

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.7224 of 2017

ORDER:

The revision petitioner is the respondent in GWOP.No.16 of 2017 on the file of VII Additional District & Sessions Judge, Ongole, Prakasam District, is no other than the father of the minor child Mokshith born on 24.02.2016 (just crossing 2 years soon). The revision respondent is B. Suryam, maternal grandfather of the minor boy and father in law of the revision petitioner and said Suryam is the petitioner in main GWOP.No.16 of 2017 supra.

The parties are being referred as arrayed before the lower Court for the sake of convenience and to avoid confusion.

The said main petition is filed for custody of the minor child. The averments in the main petition are that the respondent Ramana Babu-father of the minor boy is husband of the petitioner's daughter given in marriage by name Sirisha and it is in their wedlock the child was born and later Sirisha, the mother of the minor and the wife of the respondent Ramana Babu, stated met with ill-treatment and met with death on 01.03.2017 covered by crime No.46 of 2017 of Addanki Police Station under Sections 498-A and 306 IPC. It is also the averment that the respondent, father of the child is one of the prime accused in the crime supra, along with his mother and others, is under the control of his mother, who is a widow and she was having illegal contacts with one Kappula Nageswara Rao and she was spending with Nageswara Rao in the house that was even questioned by Sirisha and victimized to met with death. It is

averred that Sirisha was even compelled to look after said Nageswara Rao along with her mother in law and serve, by the dictation of the husband which she unheeded for which she was physically and mentally ill-treated and was killed. Having also with no gain from even mediation for the ill-treatment in her lifetime and even after set up of separate family, but for gravity of the ill-treatment and in elimination of Sirisha. It is averred that during pendency of the crime from arrest of respondent, who is a lorry driver with all wises, and not even regular to attend house, the minor child was handed over to some distinct relatives and he was threatening to leave the minor child to anadha ashram and go for second marriage and having no liking to the minor child, resulted the welfare of the minor child is fell in dark and for all these the father of the minor child is unfit to act as guardian to take welfare of the minor child. The petitioner in the main petition by name Suryam is the maternal grand father, he and his wife Victoria are interested in taking care and welfare of the minor child and though agreed by the respondent and his mother to handover the minor child they put a condition to take the child after compromising the criminal case, for which they did not agree though interested in taking welfare of the minor for both are earning by tailoring more than Rs.2,000/- per day with no other dependents and having affection to take care of the minor child and ready to give their house at Kopperapadu Village to the minor and to educate and provide shelter to the minor as a consequence of which they are constrained to file the petition for custody. The same is opposed by the counter of the respondent father of the minor child in impugning on maintainability and other averments

and in saying once the father of the child is alive the question of giving custody to the minor other than father that is to the maternal grandparents does not arise and that too when father's mother is with the father residing as widow and taking care of the minor child. The welfare of the minor child sub serves better with the father and the paternal grandmother and thereby the petition for custody sought for by the maternal grandparents is liable to be dismissed.

The counter also referred the expressions in **Rosy Jacob Vs. Jacob A. Chakaramakkal**¹ as to the criteria and in saying his wife only met with unnatural death of suicide for which he is not responsible and he is affectionate to the child being father in taking care of and developed a good bondage with the child and has no any bad habits in the averments of he wanted to leave the child in anadha ashramam by going for second marriage is not correct but for made to gain sympathy of the Court if possible for the purpose of custody petition if possible and he cannot live without presence of the minor boy with him that too being the natural guardian and father including under Section 6 of Hindu Minorities and Guardians Act and sought for dismissal of the petition.

It is pending disposal of the petition, application for interim custody sought that was opposed and the learned trial Judge by impugned order dated 11.12.2017 in I.A.No.322 of 2017 observed by referring to several expressions as to the welfare of the minor is paramount irrespective of legal rights including from the

¹ AIR 1973 SC 2090

expressions in **TH Dolikura Vs. HS Dolikura**², **MM Ganguli Vs. Jayant Ganguli**³ besides **Rosy Jacob supra** and **E.Dinshaw Vs. Arvand M Dinshaw**⁴ by saying custody is merely in the nature of trust for the welfare and benefit of the child irrespective of the person is or not the natural guardian in seeking and permitting as the case may be and considering to the facts and circumstances of the case with reference to the pleadings from the legal position, it is fit to pass orders permitting custody of the ward till disposal of the main OP in handing over to the main petition petitioners, the maternal grand father as interim custody from the petition respondent father. Such is the impugment and there is interim suspension of the order of the lower Court which is in force as on today.

Before coming to the facts supra without any repetition of facts of the case on hand, so far as the legal position from the above expressions covering as to the welfare of the child paramount consideration, coming to the other expressions relevant for the purpose concerned; it is necessary to mention on the scope of law that custody is different from guardianship though custody can be continued with the guardian generally as held by a Division Bench of this Court in **Mohd.Shaharyarkhan V. Hussain Khan**⁵. In fact, the Apex Court in **Rosy Jacob supra** 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 changed social

² AIR 1982 SC 1276

³ JT 2008 (6) SC 634

⁴ AIR 1987 SC 3

⁵ 1996(3) ALD-816 (DB)

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".

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".

It is true in ***Bimlenda Kumar Chatterjee V. Dipa Chatterjee***⁶ 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.

⁶ (2001)8 SCC 5

In ***R.V.Srinath Prasad V. Nandamuri Jaya Krishna***⁷ 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***⁸.

No doubt it is one of the factors as to father is involved in the murder of the mother of the minor child along with his mother as co-accused and the child is with them. Leave about there is allegation about the father's mother illicit relationship with one Nageswara Rao and truth of this vehemently in dispute saying with no substance to the allegation and these are main matters to be decided though per se it is not a disqualification but for one of the main factors for consideration to permit the child with them or not.

In fact the main petition itself is of the year 2017 thereby while directing the lower Court to take up the trial and dispose of the main petition on own merits preferably within two (2) months from the date of receipt of this order, the main petition respondent is directed to produce the child before the learned Additional Judicial Magistrate of First Class, Addanki, on every Wednesday and Saturday between 10.30 AM to 11.00 AM so that the main petition petitioner and his wife, maternal grandparents can take the child and spend with the child till evening and handover the child back by 04.30 PM on the same days so that they can develop bondage with the child gradually. However, it is made clear that this stop gap arrangement is made without

⁷ (2001)4 SCC 71

⁸ (2000)6 SCC 598

prejudice to decide the petition on own merits uninfluenced either by this order or by the earlier interim custody order.

With the above observations, the Civil Revision Petition is disposed of.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 09.02.2018
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