

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

**C.R.P.No.1604 of 2018**

**ORDER :**

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.23.01.2018 in I.A.No.5 of 2018 in G.W.O.P.No.4 of 2018 on the file of Principal District Judge, Chittoor.

2. The petitioner herein is lawfully wedded wife of 2<sup>nd</sup> respondent.
3. The 1<sup>st</sup> respondent herein is the mother of 2<sup>nd</sup> respondent.
4. The marriage between petitioner and 2<sup>nd</sup> respondent had taken place on 11.08.2013 in Kanipakkam, Chittoor District.
5. On 16.06.2014, a female child by name P. Jyoshika Reddy was born during wedlock to petitioner and 2<sup>nd</sup> respondent.

**THE PLEADINGS OF RESPONDENTS IN THE GWOP**

6. G.W.O.P.No.4 of 2018 was filed by respondents contending that they ought to be appointed as guardians of the minor child.
7. They contended that the petitioner suffered from epilepsy which was suppressed by her and her parents at the time of marriage between petitioner and 2<sup>nd</sup> respondent; when petitioner was admitted in hospital for delivery of the child, the respondents came to know that the petitioner was suffering from epilepsy; that previous to marriage also the petitioner had been admitted on 16.06.2011 in S.V.I.M.S.

Hospital, Tirupathi for epilepsy and got treated; on the 11<sup>th</sup> day after the marriage also she suffered with epilepsy and her parents admitted her in Srinivasa Nursing Home, Piler, and later shifted her to St. John Hospital, Bangalore and later to C.M.C. Hospital, Vellore for treatment; and that in February and August, 2017, the petitioner got epilepsy when she subjected the 2<sup>nd</sup> respondent to cruelty.

8. The respondents contended that petitioner had been acting detrimental to the interest of the 2<sup>nd</sup> respondent; that petitioner studied B.Tech. in Information Technology and was interested to do job at Hyderabad, and though the 2<sup>nd</sup> respondent requested her not to take up job in Hyderabad, she did not agree to it; and due to harassment by the petitioner, the 2<sup>nd</sup> respondent had given resignation to his job three times.

9. It is further contended that the petitioner did not take care of the child in view of her ill-health and the child was being taken care of by the 1<sup>st</sup> respondent, but petitioner kept insisting that the child be sent to her parents' house at Puthalapattu (allegedly a remote village without proper educational and medical facilities); that parents of the petitioner have no means to maintain the child; that mediation efforts failed; and the petitioner and her parents threatened to file false cases against the respondents; and the petitioner left the company of the 2<sup>nd</sup> respondent on 23.12.2017.

10. According to respondents, the 1<sup>st</sup> respondent, being the paternal grand-mother could act as a guardian under the supervision of the 2<sup>nd</sup> respondent and safeguard the interest and welfare of the minor.

11. It is alleged that the minor child has no interest to join the petitioner and her parents, that the child was in Anganwadi School in the year 2016 and is presently studying in Lower Kinder Garden (L.K.G.) in Camford English Medium School (East), Kongareddipalle, Chittoor, and the 1<sup>st</sup> respondent has been taking care of the child by providing sufficient funds; that it is not safe to keep the child in the care and custody of the petitioner who is suffering from epilepsy; and that the respondents have no objection for the petitioner visiting the child.

**THE COUNTER FILED BY PETITIONER IN THE GWOP**

12. Counter-affidavit was filed by the petitioner opposing the said contentions.

13. She stated that at the time of marriage huge dowry was demanded and taken by the respondents; that while fixing the marriage, the parents of petitioner had informed about her epilepsy to the respondents, and the respondents assured that they would not harass the petitioner or cause any pressure or tension to her, and believing their words the marriage was performed.

14. She contended that later, the respondents changed their attitude and behaviour towards her; that the 2<sup>nd</sup> respondent had all vices and

was addicted to drinking and used to abuse petitioner in filthy language, and the 1<sup>st</sup> respondent used to support him.

**15.** According to petitioner, after the child was born on 16.06.2014 in C.M.C. Hospital, Vellore it was informed to the respondents over the phone, but they did not choose to visit the hospital, and therefore she and her parents bore the medical expenses of birth of the child; that she and her parents informed the respondents about the date of naming ceremony of the child, but the respondents refused to attend the said function on the ground that the child was a female child; that she also requested the respondents through mediators to take her back along with the child, but the 2<sup>nd</sup> respondent demanded the petitioner to leave the child with the 1<sup>st</sup> respondent at his native place; and in order to maintain her marital relation with the 2<sup>nd</sup> respondent she joined the 2<sup>nd</sup> respondent at Hyderabad; and that the 2<sup>nd</sup> respondent started harassing her and she suffered epilepsy again due to such harassment.

