Sunday or in the event of second Sunday happens to be a holiday for the Family Court, on next working Sunday before the Family Court that is only once in a month and that the father of the child to spend with the child therefrom within the Court compound and not to take the child outside, without permission of the Court if at all on filing any memo so to permit, to spend within the timeframe and to hand over back to the mother of the child by 4.00 P.M. i.e. to spend for three hours maximum. Same is recorded from the settled expressions of the Apex Court that custody matters shall never be final and can be modified at any time subject to any change and particularly in the welfare of the child and by keeping in mind the sensitiveness and attachment of the child to the parties and in recognition of the right to spend.

7. Accordingly, the Revision petition is disposed of by recording the consensus of both the parties. There is no order as to costs.

8. Consequently, pending miscellaneous petitions in this revision, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 02.09.2016
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