

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Writ Petition No.9930 of 2018

ORDER:

This writ petition is filed, under Article 226 of the Constitution of India, seeking verbatim the following relief:

“ For the reasons stated in the accompanying affidavit, the petitioner herein pray that this Hon'ble Court may be pleased in the interest of justice to issue a writ, order or direction more particularly one in the nature of Writ of Mandamus declaring the action of the respondents 2 and 3 by handing over the 5th respondent i.e., Syeda Abeda Fathima to the 4th respondent contrary to the interim orders passed in I.A.No.894 of 2017 in O.P.No.1164 of 2017, dated 18.9.2017 as illegal, arbitrary, unjust and improper while directing the respondents 2 to 4 to handover the girl Syeda Abeda Fathima i.e., 5th respondent to the petitioner forthwith in the facts and circumstances and in compliance of interim orders passed in I.A.No.894 of 2017 in O.P.No.1164 of 2017, dated 18.9.2017 on the file of the Judge, Additional Family Court, City Civil Court, Hyderabad and pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

2. I have heard the submissions of *Sri Srinivas Emani*, learned counsel appearing for the petitioner, of learned Government Pleader for Women Development & Child Welfare (TS) appearing for respondents 1 and 2, of learned Government Pleader for Home (TS) appearing for respondent no.3, and, of *Sri Mohd. Obaid ur Rehman*, learned counsel appearing for the 4th respondent. I have perused the material record.

3. The case of the petitioner relevant for consideration, in brief, is as follows:

The 4th respondent is his divorced wife. Out of lawful wedlock, they both had one son and one daughter, Syeda Abeda Fathima, aged 8 years, that is, the 5th respondent herein. The 4th respondent having wanted to live separately and having offered 'Khula' (customary divorce) and having agreed to give permanent custody of the two children to the petitioner, executed a

khula/ divorce deed, on 14.05.2017, and had thus taken divorce. She had earlier executed a declaration or undertaking, dated 25.04.2017, stating that she is giving permanent custody of the children to the petitioner. She had thus left the children in the custody of the petitioner. The petitioner and his 1st wife, Husna Begum, are taking good care of the two children born to the petitioner through the 4th respondent, the 2nd wife. While so, 4th respondent along with her associates visited the house of the petitioner, on 11.09.2017, and attempted to take the children forcefully from the custody of the petitioner. On resistance, she and her men went away. The petitioner filed OP.no.1164 of 2017 on the file of the Additional Family Court, City Civil Court, Hyderabad, for perpetual injunction restraining the 4th respondent and her men etcetera from taking away the children. In I.A.no.894 of 2017 filed in that OP, the learned Judge, Additional Family Court, while ordering notice and posting the matter to 27.09.2017, *inter alia* noted specifically in the docket orders passed on 18.09.2017 as under: 'Since admittedly, the children are in the custody of the petitioner he can continue them with him.' Thus, the Family Court in its orders noted the admitted fact that the children are in the custody of the petitioner. While so, 4th respondent came along with two persons, on 20.03.2018, at about 5 PM and high handedly took away the daughter, the 5th respondent, taking advantage of the fact that the petitioner and his 1st wife were not in the house. The 1st wife of the petitioner lodged a report with the police/ 3rd respondent on the same day at 9 PM. A case in Crime no.98/ 2018 was registered for the offences punishable under Sections 448, 427, 323, 363, 380 read with 34 IPC. Later, the police officer/ inspector of police brought the girl from the illegal custody of the 4th respondent and handed over the girl to the Superintendent, Government Special-cum-Children Home for Girls & Observation Home for Girls, the 2nd respondent, despite the petitioner showing the orders of the Additional Family Court to the said officer. In spite of requests of the petitioner, the girl was not handed over back to the petitioner,

though the petitioner is the rightful person to have the legal custody of the child as per the orders of the Additional Family Court. The 2nd respondent having not considered the orders of the Family Court handed over the girl to the 4th respondent, on 20.03.2018, in the presence of the petitioner and the police officer, by calling the 4th respondent to the office of the 2nd respondent. The said highhanded action of the 4th respondent and the subsequent highhanded actions of the respondents 3 and 2 are illegal and contrary to the orders of the Family Court aforementioned. As the 4th respondent remarried, there is no safety for the girl and any untoward incident may happen. In such an event, the 4th respondent-kidnapper shall alone be responsible. Hence, the writ petition is filed seeking the aforestated relief.

