

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL REVISION CASE No.2356 of 2016

ORDER:

This revision is preferred by the DVC 1st petitioner for herself and for 2 minor children (2nd and 3rd petitioners) against DVC respondent Nos.1 to 3, who are her husband and her parents in law, against the order dated 12.07.2016 in Crl.A.No.180 of 2016 preferred by the DVC respondents on the file of the Special Sessions Judge-cum-IV Additional District and Sessions Judge, Guntur, in allowing the appeal, by setting aside the order of granting custody of the 2nd petitioner i.e. Dudekula Irfana (minor daughter of DVC 1st petitioner and 1st respondent) to the DVC 1st petitioner within 10 days from the date (dated 26.02.2016) of said order, in Crl.M.P.No.3802 of 2015 in DVC No.33 of 2014 filed by the DVC petitioners.

2. The grounds in the revision vis-à-vis oral submissions are that the order of the lower appellate Court is contrary to law and weight of evidence, that the lower appellate Court failed to see that as per Muslim law, the mother is entitled to the custody of a minor girl child until she reaches the age of puberty and also failed to see that ordinary rule of Muslim law prevails over the desire of the child, that the lower appellate Court failed to see the malafide intention of the 1st respondent in keeping 2nd petitioner with him by necking out the 1st and 3rd petitioners, that the lower appellate Court failed to see that it has given defacto-custody to the 2nd and 3rd respondents and not the father i.e. the 1st respondent who are in no way entitled to the custody of a minor girl child as per Muslim law. That the lower appellate Court failed

to see that minor is under the influence of grandparents and her unwillingness is not voluntary and the mother is the only rightful guardian of a minor unless she remarries within prohibited degrees in which case the father is entitled to it. That the lower appellate Court failed to see that there are better opportunities for education of child at Guntur rather than Giddalur where she is now staying with the 2nd and 3rd respondents. Hence to set aside the order impugned herein by allowing the revision.

3. Whereas, it is the submission of the learned counsel for the respondents that the order of the lower appellate Court holds good and no way requires interference while sitting in revision and thereby sought for dismissal of the revision.

4. Heard and perused the material on record.

5. The DVC 1st petitioner and DVC 1st respondent's marriage was performed on 11.04.2009 under Muslim Law and in their wedlock they blessed with 2 children and the disputes arose between the couple resulting in their separation and wife filed against the husband in C.C.No.329 of 2013, the case of cruelty and dowry harassment. The DVC 1st respondent is working as a soldier basically within the State of Punjab near Batinda. There was a maintenance claim with interim maintenance order against the husband. The father kept the daughter with him and allowed the mother with another child and the daughter is staying with paternal grandparents as DVC 1st respondent is now and then coming and taking care of the child in day to day care of his parents. It is in the factual scenario, the mother also sought for custody of the daughter. She went successful in so far as interim

custody pending DVC.No.33 of 2014 before the trial Court in Crl.M.P.No.3802 of 2015 and that was reversed by the lower appellate Court. The trial Court observed that female child by then aged 5 to 6 years and mother is under personal law entitled to custody that too it is her contest that father of the child is having illicit relationships, whereas the respondents to the custody petition are contending that the 1st petitioner is having illicit relationship with maternal uncle at Guntur, even ignoring these for the father is not taking care of day to day affairs being working in defence at farer place to the child. The lower appellate Court in reversing the same observed particularly at Para 12 that in the course of hearing the appeal from the rival contentions against the impugned order of the trial Magistrate that the minor when examined by the Court even asked to go to the mother she expressed her unwillingness and wants to continue with DVC respondents only and there was several sittings in the attempt to see that the child go to the mother and for at least to talk to her, but in vain which resulted in reversing the order. The said reversal findings are now subject matter of the revision as to which one is correct or otherwise what is just order to pass by this Court while sitting in the revision on the impugned legality and correctness of the lower appellate Court's order.

