

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.29461 of 2018

ORDER:

This writ petition is filed seeking to issue a writ of mandamus declaring the action of the 3rd respondent in not issuing the transfer certificates in respect of petitioners 2 and 3 in spite of the 1st petitioner, being their mother, making an application for issuance of transfer certificates as being illegal arbitrary and un-constitutional and against the provisions of the Right of Children to Free and Compulsory Education Act, 2009, and for consequential directions to the 3rd respondent to issue transfer certificates in respect of petitioners 2 and 3, in the interest of justice. It is also prayed for formulation of policy with regard to issuance of transfer certificates in respect of children whose where parents are not residing together.

2. Facts stated are:-1st petitioner is the wife of the 4th respondent and petitioners 2 and 3 viz., S. Amruthavalli and S. Sri Ranga Rishit are their children. Petitioners 2 and 3 were studying in 3rd respondent-School prior to their moving to

Hyderabad with their mother, 1st petitioner. The 1st petitioner is a Homeopathy practitioner and she used practise at Tadipatri, Ananthapur District. While things stood thus, matrimonial disputes arose between the contesting parties and it is alleged that 4th respondent started harassing his wife and in connection with the harassment meted out to her, at the hands of her husband, she lodged a complaint to concerned Police and the matter be is under investigation. To escape from the clutches of her estranged husband, the 1st petitioner with her children moved to Hyderabad and stated to be presently living at Hyderabad and joined her children in a school at Hyderabad. When she approached the 3rd respondent-School, where her children studied, for issuance of transfers certificates, the 3rd respondent-School refused to issue transfer certificates on the purported ground that the 4th respondent addressed a letter to them not to issue transfer certificates without his consent, as he is the father and natural guardian of petitioners 2 and 3. To the legal notice

got issued by the 1st petitioner, reply notice was issued by the 3rd respondent-School stating that the 3rd respondent is willing to issue transfer certificates, but it was asked not to issue the transfer certificates by the 4th respondent and in view of the letter addressed by the 4th respondent, advised the 1st petitioner to obtain appropriate orders from Court of law or alternatively insisted that both parents should come together to receive the transfer certificates. Under these circumstances, the present writ petition came to be filed for appropriate directions to the 3rd respondent-School for issuance of transfer certificates to the 1st petitioner in respect of her children, petitioners 2 and 3.

3. 4th respondent filed counter affidavit denying all the allegations made by his wife. It is stated that the 1st petitioner stealthily taken away the children along with her by putting the interest of the children at peril in the mid of the academic year. That she has taken away the children only to harass him and to show him in poor light among the his relatives and in

the Society. That he is ready and willing to maintain the children by giving them good education and he has already paid fees of petitioners 2 and 3 for the entire academic year in the 3rd respondent-School. That the 1st petitioner has no permanent source of income and she cannot give good education and good standard of life to the children and all this is being done to settle scores with him and only satisfy her ego.

4. Learned counsel for the petitioners strenuously contended that the 3rd respondent-School cannot refuse to issue the transfer certificates on the ground that 4th respondent insisted not to issue them when admittedly the children are joined in a school at Hyderabad and no longer continuing in the 3rd respondent-School. It is also stated that under Section 5 of the Right of Children to Free and Compulsory Education Act, 2009, the 3rd respondent-School is duty bound to issue transfer certificates when once the children are withdrawn from that School. In support of his

contention, the decision of the Kerala High Court at Ernakulam passed in WP (C) No.1275 of 2017 is relied on.

5. In opposition, learned counsel for the 4th respondent contended that the father being natural guardian, the 1st petitioner left the company without valid reason or cause, the children should be allowed to be in the custody of their father, and allowed to prosecute the studies in the 3rd respondent-School and, therefore, no exception can be taken to the action of the 3rd respondent in refusing to issue the transfer certificates to the 1st petitioner based on the letter not to do so by the 4th respondent. It is also stated that the writ petition is not maintainable against private parties as there is no violation of fundamental rights, muchless breach of violation of any statutory law, except civil rights of the parties which can be redressed under common law remedy.

6. It is to be seen that admittedly the children are with the 1st petitioner. Whether they are to be in the custody of the 1st petitioner, mother or they are to be in the custody of the 4th

respondent, father and in whose custody their overall interest and well-being will be best protected is yet to be decided, if the contesting parties so desire, by the a competent Court of law.

