

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
*FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

***THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
and
*THE HON'BLE SRI JUSTICE N. BALAYOGI**

F.C.A.No.189 of 2017

%Date: 20-04-2018

#Between:

Ahmed Mohiuddin, S/o late Gulam Mohiuddin,
Aged about 54 years, Occ: Private Service,
R/o 6-3-1103/112, Gulrez Apartments, Rajbhavan
Road, Somajiguda, Hyderabad-82.

... Appellant

Vs.

Shabana Yasmeen, W/o Ahmed Mohiuddin,
Aged about 44 years, Occ: Housewife,
R/o H.No.10-2-350/7, Flat No.303, Pramod
Apartments, Asifnagar (North), Hyderabad.

.. Respondent

!For Appellant : Mr. Ahmed Mohiuddin, Party-in-person

^For Respondent : Mrs. Shabana Yasmeen, Party-in-person

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? Cases referred

**HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI**

F.C.A.No.189 of 2017

JUDGMENT: *(V. Ramasubramanian, J)*

This appeal is filed under Section 19 of the Family Courts Act, 1984, as against the order dismissing an Interlocutory Application for modification of a final order passed in a petition under the Guardians and Wards Act, 1890.

2. Heard Mr. Ahmed Mohiuddin, petitioner appearing in person and Mrs. Shabana Yasmeen, respondent appearing in person.

3. The marriage between the appellant and the respondent was solemnized on 14-10-1991 as per Muslim Religious and Customary Rites. Two daughters and a son were born in the wedlock. But disputes arose between the couple in the year 2009 and they got separated.

4. The appellant filed O.P.No.1217 of 2010 for restitution of conjugal rights and the same was allowed by the Family Court on 15-06-2013. The respondent and the three children filed a petition for maintenance in M.C.No.41 of 2010 and the same was allowed, granting a sum of Rs.3,500/- per month to the respondent, another sum of Rs.3,500/- to the elder daughter and a sum of Rs.2,000/- per month each to the second daughter and the son. But the said order was challenged by the appellant by way of a revision in CrI.R.C.No. 348 of 2011.

5. The respondent filed a petition in O.P.No.860 of 2015 for dissolution of marriage. It is admitted before us that the couple are now separated by a decree of dissolution of marriage.

6. During the pendency of the aforesaid proceedings, the appellant filed FCOP.No.1411 of 2010 under the Guardians and Wards Act seeking permanent custody of all the three children. The said petition was disposed of by a final order dated 15-06-2013 by the Family Court. By the said order, the appellant was granted visitation rights in so far as the second daughter and the son were concerned. But the Court rejected the claim for permanent custody of the elder daughter, as she had, by then, attained majority.

7. Challenging the fair and decretal order dated 15-06-2013 passed in FCOP.No.1411 of 2010, the appellant filed F.C.A.No.373 of 2013 on the file of this Court. The said appeal was allowed in part, by an order dated 08-04-2015, modifying the order of the Family Court to a small extent, granting larger visitation rights.

8. The appellant filed a Special Leave Petition in S.L.P. (Civil) No.17611 of 2015, but it was dismissed on 13-07-2015.

9. Thereafter, the appellant filed an application in FCAMP. No.524 of 2015 for a review of the order passed in FCA.No.373 of 2010. The review application was dismissed on 04-12-2015.

10. As against the dismissal of the review application, the appellant filed S.L.P. (Civil) No.34243 of 2016. Simultaneously, the petitioner filed an application in I.A.No.506 of 2016 before the Family Court for a modification of the final order passed on 15-06-2013.

Therefore, when the Special Leave Petition in S.L.P.(Civil) No.34243 of 2016 came up for hearing, the Supreme Court passed an order dated 27-03-2017, dismissing the appeal, but directing the Family Court to dispose of I.A.No.506 of 2016.

11. Pursuant to the said order of the Apex Court, the Family Court took up I.A.No.506 of 2016, allowed the parties to mark documents and eventually dismissed the application by order dated 19-04-2017. It is against the said order that the appellant has come up with the above appeal under Section 19 of the Family Courts Act.

12. Before proceeding further, it must be recorded that out of three children born in the wedlock, two daughters have already attained majority. Though the appellant insisted that under the Muslim Personal Law, the father is entitled to custody of the major daughters also, we do not think that the said argument is legally sustainable. The very provisions of the Guardians and Wards Act are applicable only to minor children. No Court can compel sons and daughters who have attained majority, to go with their father. The Supreme Court has clarified the same in **Shafin Jahan v. Asokan**, decided on 8-3-2018. Therefore, the appeal, in so far as it relates to two daughters, who had attained majority, is bound to be rejected as infructuous.

13. In so far as the son is concerned, he is admittedly attained 14 years of age. Keeping this mind, let us take up for consideration the merits of the appeal.

14. At the outset it should be pointed out that the very application out of which the above appeal arises, was not maintainable in law. The main Original Petition in FCOP.No.1411 of 2010 filed under the Guardians and Wards Act, 1890, was disposed of by a final judgment dated 15-06-2013. After the disposal of the main petition, the Family Court became *functus officio*. Therefore, the question of modifying the final order passed therein would not arise.

15. It is contended by the appellant that all custody orders, by their very nature, are temporary and that therefore, they are capable of being modified.