6. From the facts supra, it is necessary to mention the legal position that custody is different from guardianship. Personal law mainly provides for guardianship. The considerations for guardianship are thus somewhat different to the considerations for custody.

7. From that difference to be kept in mind it is to be seen it is the legal rights under personal law of the parties or mere emotions of the parties or mere affluence of any of the party are the considerations or welfare of the child with cumulative effect of all these depending upon the facts of the case on hand to decide.

8. In **Mt. Haidri Begum Vs. Jawwad Ali Shah**¹ it was observed that mother is prima facie entitled under personal law to which the parties are subject to the custody of the minor until the minor attains the age of 7 years and there is nothing to show any disentitlement of custody to her in so considering. In that expression personal law given sole consideration on legal rights than welfare of the child.

9. Even the Bombay High Court in **Syyad Sabdarali Sy.Nyajali V. Shahistabegum**², observed referring to the principles of Mohammadan law Mulla, 19th Edition, Chapter XVIII under heading (B) at Para 352, page 287, that mother is entitled to custody of male child until he completes the age of 7 years and of female child until she attains puberty and that right continues though she divorced by the father of the child, unless she married a second husband to give in such case custody to the father even within the age. It was also observed that, the personal law of the parties must be blended appropriately to ensure welfare of the minor even for appointing a guardian.

10. The above trend of expressions not considered the sweep change of paramount consideration is not the legal rights but welfare of the child.

¹ AIR 1934 Allahabad 722 (DB)

² 2007 LawSuit (Bom) 468

11. In **Mohd.Shaharyarkhan V. Hussain Khan**³, it was held that in custody matters of children it is irrespective of legal rights, paramount consideration is the welfare of the child and whereas in guardianship among the natural guardian father and mother who have to be appointed, if not any other guardian or Court guardian or testamentary or the like as the case may be.

12. The Madras High Court in **Arafathunnisa V. T.I.Zeeyavudeen, Taraja Beevi and Mohammed Yasin**⁴, at Para 12 also observed that interest and the welfare of the minor children are paramount importance rather than conflicting claims and interest of the parents even under the Muslim law.

13. In **Mir Mohamed Bahauddin Vs. Mujee Bunnisa Begum Sahiba**⁵ also the Madras High Court way back in 1951 observed that paramount consideration for custody and also for guardianship even under Muslim personal law is the welfare of the child.

14. As held in **Mausami Moitra Ganguli V. Jayan Ganguli**⁶ in adjudication of the custody matters so far as factual matrix of the case are concerned, precedents held are not binding on facts.

15. The Apex Court in **Rosy Jacob V. Jacob A.Chakramakkal**⁷ at page 855 Para 15 observed as follows:

“15. The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern

³ 1996(3) ALD-816 (DB)

⁴ 2010 LawSuit (Mad) 2338

⁵ AIR 1952 (39) Madras 280 (C.N.105(16))

⁶ (2008)7 SCC 673

⁷ (1973)1 SCC 840

changed social conditions, yielded to the considerations of their welfare as human beings; so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”

16. In **Halsbury's** Laws of England the law pertaining to the custody of children has been stated at Para No.809 that Wherein any proceedings before any Court, the custody or upbringing of a minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

17. **Rosy Jacob (supra)** and **Halsbury's** Laws on the principles of custody quoted (supra) are noted with approval by the Apex Courts later expression in **M.M.Ganguly (supra)** holding that the question of welfare of the minor child must be considered in the background of relevant facts and circumstances for which stability, security and welfare of the child are paramount, besides preference by child also one of the considerations apart from the custody matters are not final and for any changed circumstances and in the welfare of the child, any directions or modifications

regarding custody can be given by the Court. On facts, it was observed that the wife left the child at the third year and she is a teacher working at different places and the child all through is with father who is stable and secured and attending school and settled in the environment and as such and from his view also not willing to go to the mother, the custody has to be continued with the father in the welfare of the child.

