

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2837 of 2016

ORDER:

This is a civil revision petition under Article 227 of the Constitution of India by the unsuccessful petitioner assailing the order, dated 17.03.2016, of the learned XV Additional District Judge-cum-Judge, II Additional Family Court, Ranga Reddy District, Kukatpally at Miyapur, passed in IA.no.493 of 2015 in OP.no.1457 of 2015 filed by the petitioner under Section 12 of the Guardian and Wards Act, 1890, read with Section 151 of the Code of Civil Procedure, 1908, requesting to give interim/temporary custody of the minor child on every Sunday and during the public holidays and school holidays of the child pending final disposal of the main petition.

2. I have heard the submissions of Sri D. Vijaya Kumar, learned counsel for the revision petitioner, and of Sri V. Brahmaiah Chowdary, learned counsel for the respondents 1,2 and 4. I have perused the material record.

3. The above stated petition filed by the father of the minor child was resisted by the respondents 1 and 2, who are his parents-in-law and also the other respondents 3 and 4, who are the children of the respondents 1 and 2. On merits and by the orders impugned in this revision, the trial Court dismissed the petition. Therefore, the aggrieved petitioner is before this Court.

4. The petitioner's case in support of his afore-stated request, in brief, is this:

Late Avula Hyma is the legally wedded wife of the petitioner. His marriage with the said Hyma was performed on 01.06.2005. Under lawful wedlock, she gave birth to a female child, Harshini, on 31.07.2008. The petitioner, his wife and the child lived together happily. He was having immense

love and affection for his wife. He used to look after his wife and child very well, in all respects. As per the wish of his wife, he used to help his parents-in-law; he opened a mobile shop at Patancheru by spending an amount of Rs.12,00,000/- on its capital; he entrusted the said business to his parents-in-law, the respondents 1 and 2, for eking out their livelihood. This fact reflects the good understanding and relationship between him on one hand and his wife and the respondents 1 and 2 on the other. Due to some misunderstandings between him and his wife, his wife, who is of aggressive temperament, committed suicide on the midnight of 21.10.2009. For no reason, the 1st respondent filed a false complaint against the petitioner before the police of Vijayawada. He did so only with an intention to threaten this petitioner and extract money from him. As this petitioner refused to agree for the conditions of the 1st respondent and his illegal demands, all the respondents conspired and gave false evidence against the petitioner in S.C.No.77 of 2010 on the file of Mahila Court, Vijayawada. Therefore, the said Court convicted this petitioner. He preferred an appeal before this Court and this Court enlarged him on bail. The said appeal is pending. This petitioner was under shock and trauma at the time of the death of his wife. Without the permission of this petitioner and without informing him, the respondents 1 and 2 forcefully took his daughter into their custody. Hence, he filed the OP.147 of 2010, on the file of Family Court, Rajahmundry, seeking custody of his child. During mediations, the respondents came forward for an out of Court compromise and agreed to handover the minor child to the petitioner. Hence, he did not pursue the said OP; the said OP was dismissed on 22.12.2010, for default. Thereafter, a number of times, the petitioner requested the respondents to give custody of the child. They initially dragged on the matter on one pretext or the other and finally refused to do so. They took away the petitioner's daughter and disappeared from his place. His efforts to trace

