

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.1804 OF 2017

O R D E R

O.P.No.2222 of 2016 on the file of the learned XV Additional District Judge, Ranga Reddy District, Kukatpally at Miyapur, was instituted by Karuna Gadde against her husband, Sudarsana Rao Gadde, under Section 7 of the Guardians and Wards Act, 1890 (for brevity, 'the Act of 1890') seeking permanent custody of their minor son, Ayush Krishab Gadde, now aged over 8 years, and to declare her as his natural guardian. I.A.No.685 of 2016 was filed by her therein seeking temporary custody of the child pending disposal of the O.P.

Initially, by order dated 14.02.2017, the trial Court granted temporary custody of the child to the mother. Aggrieved thereby, the father filed C.R.P.No.859 of 2017 before this Court under Article 227 of the Constitution. By order dated 27.02.2017, this Court took note of the fact that the trial Court had dealt with the matter in an utmost casual and perfunctory manner and set aside the order under revision. The matter was remanded to the trial Court for consideration afresh. Reference was made by this Court to the law laid down by the Supreme Court in **GAURAV NAGPAL V/s. SUMEDHA NAGPAL**¹ to the effect that the paramount consideration in determining the question as to who should be given custody of a minor child is the 'welfare of the child' and not the rights of the parents or what they say.

Upon interaction *in camera* with the child and the parents, this Court opined that as the child had been with his father for several months and had not seen his mother except for a few times, there

¹ (2009) 1 SCC 42

was every possibility of his getting alienated from her. This Court also found signs of such alienation during the interaction and concluded that such estrangement from the mother was not in the overall interest of the child. The custody of the child was therefore directed to be handed over to the mother till disposal of the I.A. afresh, but the father was permitted to see the child and spend time with him every day in the evening hours at the mother's residence. The I.A. was directed to be disposed of within a time frame and both parties were given liberty to adduce additional evidence, which was to be given due weightage by the trial Court while considering the I.A. on its merits.

Pursuant to this remand order, the trial Court took up the matter afresh and by order dated 03.04.2017, the trial Court dismissed I.A.No.685 of 2016 in O.P.No.2222 of 2016 and directed restoration of the child's custody to the father pending disposal of the main O.P. The mother was however permitted to see the child and spend time with him every day in the evening hours at the father's residence. Aggrieved thereby, the mother is now in revision before this Court under Article 227 of the Constitution.

Heard Sri S.Niranjan Reddy, learned senior counsel appearing for Ms.Gorantla Sriranga Pujitha, learned counsel for the mother, and Sri N.V.Anantha Krishna, learned counsel for the father.

As this Court already interacted with the child during the first round of this litigation, subjecting him to another Court visit was felt unnecessary.

At this stage, it may be noted that the 'welfare of the child', which is of cardinal importance in deciding the issue of his/her custody, comprehends optimal growth and development of the

personality of the child and when the child is at the stage of a major shift in the thinking process and shaping of individual personality, a deeper level of emotional care is needed for his/her mental stability and maturity. Psychologically, child-mother bonding is regarded as the best for the child's wholesome development though this presumption is rebuttable. As a result of the separation of the parents, the child would fall in the middle of a contest of loyalty (Parental Alienation Syndrome) which has deleterious effects (psychological and even to some extent physical). The intent of the Court should be to circumvent such effects (See **VIVEK SINGH V/s. ROMANI SINGH²**).

In **VIVEK SINGH²**, the minor daughter had remained with the father from the tender age of 21 months and was about eight years at the time the decision was rendered by the Supreme Court. She was happy in the father's company and desired to continue to live with him. However, the Supreme Court took note of the other side of the picture which was equally significant – that the child was at a crucial phase when there would be a major shift in thinking ability, which would help her to understand cause and effect better and think about the future and involvement of both parents in her life, and when regular school attendance was absolutely essential for her personality development. Reference was also made to the Parental Alienation Syndrome, originally described by Dr. Richard Gardner in ***Recent Developments in Child Custody Litigation*³**, which has at least two psychologically destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked

² (2017) 3 SCC 231

³ The Academy Forum, Vol.29, No.2: The American Academy of Psychoanalysis, 1985

to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

Further, in **VIVEK SINGH²**, the Supreme Court pointed out that in a case of this nature where a child feels tormented because of the strained relations between his parents but ideally needs the company of both, it becomes a difficult choice for the Court to decide as to whom the custody should be given. It was observed that, no doubt, the paramount consideration would be the welfare of the child, but at times the prevailing circumstances are so puzzling that it becomes difficult to weigh conflicting parameters and decide as to which side the balance tilts. It was also pointed out that growth and development of the child in the best environment should be ensured.

It may also be noted that in its earlier order dated 27.02.2017 in C.R.P.No.859 of 2017, this Court referred to **GAURAV NAGPAL¹**, wherein the Supreme Court had observed that the Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but, over and above physical comforts, moral and ethical values also have to be noted as they are equal, if not more important than the others. The Supreme Court further observed therein that matured thinking is necessary in such a situation and when confronted with conflicting demands made by the parents, the Court not only has to look at the

issue on a legalistic basis but human angles should also be considered. The Supreme Court concluded that it is not merely physical custody of the child but due protection of the rights, health, maintenance and education of the child which is the object and purpose of the Act of 1890.