18. Even from the expression in **Gayatri Bajaj V. Jiten Bhalla**⁸, it is clearly laid down that, while considering the paramount consideration of welfare of the child, as part of duty of the Court; for rights of the parents under a statute will not outweigh the same, the wishes of the children are also a relevant factor. On facts therein, the divorced- mother even seeking custody of the two daughters from her ex- husband, the daughters wanted to continue with their father and not willing to go with their mother and there from observed that interest of the minors and their welfare better be sub-served to continue in the custody of the father without disturbance to give to the mother.

19. It is true in **Bimlenda Kumar Chatterjee V. Dipa Chatterjee**⁹ the Apex Court held that humanitarian approach is necessary for solving the disputes regarding custody and guardianship and it was held that even custody retained with mother, the right of father to see the child at intervals cannot be ignored.

⁸ (2012)12 SCC 478

⁹ (2001)8 SCC 5

20. In **R.V.Srinath Prasad V. Nandamuri Jaya Krishna**¹⁰ it was also held that since custody matters are sensitive issues involving emotions of parties concerned, the Courts have to strike a balance between the emotions and the welfare of minor, which is a matter of greater importance as held in **Jai Prakash Khadria V. Shyam Sunder Agarwalla**¹¹.

21. It is further held in **R.V.Srinath Prasad** supra that custody matters can never be final but a change should only be made out to interfere that too if it is shown the change required is in the welfare of the child as a paramount consideration, even affluence of the parties to provide comfortable life not a sole consideration, needless to say no single factor can be taken as decisive but cumulatively all the factors placed by the parties on record in deciding each case on own facts and circumstances.

22. Having regard to the cumulative consideration of all the facts and events discussed supra from the material on record and the expressions supra clearly say **welfare of child is the foremost and paramount consideration being most relevant, leave about any other relevant considerations like personal law of the parties or legal rights or financial resources and love for child etc., and however** while considering the paramount consideration of welfare of the child, the Court has also to keep in mind though not the legal rights of the parties, at least with that the emotions of the parties with humanitarian approach, by balancing with the paramount consideration of welfare of the child, it is just to provide visiting rights to the mother while upholding the custody

¹⁰ (2001)4 SCC 71

¹¹ (2000)6 SCC 598

with revision respondents (husband and parents in law of 1st petitioner as the child wants to stay with them as per the impugned order of the lower Court from the interview of the child in ascertaining the wishes of the child by the court) however not to ignore the fact that mere tutoring or influencing the child from the child is away to the mother in expressing reluctance to go to mother is not a sole consideration. Needless to say the Court while final disposal of the DVC can no way influence by the orders supra but for from full dressed enquiry with reference to the evidence beside with reference to the legal position decide the lis.

23. In the result, the revision is allowed in part while confirming the order of the lower appellate Court to the extent while upholding the custody with revision respondents (husband and parents in law of 1st petitioner as the child also wants to stay with them as per the impugned order of the lower appellate Court from the interview of the child in ascertaining the wishes of the child by the court below) however not to ignore the fact that mere tutoring or influencing the child from the child is away to the mother in expressing reluctance to go to mother is not a sole consideration and that too from the age of the child in not capable of exercising her absolute discretion but for to not to disturb the mind of the child from her reluctance and to balance these with the emotions of the parties and the humanitarian approach required, it is just to allow the revision in part to the extent of providing visiting rights to the mother of the child, once in two weeks on every alternative Sunday at NTR Gardens, Hyderabad for the respondents to bring the child so that the

petitioner can spend with the child between 04.00 PM to 06.00 PM. Any violation by any of the parties, the trial Court can be moved to enforce as per the provisions of the Guardians and Wards Act particularly Section 25; besides liability for legal consequences of any disobedience, under the Domestic Violence Act. There shall be no order as to costs. As a sequel, miscellaneous petitions if any pending shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 20.04.2017
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