As things stand now, the children, petitioners 2 and 3 are in the custody of their mother, 1st petitioner reasons or otherwise, moved to Hyderabad and joined the children at a school in Hyderabad. Section of 5 Right of Children to Free and Compulsory Education Act, 2009, reads as under:-

“Section 5. Right of transfer to other school

(1) Where in a school, there is no provision for completion of elementary education, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of section 2, for completing his or her elementary education.

(2) Where a child is required to move from one school to another, either within a State or outside, for any reason whatsoever, such child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of section 2, for completing his or her elementary education.

(3) For seeking admission in such other school, the Head-teacher or in-charge of the school where such child was last admitted, shall immediately issue the transfer certificate:

PROVIDED that delay in producing transfer certificate shall not be a ground for either delaying or denying admission in such other school:

PROVIDED further that the Head-teacher or in-charge of the school delaying issuance of transfer certificate shall be liable for disciplinary action under the service rules applicable to him or her”.

7. It is no doubt true that under Section 5 (2) of the Right of Children to Free and Compulsory Education Act, 2009, the Headmaster or In-charge of the School, as the case may be,

cannot refuse to issue transfer certificate for a child seeking admission in such other school elsewhere and such transfer is being made for whatsoever reasons.

8. In the decision cited by learned counsel for the petitioners is a case where the petitioner therein executed a bond to render compulsory one year service in the Medical College on completion of the course and failure to do so, the candidate has to pay compensation prescribed therein. It was also provided in the bond that the certificates submitted by the candidate at the time of admission will be released only after successful completion of one year compulsory service in the College or payment of compensation in lieu thereof. The petitioner therein sought for return of certificates without rendering the compulsory service in the College, the College management refused to release the certificates and on a writ petition being filed in the High Court of Kerala at Ernakulam observed that in case failure to render compulsory service in the College, the candidate is liable to pay compensation and

even that compensation cannot be insisted to be paid straightaway, but will have to be recovered by filing a civil suit, and in the meanwhile, the College management cannot withhold the certificates of the candidate and accordingly directed to release them within a time frame. The decision cited supra is not applicable to the facts of the present case.

In this case a particular situation is emerging. The 3rd respondent-School is ready and willing to issue the transfer certificates and there is no fault on its part, but for the letter addressed by the 4th respondent who is natural guardian and father of petitioners 2 and 3.

9. It is very heartening to note that in the tussle purportedly arose out of matrimonial relations between the 1st petitioner and the 4th respondent, the interest, well-being and future career of the children should not take a backseat. In the fitness of things, the 4th respondent ought not to have addressed such a letter to the 3rd respondent-School insisting them not to issue transfer certificates in respect of his

children, when admittedly the children are not in his custody and not residing with him at Tadpatri. If transfer certificates are not issued to petitioners 2 and 3, neither they will be able to prosecute the studies at the 3rd respondent-School nor at a school at Hyderabad. Section 6 of the Hindu Minority and Guardianship Act, 1956, speaks of as to who are natural guardians of a Hindu minor. According to Clause (a) of Section 6 of the said Act, in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. In this case the children are above five years of age. However, the fact remains they are in the custody of the mother. Considering the predicament from this point of view and in the interest of the children, petitioners 2 and 3, there shall be a direction to the 3rd respondent-School to issue the transfer certificates in respect of petitioners 2 and 3, as requested by the 1st petitioner, within a period two weeks from the date of receipt of a copy of

this order, to enable her to continue the studies of the children in a school at Hyderabad. However, the 4th respondent in case seeks to have the custody of his children and also join them at a school in a place where he is residing, he can do so by taking to legal remedies, if so advised. It is needless to observe that issuance of transfer certificate to the 1st petitioner would be subject to the orders, if any to be passed by the competent Court of law for custody of children.

10. It is settled proposition of law that the writ petition is maintainable against private institutions or persons performing public duties/functions. The 3rd respondent is under the law is performing a public function of imparting education and any breach or violation in relation to that function, the aggrieved can approach the writ Court. The relief sought for formulation of policy with regard to issuance of transfer certificates in respect of children where estranged parents are not residing together cannot be considered as such a relief is a right in *personam* and not a right in *rem*.

Every case depends on its own merits and who among, either of the spouse is at fault is to be examined in each case and an universal principle/policy cannot be laid down in such matters.

11. In the result, the writ petition is disposed of with the above observations. Miscellaneous petitions, if any pending shall stand disposed of. There shall be no order as to costs.

Dated: 11-10-2018
NRG



A. RAJASHEKER REDDY, J

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.29461 of 2018

//WEB//



Dated: 11-10-2018

NRG