4. Learned counsel for the petitioner while reiterating the pleaded case, the sum and substance of which is extracted supra, submitted that the action of the 4th respondent is illegal and highhanded and that the sequential action of the 3rd respondent in not handing over the child to the petitioner after taking custody from the 4th respondent and the further action of the 2nd respondent in handing over the child to the 4th respondent ignoring the orders of the Family Court are illegal and unsustainable and such actions of the official respondents 2 and 3 are in the nature of abetting the offence of kidnapping committed by the 4th respondent and that the continuation of the female child aged 8 years in the custody of the 4th respondent is unsafe; and, in view of the nature and attitude of the 4th respondent any untoward incident detrimental to the interests of the girl child is likely to happen; and, therefore, the respondents may be directed to hand over back the child/the 5th respondent to the petitioner forthwith leaving it open to the 4th respondent to seek appropriate remedies before the appropriate Forum in the event she wants to have visitation rights or custody of the child though, she is not entitled to any such reliefs in view of her consent voluntarily given earlier with regard to the custody of the children.

5. Learned Government Pleader appearing for the respondents 1 & 2, and the learned Government Pleader (Home) appearing for the 3rd respondent would submit that the 4th respondent is the natural mother of the girl child, who is below the age of 10 years; that after a report was lodged by the petitioner, the police officer took custody of the child from the mother, the 4th respondent, who was said to have forcefully taken the child from the petitioner; that the police officer handed over the child to the 2nd respondent for safe custody; that subsequently, the child was kept in an institution as per the authorization of the child welfare committee; that the child welfare committee, keeping in view the best interests of the child, by order, dated 22.03.2018, directed the Superintendent of the institution to hand over the child to the mother, the 4th respondent; that accordingly, the child was handed over to the 4th respondent; and, that such custody was granted keeping in view the interests of the girl child.

5.1 Learned Government Pleader appearing for respondents 1 & 2 placed on record a copy of written instructions in the above regard received from the Superintendent, Government Special-cum-Children Home for Girls and stated that neither admission nor release of any child whether in conflict with law or in need of care & protection can be made in the said institution without the authorization of the Juvenile Justice Board and the Child Welfare Committee respectively.

6. Learned counsel for the 4th respondent submitted that the 5th respondent is a female child below the age of 10 years and that the 4th respondent is her mother and that the 4th respondent, who is the proper person to have custody of the female child, is entitled to have the custody of the said child being the natural mother and guardian and that keeping in view the interests of the child, the child was handed over to the 4th respondent by competent Government officers and that if the petitioner has any grievance, he has to

approach an appropriate Forum and seek appropriate reliefs for custody of the child; but, he cannot seek any relief in this writ petition. He would further submit that since the child is in the safe custody of the mother and as the allegations about the safety of the child are unfounded and invented, the writ petition may be dismissed.

7. I have given earnest consideration to the facts & submissions.

8. The relationship between the petitioner and the 4th respondent and that the 5th respondent is their girl child is admitted. This Court need not go into the issues related to the divorce and matrimonial disputes, if any, between the spouses. Admittedly, the petitioner first approached the Additional Family Court, City Civil Court, Hyderabad, and filed the aforementioned Original Petition (OP) for perpetual injunction restraining the 4th respondent and her men from taking away the children from the custody of the petitioner. In I.A.no.894 of 2017 filed in the said OP 1164 of 2017, the learned Judge, Additional Family Court, passed the following order:

“Petitioner present. Minor children are also present along with petitioner. Main O.P is filed for perpetual injunction to restrain respondent-mother of children by way of perpetual injunction. It is reported that there was Khula divorce between petitioner and respondent. Court is not inclined to grant *ex parte* order without hearing the respondent. Since admittedly the children are in the custody of petitioner he can continue them with him. Issue urgent notice to respondent on payment of process by RPAD and Court. Call on 27-9-2017. Personal service is permitted.”