them were of no avail. Having come to know of the whereabouts of the respondents 1 and 2 and the child, he again approached them and made requests for giving the custody of the child to him. He even brought the matter to the notice of the police. But, the police did not take any action saying that the matter is of civil nature. Therefore, the petitioner got issued a legal notice, dated 16.07.2015, seeking custody of the child. The 1st respondent, having received the said notice, did not either handover the custody of the minor child or issue any reply. This petitioner is having lot of love and affection for the minor child. He is entitled to have the custody of the child being the father and natural guardian. His parents are also having lot of love and affection towards the minor child. If the child is given to his custody, her future, including academic progress, will be better in all respects. He and his family members are having sufficient income and properties to provide sufficient comforts and education to the child. The respondents 1 and 2 are aged persons; they have no income or a house of their own; and, they are dependant upon their children, who are the respondents 3 and 4 herein. After their marriages, the respondents 3 and 4 will be leading their individual lives with their families. In such an event, there will be nobody to take care of the minor child. This petitioner is alone having ways and means to take custody and care of the minor child. He has also decided not to marry any other woman in future, for the sake of taking care of the minor child and bringing her up with love and affection and to provide her the best of future. After the death of his wife, he is all alone, as the respondents 1 and 2 took away his daughter and kept her in their custody. He is not able to live without seeing the child. Since the last 6 years, the respondents are not allowing him to see the child. Therefore, he is suffering lot of mental agony. If the same situation continues, the child will forget him and will not have any

memories of him and may not even recognise him as a father. As such, it is just and necessary to give him temporary custody of the child as prayed for.

5. Apart from denial of the material allegations levelled by the petitioner in his affidavit filed in support of the petition, the case of the respondents as stated in the counter of the 1st respondent, in brief, is this:

The petitioner who is having evil desires and lust for money started harassing his wife, having come to know that the child in her womb was a female child. Thereafter, the relationship between the petitioner and his wife was strained; during the said period, the petitioner used to beat his wife; at one such time, when the adjacent flat owner intervened in the matter, he was also beaten up by the petitioner. Having come to know of such events, the 1st respondent pacified the matter. The petitioner was released after taking from him, a bind-over bond. Immediately he had shifted his residence. It is true that on the death of the petitioner's wife, who is no other than the daughter of the respondents 1 and 2, a complaint was lodged. The petitioner was convicted in S.C.No.77 of 2010 on the file of the Mahila Court, Vijayawada. The judgment was rendered based on oral, documentary and scientific evidence. It is also true that the petitioner filed an appeal and was enlarged on bail. Even though the parents of the petitioner were acquitted, the State has not preferred any appeal. Hence, the respondents are taking steps for preferring an appeal. After obtaining bail in the Sessions Case he tried to take custody of the child; and, the said attempt was resisted. Then he filed OP.no.147 of 2010 before the Family Court, Rajahmundry. Later, the said OP was dismissed for non prosecution; but, not for the reasons stated by the petitioner. If really the respondents disappeared with the daughter as alleged by the petitioner, it is unexplained as to how he made requests for the custody of the daughter. It is a lame excuse. For the past more than seven years, the young female child, who is the grand

daughter of the respondents 1 and 2, is staying with them. It is not the case of the petitioner that the grandparents are not taking care of her or that she was missing fatherly affection. The allegations made by the petitioner are invented for the purpose of the main petition and this petition. The respondents are in the process of forgetting the bitter past by seeing the development of the grand child. The petitioner filed the main petition and this petition by making bald and false allegations, only to wreck vengeance. The allegations that at the time of his wife's death, when he was under shock and trauma, the respondents 1 and 2 took away the girl child are false. Having killed his wife brutally and having waited for a long time of six years from the date of the death of his wife, the petitioner filed this petition; the said fact would only show that he has no love and affection either towards his wife or the daughter. The allegations about the income and financial capacity of the petitioner are false. He suppressed the fact that in the Sessions Case he was sentenced to undergo imprisonment. Though the Court of Session awarded a compensation of Rs.2,00,000/- to the minor child as long back as on 30.01.2005, no amount was paid till date. This circumstance also establishes that the petitioner is not having any respect for the orders of the Courts. In view of the conduct of the petitioner, the petition is liable to be dismissed *in limine*. Right from the birth of the minor child, the petitioner has shown not any interest towards the child. His parents are aged more than 70 years. The present petition is filed only to pressurise the 1st respondent-*de facto* complainant and his family members to withdraw the accusations made against him. As the earlier petition filed for the same relief before the Court at Rajahmundry was dismissed, the present petition is barred by *res judicata*. Hence, the petition may be dismissed with exemplary costs.