16. We have no doubt that custody orders are only temporary in nature, capable of being modified at any time. But there is a procedure to be followed for modification. Whenever a petition under the Guardians and Wards Act is disposed of finally, the same puts a seal on all questions that arose up to that date. But if there are subsequent developments or changes, which made one party eligible and the other ineligible for custody or guardianship, a fresh main petition may be maintainable. In such an event, the final order passed in the first main petition cannot be treated as *res judicata*, since the question relating to the interest and welfare of the children is always in a state of flux, depending upon the variation in parameters. Let us take a hypothetical case. If after the disposal of a petition under the Guardians and Wards Act, one of the parents had suffered a disqualification or had undergone some kind of a change

in his or her financial or family or mental status, the same would give rise to a fresh cause of action for filing a fresh Original Petition. But it will not give a right to one of the parties to seek a modification of the order passed in the main petition by filing an interlocutory application in the disposed of case.

17. Another difficulty for the appellant is that Section 48 of the Guardians and Wards Act declares the orders passed under the Act to be final. This is not to say that a fresh petition is not maintainable. But an application for modification of the Original Order will not be maintainable.

18. One more point against the appellant is that the final order passed by the Family Court in FCOP.No.1411 of 2010 on 15-06-2013 actually stood modified by the judgment of this Court in F.C.A. No.373 of 2013. The order passed by this Court in F.C.A.No.373 of 2013 has merged with the order of the Family Court in FCOP.No.1411 of 2010. Therefore, the Family Court is disabled from modifying its order dated 15-06-2013.

19. It is seen from the application filed by the appellant in I.A.No.506 of 2016, that what he wanted was a modification of the final order dated 15-06-2013. But the order dated 15-06-2013 passed by the Family Court merged with the judgment of this Court dated 08-04-2015 in FCA.No.373 of 2013. The Family Court is not competent to modify the order of this Court. Therefore, the very application I.A.No.506 of 2016 was not maintainable. If it was not maintainable, the present appeal is also not maintainable.

20. As we have stated earlier, the appellant made an attempt in vain before the Supreme Court to challenge the judgment of this Court dated 08-04-2015 passed in FCA.No.373 of 2013. After it was dismissed by the Supreme Court on 13-07-2015, the appellant made a second attempt by filing a review application before this Court in FCAMP.No.524 of 2015, seeking a review of the judgment in FCA.No.373 of 2013, but the same was also dismissed on 04-12-2015.

21. In the Special Leave Petition arising out of the dismissal of the review application, the appellant got a breather, getting a direction from the Supreme Court to the Family Court to dispose of I.A.No.506 of 2016. But the order of the Supreme Court cannot be taken as something that would make I.A.No.506 of 2016 maintainable in law, when it is actually not.

22. Let us keep aside for a moment, the question of maintainability. Even then we do not think that the appellant made out any substantial change of circumstances to warrant a modification of the final order passed in FCOP.No.1411 of 2010. This can be seen from certain facts.

23. Before the Family Court, the appellant filed 24 documents. Out of them, 11 documents are certified copies of some proceedings or FIR. One document is the certified copy of a final report. One document was a legal notice. A set of 32 photographs along with a C.D. was filed as Ex.P.10. The salary and Service Certificates were

filed as Exs.P.11 to P.15. The Educational Certificate was filed as Ex.P.16.

24. None of the above documents established any change of circumstances, after the disposal of the main petition in FCOP No. 1411 of 2010, as observed by the Family Court. When there are no change of circumstances, the appellant cannot seek a modification of the original judgment of the Family Court, which actually got merged with the judgment of this Court in FCA.No.373 of 2013.

25. The appellant appearing in person filed written submissions, after we reserved orders. The contentions put-forth in the written submissions, in brief, are – (1) that since the marriage between the parties has already been dissolved, as per the personal law applicable to the parties, the permanent custody of the children, including that of the majors should go to him in terms of the personal law applicable to Sunni Hanafi Sect; (2) that since the children were forcibly removed from his legal custody, they must be restored to him; (3) that since the respondent has a criminal bent of mind and emotionally unstable, there is a great risk to the precious lives of the children; and (4) that the behavior and educational progress of the son has deteriorated after the respondent took over the custody, and that therefore, the appeal deserved to be allowed.

26. But as we have pointed out earlier, the provisions of the Guardians and Wards Act are not applicable to persons who have attained majority. The law is well settled that even in the case of minors to whom the Guardians and Wards Act applies, the

prescriptions contained in the personal law to which the parties belong, would only be one of the several factors and not the only factor that should weigh with the Court. In any case, the Courts have no control over persons who have attained majority. At any rate, this contention is not new but already available in the first round of litigation and hence it cannot now be raised.

27. The contention that the custody of the children were forcibly removed, was a contention raised or ought to have been raised in the first round of litigation. After failing to secure permanent custody in the first round, the issue cannot be reopened without pleading and proving the change of circumstances.

28. None of the other contentions indicated in the written submissions, indicate any change of circumstances. Therefore, we find no merits in the appeal and hence, the same is liable to be dismissed. Accordingly, it is dismissed.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

N. BALAYOGI, J

Date: 20-04-2018

Ksn/js

***THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**

and

***THE HON'BLE SRI JUSTICE N. BALAYOGI**

F.C.A.No.189 of 2017



20th April, 2018.

Ksn.