[Reproduced verbatim]

Thus, the judicial order clearly reflects that the two children including the 5th respondent, that is, the female child aged about 8 years, were in the custody of the petitioner as on 18.09.2017. However, the petitioner alleges that the 4th respondent came along with two persons, on 20.03.2018, at about 5 PM and high handedly took away the daughter, the 5th respondent, taking advantage of

the absence of the petitioner and his 1st wife from the house and that a report was lodged by the 1st wife of the petitioner with the police/ 3rd respondent on the same day at 9 PM and on that a case in Crime no.98/ 2018 was registered for the offences punishable under Sections 448, 427, 323, 363, 380 read with 34 IPC. The copy of the FIR in the aforesaid crime, which is placed on record, corroborates the version of the petitioner. However, it is not in dispute that thereafter the girl child was first removed by the police officer from the custody of the 4th respondent, and that later the girl child was sent, on 20.03.2018, to Government Special-cum-Children Home for Girls for safe custody and that the child was kept in the said institution as per the authorization, dated 20.03.2018, of the Child Welfare Committee and that later, the child was produced before the Child Welfare Committee, Hyderabad, on 22.03.2018. It is also not in dispute that the child welfare committee by an order, dated 22.03.2018, directed the Superintendent of the institution to hand over the child to the 4th respondent, the mother of the child and that in obedience to the said orders, the child was handed over to her mother, the 4th respondent. Keeping aside for a moment, the submissions and the events, it is to be noted that the highhanded action of the 4th respondent, in forcefully taking away the child from the custody of the father, that is, the petitioner herein without having recourse to law and by taking the law into her hands is not appreciable, to say the least. If the 4th respondent wanted to have the custody of the child or visitation rights, she ought to have approached a proper Forum and ought to have sought appropriate reliefs by following the procedure established by law. She did not do so. The petitioner complains that the 4th respondent took away the child from the custody of the petitioner despite the fact that an OP for injunction is pending on the file of the Additional Family Court, Hyderabad, and an order recognizing the custody of the child with the petitioner was passed by the said Court. In fact, a criminal case was also registered in the above regard on the report of the 1st wife of the petitioner.

9. In the stated background of facts & events, the writ petitioner now requests this Court to direct the respondents 2 to 4 to hand over back the custody of the 5th respondent to him. In this writ petition, where the scope of adjudication is limited, this Court need not go into the merits of the matter as regards the eventual entitlement of either the petitioner or the 4th respondent to have custody of the girl child. It is trite to observe that the interest of the girl child is paramount. She is also having a brother, who is presently in the custody of the petitioner. Before either an order as an interim measure or a final order is made, in the considered view of this Court, it is necessary to have in-camera proceedings for necessary interactions jointly and separately with the spouses and also separately with the girl child to assess the situation wholesomely. It is also necessary to assess as to whether the girl child is having the ability/ wisdom or required mellowness to make her own choice and then know the option of the child, in case, she is found capable of making an appropriate choice on her own. Only after such an exercise and on hearing of the parties, a well considered decision has to be taken, however, keeping in view the interest of the girl child, which is paramount. In that view of the matter, this Court deems it appropriate to dispose of the writ petition with appropriate directions, nevertheless, without expressing any opinion on the merits of the matter.

10. In the result, the writ petition is disposed of directing the petitioner and the 4th respondent to appear without fail before the Additional Family Court, City Civil Court, Hyderabad, on 12.04.2018 at 10.30 AM. On such appearance of the parties, the learned Judge, Additional Family Court, shall either take up the matter (OP.no.1164 of 2017) on that day for hearing and passing appropriate orders or shall fix an early date preferably within one week from 12.04.2018 for filing the pleadings, if any, of the 4th respondent including the counter in the interlocutory application and/or for holding in-camera proceedings. It is needless to state that on completion of such exercise as

contemplated under law, the learned Judge shall pass appropriate orders with regard to the custody of the 5th respondent herein and other allied aspects keeping in view the interest of the said girl child, which is paramount. In any event, the Family Court shall endeavour to adjudicate the issue of custody of the child within one month from 12.04.2018. However, this order shall not preclude the learned Judge, Additional Family Court, from passing an order either in regard to interim custody of the said child or any other interim or intermediary order, if passing of such order/s become/s necessary either for just and valid reasons or in the event of one of the parties to the *lis* adopting dilatory tactics. Further, the 3rd respondent is directed to expedite the investigation into crime no.98 of 2018 and file a final report before a competent Court by strict adherence to the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

06th April, 2018
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M. SEETHARAMA MURTI, J