**16.** She alleged that the respondents have taken all the gold jewels from her by stating that they would keep them in a safe place, but they have sold them away; that the 2<sup>nd</sup> respondent compelled the petitioner to do the job and to get income and used her entire salary by giving only a meager amount to her; that the 2<sup>nd</sup> respondent used to visit her working place and abused her, apart from beating her in the presence of co-employees and in the year 2015, when she suffered epilepsy for the second time the 2<sup>nd</sup> respondent harassed her, kicked her on her

stomach and caused miscarriage; that the 2<sup>nd</sup> respondent suspected her character and repeatedly beat her.

**17.** She further contended that on 22.12.2017 morning when the petitioner wanted to see her child and requested the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent did not allow her to meet the child and in the evening of that day when she returned home from work, the 2<sup>nd</sup> respondent was in a drunken condition and demanded her Rs.2 lakhs dowry from her father and sister and necked her out of the house; and so she had no choice but to leave the matrimonial home at Hyderabad and come to Bangalore where her sister was residing.

**18.** It is also stated that when mediation was attempted on 28.12.2017, the respondents abused her parents and other elders and forcibly took the child from her custody and escaped with the child forcing her to give a complaint to the Dy. Superintendent of Police, Women Police Station, Chittoor and only to escape the consequences of the criminal case, the respondents filed the present case by making false allegations and throwing the blame on the petitioner.

**19.** She also contended that since 28.12.2017 till date, the whereabouts of the child were not known to her and the child was not being shown to her or to the Court; that the minor child, being a female child would be more comfortable with the natural mother, and it would also be safe for the child at that age to remain in the custody and care of her mother, but not with the respondents; that she is hale

and healthy and is not suffering from any ill-health and is capable of looking after and bringing up the child in a good manner by providing all amenities with the income derived by her as a H.R. Executive; that her parents have immovable properties of their own at their native place and they are getting sufficient income from cultivation, and the welfare of the child is thus protected.

**I.A.No.5 of 2018**

**20.** Pending the above O.P., the respondents filed I.A.No.5 of 2018 under Section 12(2)(e) of the Guardian and Wards Act, 1890, read with Section 151 Code of Civil Procedure to restrain the petitioner and her parents from taking away the child by force from the custody of respondents till the appointment of the guardian and to grant interim custody.

**21.** In the affidavit filed in support of the said application, the allegations made in the O.P. were repeated.

**22.** Counter-affidavit was filed thereto by the petitioner reiterating the stand taken by her in the counter-affdiavit.

**THE ORDER OF THE TRIAL COURT**

**23.** By order dt.23.01.2018, the Court below allowed I.A.No.5 of 2018 and granted interim custody of the minor child until further orders to the 1<sup>st</sup> respondent to take care of the child under the supervision of the 2<sup>nd</sup> respondent who was directed to meet all required expenses. The petitioner was however given rights of

visitation and was allowed to see the child whenever she wants without causing disturbance to her studies. She was also permitted to go to the 1<sup>st</sup> respondent's house and see the child and spend time with her preferably during weekends and school holidays of the child, and the respondents were directed not to shift the minor child from the house of the 1<sup>st</sup> respondent at Kongareddipalle, Chittoor without prior permission of the Court.

**24.** The Court below, after taking note of the fact that the child at the time of deciding the O.P. was aged 3 years and 6 months, held that both petitioner as well as 2<sup>nd</sup> respondent were employed at Hyderabad; that the native place of 1<sup>st</sup> respondent was Kongareddipalle, Chittoor District; under Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of an unmarried girl is the father and after him the mother, and the custody of a minor child below the age of five years shall be ordinarily be with the mother. It also cited certain decisions dealing with the custody of the child.

