

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.4055 of 2018

ORDER:

This CRP is filed under Art.227 of the Constitution of India challenging the order dt.23.6.2018 in IA.No.680 of 2018 in FCOP.No.367 of 2018 of the Judge, Family Court, Secunderabad.

2. The petitioner herein is the wife of the respondent. They have a child Agastya, aged just above 5 years.

3. The said FCOP was filed as GWOP No. 624/2018 by the respondent against the petitioner before the Family Court, Ranga Reddy District at L.B.Nagar seeking custody of the said minor child under the Guardian and Wards Act,1890. Later, on an objection by the respondent vide I.A.No.258/2018 as to the territorial jurisdiction of the said Court, it appears that the OP was returned on 23-5-2018 directing the respondent to present it to the Family Court, Secunderabad. It was then presented in the said Court and given the FCOP No.367 of 2018.

4. In the O.P , the respondent contended that he and the petitioner had got married in Hyderabad, that the above child was born during wedlock, that the child had been separated from him since January,2018 by the petitioner, that she had filed false criminal cases against him which failed, and since he is attached to the child and cannot bear to be separated from the child, and the child was earlier

living in a very comfortable, affectionate, loving and happy environment provided by him, he should be given permanent custody.

5. Though the respondent had filed applications to see the child and also for custody during summer vacation of the child in April- May, 2018, there were no favorable orders in his favor.

6. So after the FCOP.No.367 of 2018 was numbered, the respondent filed I.A.No.680 of 2018 u/s.151 CPC in June, 2018 seeking custody of the child from 15.6.2018 till 30.6.2018. Citing his inability to spend time till then and contending that his own (the respondent's) birthday was on 17.6.2018, his mother's birthday was 24.6.2018 and his late father's death anniversary was on 26.6.2018, he made the above application. He stated that there are several persons in his house to look after the child and he would ensure that the child would not miss school during the above period.

7. This application was opposed by the petitioner who contended that she and the child had been living away from the respondent for more than 4 years, that during this period the respondent showed no love or care towards the child, that the respondent is a homosexual having a relationship with a male person, that only because of pressure from family and society, the respondent cohabited with petitioner in 2012 resulting in the birth of the child. She contended that the respondent had subjected the child to non-aggravated forms of sexual abuse for which she lodged a

complaint Cr.No.32/2018 under Sec.5 of the POCSO Act against the respondent, but police were influenced by the respondent to wrongly invoke S.5 of the said Act dealing with aggravated form of sexual abuse and they later closed the case. She contended that there is a serious threat to the life and well being of the child if temporary custody of the child was given to the respondent. She also alleged that the mother of the respondent treated her with cruelty. She contended that the respondent is living with a male companion in his house and so the I.A be rejected.

8. By order dt.23.6.2018, the Family Court, Secunderabad granted temporary custody of the child to the respondent from 10.30 am to 5.00 pm on 24.6.2018 *and* from 5.30 pm to 6.30 pm on 26.6.2018. The Court also appointed an Advocate Commissioner to take the child from the petitioner to the respondent and later restore the child to the petitioner. It observed that the child is very much attached to the petitioner and so custody for long period cannot be given, but respondent, being the father cannot also be deprived of his legitimate right to spend time with the child. It declined to consider the Final report and certificate issued by the DCP filed by the respondent in the absence of oral evidence adduced by parties but took note of certain photographs filed by the respondent.

9. Challenging the same the present Revision Petition was filed by petitioner.

10. The petitioner also filed I.A.No.1/2018 to stay all further proceedings in the OP.367 of 3018 pending disposal of the Revision.

11. The petitioner however did not comply with the impugned order and so the respondent filed a Contempt case against her in the court below.

12. Though this Revision was listed before the Court on 20-7-2018, it was posted to the next week and no interim orders were passed.

13. Thereafter, it was next listed only on 17.12.2018.

14. On 17-12-2018, this Court observed that though the challenge to the order dt.23-6-2018 does not survive, since a Contempt petition had been filed by respondent against petitioner and it is pending, it would consider the legality of the said order, but directed the petitioner to produce the child on 20-12-2018 in view of the allegations made by her against the respondent.