6. At the hearing, learned counsel for both the sides made submissions in line with the respective cases pleaded by the parties.

7. 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, religious and ethical welfare of the child must also 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 v. Stella Richard¹). Even when one spouse is acrimonious towards the other spouse, it may not be a sole ground to deny the right of such spouse to see the children and continue to have the parental/filial bond. (See: Manoj Anslern Rebeiro v. Candace Elizebath Rebeiro²). 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 on account of the said reason if the minor children developed roots at their present place of stay with the other spouse or any other relatives like grand parents, even in such a case, if the facts of the case warrant consideration of the request, then, instead of granting long duration rights straight away, opportunities to have short meetings shall be created in the form of parenting time or short duration 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

¹ AIR 1995 MADRAS 451 (V.42, C.123 Aug)

² 2016 Law Suit (SC) 512

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 is of paramount consideration, 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.

8. Learned counsel for the parties placed reliance on the following decisions: (i) In the decision in Vishnu and others v. Jaya³, the facts are as follows: 'The school going children are with the paternal grandmother and that the elder child was slightly mentally retarded; and the two children are living with their father continuously for the past seven years; during that period the respondent/ mother had no access to the children or even a brief meeting with them; the Supreme Court having interacted with all concerned was of the view that if the children are forcibly taken from their father and handed over to their mother, it will only traumatize them and that it will not do any good to anybody and that therefore, the better course would be that the mother should first be allowed to make initial contact with the children, build up her relationship with them and slowly and gradually restore her position as their mother.' In the said background of facts, the Supreme Court granted visitation rights to the wife. (ii) In Nil Ratan Kundu v. Abhujit Kundu⁴, the facts disclose that a criminal case under Sections 498-A and 304 IPC was pending against the father, who was charged of causing the death of the minor's mother. Therefore, the Supreme Court noted that the Courts below ought to have taken the said fact into consideration before passing an appropriate order and that the character of the proposed guardian also requires to be considered and that the proper test to determine the suitability of the father to have the custody of the minor is the positive test of the welfare of the minor and not the negative test that the father was unfit or disqualified to have custody.

³ Manu/SC/0274/2010

⁴ (2008) 9 Supreme Court 413

Further, the Supreme Court having interacted with the child found it to be quite intelligent and took note of the child's wish to continue to stay with the maternal grandparents, with whom he was very happy and held that it would not be proper on the facts and in the circumstances to give custody to the father and accordingly, allowed the appeal and dismissed the application filed by the father for the custody of the son. (iii) In *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam*⁵, the facts disclose that the father of the minor got married within a year after the death of his 1st wife and also was having a son through second marriage and was residing in a rural village and that the minor child was all along with his maternal grandfather and family since birth and was getting good education at their place and that therefore, the learned District Judge appointed maternal grandfather as guardian of the minor child till the child attains the age of 12 years. The Supreme Court having noted that the said conclusion as confirmed by the High Court is based on the welfare of the minor, modified the orders and gave directions about the visitation rights, as on the completion of 12 years of age of the minor, a fresh decision has to be taken about entrusting the custody of the minor child.

9. Reverting to the facts of the case, it is to be noted that in the case on hand, the allegation against the petitioner/husband is that he ill-treated his wife after coming to know that the child in the womb is a girl child. He was convicted in S.C.No.77 of 2010 by the Sessions Judge, Mahila Court, Vijayawada and his appeal preferred before this Court is pending. He is presently on bail. His wife died on 21.10.2009. The minor daughter was born on 31.07.2008. Since the date of the death of the wife of the petitioner, the minor child is in the custody of her maternal grandparents. The petitioner had earlier filed O.P.No.147 of 2010 in a Court at Rajahmundry for the custody of the child. However, the said petition was dismissed for default. He later kept quiet and filed the present OP