**25.** The Court referred to the material produced by respondents including the discharge summary issued by the S.V.I.M.S. Hospital, Tirupathi which indicated that the petitioner was admitted on 16.06.2011 for epilepsy, that she was operated on 18.06.2011 and discharged on 21.06.2011 after a surgical procedure of E.P.S. + R.F.A.; the discharge summary of Christian Medical College Hospital, Vellore which stated that petitioner was admitted on 15.06.2014 and

she was discharged on 19.06.2014 after the birth of the child; and that she had suffered from epilepsy before delivery also. It also referred to the fact that she had an appointment with the Christian Medical College Hospital, Vellore on 27.09.2017 for epilepsy and was taking treatment; that the petitioner was working in Hyderabad and until recently she was residing with 2<sup>nd</sup> respondent at Hyderabad who was also working there; and because of her employment, the petitioner cannot be expected to take personal care of the child throughout and has to entrust the custody of child to some others; and since the 11<sup>th</sup> month of the girl child she was in the custody of 1<sup>st</sup> respondent (the paternal grand-mother), and continued to be under her custody, notwithstanding the allegation made by petitioner about the imminent danger to the life of the minor child in the hands of the respondents, pending O.P., the respondents are entitled to have the interim custody of the girl child.

**26.** It also relied on the fact that the respondents have admitted the child in Camford English School, Chittoor and also got necessary vaccinations given to the child, and took the view that the child is now accustomed to live with the paternal grand-mother; and opined that if the custody is taken away, the child would be unhappy; that even if the petitioner was given custody she would entrust the custody either to her parents or relatives and there is no material to show that her parents were affluent and provide amenities like the respondents and take better care of the child.

27. It observed that in the absence of *prima facie* material to deny custody to the respondents, they should be allowed to retain the custody. It therefore held that since the petitioner was suffering from heart ailment and epilepsy and was employed in Hyderabad, it is better to give custody of the girl child to the 1<sup>st</sup> respondent who has been taking care of the child from 1 ½ years without complaint, and that the said state of affairs should not be disturbed. It also held that the suit being the welfare of the child, the normal rule that the mother has preferential right should be ignored temporarily till the rights of the parties are determined in the main O.P.

#### **THE CRP**

28. Challenging the same, the present Civil Revision Petition is filed.

#### **EVENTS PENDING CRP**

29. In this Court, the petitioner filed a Memo stating that she resigned her job at Hyderabad on 20.01.2018. She also filed her affidavit saying that she has come back to her maternal home at Kongareddipalle, Chittoor District and was staying with her parents, that she was hale and healthy and capable of taking care of the girl child along with her parents who were aged 53 and 59 years respectively. She also pointed out that the 1<sup>st</sup> respondent stays alone in her house, while the 2<sup>nd</sup> respondent is working at Hyderabad, and it would be better and in the interest of the child if she is given custody

so that she can give her undivided attention to her child and can take good care and wellbeing of her child.

**30.** The counsel for petitioner contended that in view of the said stand of the petitioner that she is available full time to take care of the child by living with her parents at Kongareddipalle, Chittoor District, the normal rule that a child under 5 years of age should be with the mother should be given effect to and interim custody of the child be given to the petitioner.

**31.** He also contended that on the basis of the two or three episodes of epilepsy in 2011, i.e., on 16.06.2011, 15.06.2014 and 27.09.2017 she cannot be deemed to be unfit to have interim custody of the minor child, particularly when during this period she was holding a responsible job as H.R. Executive in a Company in Hyderabad while living with the 2<sup>nd</sup> respondent in Hyderabad. He pointed out that such employment would not have been possible if she was unfit and was keeping unwell continuously. He also stated that the parents of the petitioner are wealthy enough to provide for the minor child and to attend to the needs of the petitioner as well as the minor child, and the child is at a tender age of 4 years at present and should be put in the interim custody of the petitioner. He however stated that the petitioner has no objection to grant visitation rights to the respondents.

**32.** The counsel for respondents however supported the order passed by the Court below. He contended that though the normal rule

is that custody of a minor child who has not completed 5 years should be with the mother, the said Rule is not to be followed when there are special circumstances, like the serious illness of the mother as in the instant case, warranting custody to be given to the father of the minor child and not the mother. He also stated that the child has been with the 1<sup>st</sup> respondent since the child was 11 months age and the *status quo* ought not to be changed.

### **THE CONSIDERATION BY THE COURT**

33. I have noted the contentions of both sides.

34. It is settled law that in matters of grant of custody of children, the paramount consideration is the welfare of the child.

35. In **Roxann Sharma v. Arun Sharma**<sup>1</sup>, the Supreme Court held

*“18. ... .. There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child’s welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons. ... ..”.*

36. The minor child in question in the instant case is female and it is not in dispute that the child was delivered at the maternal home of petitioner. Probably because of the fact that the petitioner was an employee at that time in Hyderabad and was living with the 2<sup>nd</sup>

---

<sup>1</sup> (2015) 8 SCC 318

respondent-husband, who was also employed at Hyderabad for some time, the 1<sup>st</sup> respondent had taken care of the child.