In the light of this settled legal position, this Court would have to examine as to whether the trial Court discharged its bounden duty in reconsidering the issue of Ayush's interim custody pending disposal of the O.P.

In this regard, Sri S.Niranjan Reddy, learned senior counsel, would contend that the trial Court completely overlooked the mandate of this Court while remanding the matter for consideration afresh. He would point out that the trial Court recorded, in paragraphs 5 and 6 of the order, that both parties had filed additional documentary evidence apart from video-audio compact discs to substantiate their stands and assert that except for referring to the filing of this additional evidence, the trial Court did not even consider the contents thereof. He would further point out that the trial Court merely went by the willingness expressed by the child to stay with the father and the fact that child had shown more love and affection towards the father than the mother to conclude that it would not be proper to give temporary custody of the child to the mother. He would also contend that this analysis by the trial Court fell woefully short of what was required of it in terms of the order passed in C.R.P.No.859 of 2017. Learned senior counsel would assert that the paramount welfare of the child ought not to have been assessed by the trial Court going only by what the child desired ignoring all other aspects that needed to be considered. He would

place reliance upon ***THRITY HOSHIE DOLIKUKA V/s. HOSHIAM SHAVAKSHA DOLIKUKA***⁴, which involved a custody battle over an eleven year old child. Therein, the Supreme Court observed that any matter concerning a minor has to be considered and decided only from the point of view of the welfare and interest of the minor and in dealing with such a matter, the Court has a special responsibility as it is the duty of the Court to consider the welfare of the minor and protect his interest. On facts, the Supreme Court expressed its disinclination to interview the minor child in that case being of the opinion that she would not be fit to form an intelligent preference which may be taken into consideration in deciding her welfare, as matured thinking would be necessary in such a situation to decide what would enure to her benefit and welfare and further, any child who is placed in such an unfortunate position can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare.

Per contra, Sri N.V.Anantha Krishna, learned counsel, would contend that as the O.P. is yet to be tried, it would be wholly premature for this Court to venture any opinion on the merits of the matter or the evidence adduced therein. He would point out that his client has not had the opportunity of cross-examination as yet and argue that this Court cannot rest its opinion on such untested evidence at this stage. He would state that the child was in the custody of the mother at the time the trial Court interacted with him and in spite of the likelihood of tutoring by the mother, the child expressed his desire to stay with the father. He would assert that the

⁴ (1982) 2 SCC 544

wish of the child should be given primacy while considering what would be in his paramount interest. He would state that a decision by this Court at this stage as to the interim custody of the child would have an impact on the main O.P. He would further submit that the case is ripe for trial and assert that no interference is called for now as the trial Court passed a reasoned order. He would pray that a direction be given to the trial Court to dispose of the O.P. expeditiously and in the meanwhile, interim custody of the child should be permitted to remain with the father.

In reply, Sri S.Niranjan Reddy, learned senior counsel, would argue that even if the trial Court is directed to expedite the main O.P, the issue as to which parent should have interim custody of the child pending disposal of the O.P requires to be addressed by this Court as determination of this issue would also be based on the child's welfare and best interest at this stage. He would assert that this Court must necessarily decide as to whether the interest of the child is best safeguarded by allowing him to remain with the father now.

This Court finds merit in this submission.

Sri S.Niranjan Reddy, learned senior counsel, would further contend that given the adverse material on record, the father is not entitled to interim custody. In this regard, he would assert that the child was allowed by the father to ride a scooter and also drive a car.

Reference was made by both sides to video and audio clippings.

Significantly, in **GAURAV NAGPAL**¹, it was pointed out by the Supreme Court that not just the physical comforts but also moral and ethical values have to be noted as they would be equal, if not more important than the other factors. Completely losing sight of these standards which are to be applied while deciding the

paramount interest of the child, the trial Court merely went by the fact that the child wished to stay with the father and claimed to have been unhappy while in the custody of the mother. The trial Court further observed that the video shown by the father manifested that the child was not comfortable with the mother. This factual aspect is belied by the ocular evidence filed by the mother which clearly demonstrates that the child was quite happy in the company of the mother and her family, be it during the Holi festivities or otherwise.

The other consideration which weighed with the trial Court was that the child is asthmatic and the father is a doctor by profession. The trial Court however lost sight of the fact that the father is not a practicing doctor and has taken up business as an avocation. The trial Court did not even examine as to whether the discipline in which the father was a doctor related to asthma. Unfortunately, despite the remand of the matter by this Court with specific directions, the trial Court yet again bestowed only superficial consideration upon the issues raised. However, the welfare of the child does not warrant him being subjected to further stress by remand of the matter again.