⁵ 2010(6) ALT 44 (SC)

and subject application in the year 2015. Since October 2009, the girl child is continuing under the care and custody of her maternal grandparents, the respondents 1 and 2 herein. Their children, the respondents 3 and 4 are also living along with them. She is having company of her niece and nephew, who are said to be aged 30 and 36 years. The petitioner is claiming custody only on the ground that he is the father and the natural guardian. It is not his case that the grandparents are not taking good care of his daughter. The daughter is now aged about 8 ½ years and she is attending school. There is a considerable time lag between the date of separation of the child from him and the date of request for the relief made by the petitioner. By now, the minor child who is staying with the grandparents for the past seven years developed roots at her present place and is very happy with her grandparents, niece and nephew. As per the settled law, the character of the father and his suitability to have the custody of the minor coupled with the positive test of welfare of the minor have to be considered by the Court. It appears, the trial Court did not have a meeting with all the concerned and did not interact with the child aged about 8 years and did not find out as to whether or not the child was in a position to make an intelligent preference and make a choice as per her wish and thus failed to ascertain the wish of the girl child. Be that as it may. The petitioner was tried on the charges under Sections 498-A, 304-B and 302 IPC and was found guilty and was convicted of the offences punishable under Sections 304-B and 498-A IPC and substantive sentences of Rigorous Imprisonment for ten years and simple imprisonment for three years were imposed upon him by the learned Sessions Judge, Mahila Court. Though he was directed to pay compensation of Rs.2,00,000/- to his daughter and the guardian of the daughter was permitted to withdraw the same, he did not yet pay the said compensation payable to his daughter though he claims that he has got means and properties and states that if the custody of the daughter is given to him,

he would take proper care of her in all respects and provide best education to her. Having regard to the aforesaid facts and circumstances of the case, this Court finds that the trial Court is justified in dismissing the petition of the petitioner for temporary custody of the minor girl child as giving such temporary custody to the father would traumatize her and it will not do any good to anybody in the facts and circumstances of the case.

10. However, the learned counsel for the petitioner would contend that the trial Court while dismissing the petition of the father, did not examine the issue as to whether the facts of the case warrant consideration of the request of the father, if not for granting interim custody rights straight away, but for providing an opportunity to have either short meetings to make initial contact with the child and build up relationship with her or short term visitation rights at Court hearings or some such other safe places as the court may decide to enable the distanced father to slowly re-establish a bond. He would also submit that as per settled law, the Court shall see that the child is not denied the love and affection of one of the spouses, be it the father or the mother provided there are no exceptional circumstances and that the trial Court has also not considered the aspect as to whether the case on hand is an exceptional case involving out of the ordinary circumstances to deny any rights to the father, keeping in view the welfare and interests of the minor girl, which are of paramount consideration. Be that as it may.

11. On the above analysis, this Court is of the considered view that the revision petition which is devoid of merit is liable to be dismissed, however, reserving liberty to the petitioner to make a fresh request to the trial Court for providing an opportunity to him to either have short meetings at Court hearings to make initial contact with the minor girl child and build up relationship with her or short term visitation rights on the hearing dates either at Court premises or some such other safe place as the court may decide to enable the distanced

father to slowly re-establish a bond. However, it is made clear that if any such application comes to be filed by the petitioner, the trial Court shall give an opportunity to the respondents to file their counter and then consider the said application on its merit and pass appropriate orders having regard to the facts peculiar to the case and the legal position obtaining, however, only after also examining the vital issue as to whether or not the case on hand is an exceptional case involving out of the ordinary circumstances to deny any rights to the father, keeping in view the welfare and interests of the minor girl, which are of paramount consideration.

12. The revision petition is accordingly dismissed with the above observations and directions.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed. There shall be no order as to costs.

26th December, 2016
Vjl

M. SEETHARAMA MURTI, J