37. However, since the petitioner is a young lady of age 26 years and is also the natural mother, she would undoubtedly bestow more care and affection on her child than the 1<sup>st</sup> respondent who is aged 55 years of age.

38. It is not as if the 2<sup>nd</sup> respondent is living with the 1<sup>st</sup> respondent, as admittedly, he is living at Hyderabad and not at Kongareddipalle, Chittoor District, where the 1<sup>st</sup> respondent is staying.

39. The rule that custody of a minor child who has not completed age of 5 years should ordinarily be with the mother, ought not to be dispensed with unless there are strong circumstances disqualifying the mother to have custody / interim custody.

40. In **Lekha v. P. Anil Kumar**<sup>2</sup> it was held that it is only an extreme case where a mother may not have an interest of her child most dear to her. Since it is the mother who would have most the interest of the child at heart, in the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others.

41. *Prima facie*, I am of the view that it is in the best interest of the child to have a bond with the natural parent and since in the instant case, the respondent has now quit her job and intends to take care of

---

<sup>2</sup> (2006) 13 SCC 555

the needs of the child by living with her parents in Kongareddipalle, Chittoor District, she ought to be given an opportunity to forge a bond with her child. The child also would grow well in the company of her own natural mother and maternal grand parents and bond with the petitioner as compared to her life in the sole company of the 1<sup>st</sup> respondent.

42. I am also of the view that *prima-facie* occasional episodes of epilepsy suffered by the petitioner ought not to disqualify her to have interim custody of the child at the tender age of the child of 4 years. If her illness were to be so serious she would not have worked as a HR executive in a Company in Hyderabad till January 2018, when she resigned. Therefore I disagree with the view of the trial Court in this regard.

43. In the context of claim by a father for grant of interim custody, in **Gaurav Nagpal v. Sumedha Nagpal**<sup>3</sup>, the Supreme Court held as follows :

“48. Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal

---

<sup>3</sup> (2009) 1 SCC 42

*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.”*

**44.** In the said case, the Court rejected the argument of the father that the father of the minor child should be given custody because the child was living for a long time with the father and he had spent good amount of money for providing the child excellent education and the mother does not have financial affluence as the father claims. It observed that this can be taken care of if the father is asked to pay all the educational expenses of the child in addition to maintenance being paid by the mother. It also recognized the right of the father to have visitation rights to see the child.

**45.** The decision in **Surya Vadan**~~an~~ **v. State of Tamil Nadu and others**<sup>4</sup>, cited by the counsel for respondents, does not deal with the principles of grant of custody though certain decisions of the Court were considered in relation to custody of minor children in the context of a Foreign Court being seized of the matter. Therefore, the said decision has no application to the facts of the present case.

**46.** For the aforesaid reasons, the order of the Court below cannot be sustained.

**47.** Accordingly, the order dt.23.01.2018 in I.A.No.5 of 2018 in G.W.O.P.No.4 of 2018 on the file of Principal District Judge,

---

<sup>4</sup> (2015) 5 SCC 450

Chittoor, is set aside. Pending disposal of the GWOP, the respondents are directed to handover the custody of the minor child, viz., P. Jyoshika Reddy, to the petitioner within two (02) weeks from the date of receipt of copy of the order and the child shall be brought up by the petitioner at her maternal home in Kongareddipalle, Chittoor District. The respondents are permitted to visit the maternal home of petitioner and see the child and spend time with her for a period of three (03) hours between 10:00 a.m. and 05:00 p.m. on alternate Sundays in a month. The petitioner shall not shift the minor child from the said place without prior permission of the Court below.

**48.** It is made clear that the observations made in this order are only *prima facie* for the adjudication of the interim application and the Court below is directed to independently decide the main O.P. uninfluenced by the observations made herein. The interim custody granted to the petitioner in this order shall be subject to the final orders which would be passed in the GWOP.

**49.** Accordingly, the Civil Revision Petition is allowed. No order as to costs.

**50.** As a sequel, miscellaneous petitions pending if any, in this Civil Revision Petition, shall stand closed.

**JUSTICE M.S.RAMACHANDRA RAO**

Date: 20.09.2018

Ndr/\*