At the threshold, it may be noted that the main O.P. is yet to be decided by the trial Court. Any observations on merits by this Court at the present stage may prejudice the rights of one or the other party in the said O.P. However, the issue of interim custody of the child pending disposal of the O.P. is a matter which cannot be ignored, as the trial therein is yet to commence. For this limited purpose, the material placed on record in the O.P. would necessarily have to be considered, albeit for forming a *prima facie* opinion.

Though Sri N.V.Anantha Krishna, learned counsel, would contend that the as yet untested evidence placed before the trial

Court cannot be looked into at this stage, this Court is not persuaded to agree. Certain video and audio clippings placed on record bear out certain facts which would be incapable of rebuttal even during cross-examination. One such video clipping demonstrates that Ayush was allowed to ride a Honda Brio scooter on his own and without even wearing a helmet. This was admittedly at a time when he was with his father. Further, another video clipping shows that the father is sitting in the passenger seat of the car recording the video while Ayush is driving it. Though Sri N.V.Anantha Krishna, learned counsel, would contend that the mother was also present at that time, the same is denied by Sri S.Niranjan Reddy, learned senior counsel. That apart, the video of Ayush driving the car was recorded by the father sitting beside him and manifests that the conversation at that time was only between them. Had the mother been present in the rear seat of the car, it is surprising that she did not speak up throughout. The claim that she was present in the car therefore does not merit acceptance.

An audio clipping records the conversation between Ayush's parents and his teacher. The voices of the parents are patently identifiable. The complaint of the teacher, as is clear from this audio clipping, was that Ayush was not bringing his books and pencils to school. The clipping also demonstrates that at that point of time the custody of the child was with the father and not with the mother.

These three pieces of evidence, which speak for themselves, are sufficient for this Court to form an opinion as to who should have Ayush's interim custody pending disposal of the O.P.

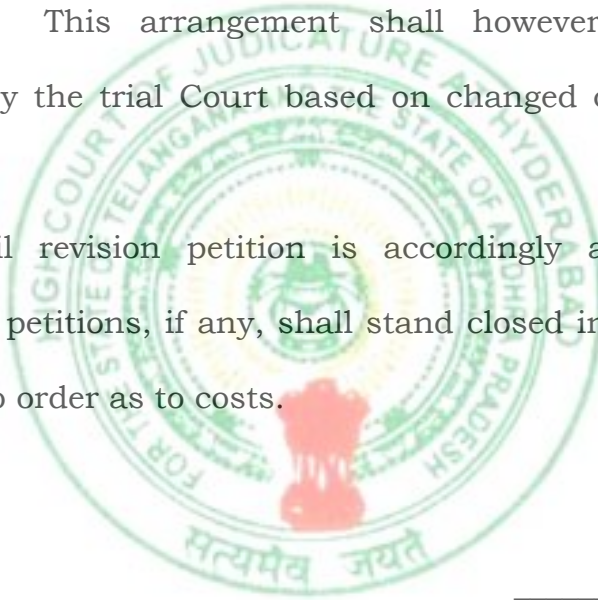
Parenting is not a codified science that can be taught and it is for each individual to develop the skill to be a good parent. Ayush is

still at the tender age of eight years and is in the formative stage of development. Treating a child of such gullible age as an adult for the purpose of weaning him away from the other parent is not an approach which would be in the interest of the child. Allowing a young child of this age to ride a two wheeler is itself shocking and to top it, the father seems to have had no second thoughts about allowing him to drive a car! Apart from such actions being illegal, they speak volumes of how the father failed to apply his mind to whether permitting such liberties to an innocent child would place him and others at risk. It is also clear from the record that the child was not regular to school while in the custody of the father. This is sought to be explained by stating that the child, who suffers from asthma, was unwell at that stage and had to necessarily miss school. However, the teacher's statement in the audio clipping puts it beyond doubt that the child was not diligent in taking his books and pencils to school. These facts demonstrate that the father presently lacks perspective in safeguarding the best interests of the child.

In cases of this nature, it is but inevitable that the child would be exposed to the disputes between the estranged parents. This is also manifest from the various video and audio clippings. It is indeed unfortunate that Ayush is being dragged into the vitriolic differences between his parents and their families. This requires to be avoided at all costs and it is for the parents to ensure that they do not argue or exhibit negativity or animosity in the presence of the child. Needless to state, the parents must give top priority to the proper upbringing of the child and desist from using him as a tool or weapon in their bitter battles.

On the above analysis, this Court finds that the order under revision is unsustainable on facts and in law. The said order is accordingly set aside. Ayush shall remain with the mother pending disposal of the O.P. As the earlier experiment of allowing visitation rights to the father on a daily basis seems to have only resulted in the father making video clippings of the child crying, for the purposes of this case, and such trauma is adverse to the welfare of the child, the father is granted visitation rights on weekends, *viz.*, Saturdays from 5.00 PM to 7.00 PM and Sundays from 9.00 AM to 3.00 PM. Perhaps, this would allow enough time to the child to complete his school work. This arrangement shall however be subject to modification by the trial Court based on changed circumstances, if any.

The civil revision petition is accordingly allowed. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR, J

16th JUNE, 2017

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