15. On 20-12-2018, the Counsel for the petitioner informed that after passing of the order dt.17-12-2018, the petitioner had been arrested and that the respondent had taken the child away with him. This was confirmed by the respondent also and so he was asked to produce the child on 21.12.2018.

16. On 21.12.2018, the Court interacted with the child and noted in a docket order that the child was happy to be with the

respondent and did not disclose any discomfort to be with his father and that he was not frightened and did not appear to be tutored by the respondent. It however directed that *the Child should continue in the custody of the respondent* and directed it to be listed on 31.12.2018. *The Court did not note that the child had said anything adverse against the petitioner.*

17. On 31.12.2018, the case was adjourned to 2.1.2019. On that day, since the petitioner engaged the present Counsel Sri Prabhakar Sripada, the matter was adjourned to 25-1-2019 at his request.

18. On 25-1-2019, I have heard the arguments of the said Counsel for petitioner and also the Counsel for the respondent Sri M.P.Chandramouli.

CONTENTIONS OF COUNSEL FOR PETITIONER

19. The Counsel for the petitioner contended that the respondent could not have taken custody of the child after the arrest of the petitioner without the permission of the Court and that this amounts to taking illegal custody of the child. He further contended that when the respondent had sought for temporary custody of the child for only 15 days, he was granted such custody only from 10.30 am to 5.00 pm on 24.6.2018 *and* from 5.30 pm to 6.30 pm on 26.6.2018 by the Family Court and so this Court could not have permitted the respondent to continue to have custody of the child, in

the light of the serious nature of allegations leveled by the petitioner against the respondent of sexually abusing the child and filing of the POCSO case against the respondent. He also contended that the Court below had passed the impugned order in undue haste without properly appreciating the material facts and without examining the child when serious allegations are leveled by the petitioner against the respondent merely by looking at certain photographs produced by the respondent. He pointed out that a protest petition had been filed by the petitioner in the Court opposing the Final Report filed by the Police and what is contained in the Final Report cannot be taken as the gospel truth. He also pointed out that the Child is very attached to the petitioner and since he had not been staying with the respondent admittedly since January,2018, the custody cannot be allowed to remain with the respondent and should be forthwith restored to the petitioner.

CONTENTIONS OF COUNSEL FOR RESPONDENT

20. The Counsel for the respondent refuted the above contentions. He said that the Police had found that complaint lodged by the petitioner against the respondent is false and so the said fact has to be taken into consideration. He also relied on the docket order dt.21-12-2018 of this Court in the CRP regarding the interaction by this Court with the child. He stated that, though it was not recorded in the said order, there were observations made orally by the Court refusing custody to the petitioner on the ground that she was poisoning the mind of the child. He stated that the protest petition

filed by petitioner was dismissed on 31-8-2018 and petition to restore it was dismissed on 10-10-2018. He stated that his client, the respondent also filed a complaint against the petitioner before the SHO, Osmania PS on 25-6-2018 alleging that she is guilty of committing offences under Sec.22(1),22(3) of the POCSO Act and Sec.192 and 195 IPC and it was taken on file as SC.PCS.No.147/2018. He stated that a non-bailable warrant was issued by the concerned court and petitioner was arrested on 17-12-2018 and later released on bail on 19-12-2018. He stated that petitioner had lodged another Complaint against respondent on 18-7-2018 repeating the allegations against the respondent and in that case also Final report has been filed by the Police stating that complaint was false. He stated that the respondent then filed another complaint against the petitioner in Cr.No.302/2018 under Sec.22(1),22(3) of the POCSO Act, Sec.192 and 195 IPC and Sec.75 of the Juvenile Justice Act. He alleged that the petitioner has filed a video recording of the child after tutoring the child containing obnoxious allegations. He denied that the respondent had forcibly taken away the child from the custody of father of petitioner after the petitioner was arrested and stated that as he is natural guardian, he has every right to keep the child with him. He contended that petitioner has no interest in the welfare of the child and her conduct disentitles her to custody of the child.

21. I have noted the contentions of both sides.

THE CONSIDERATION BY THE COURT

22. It is true that the petitioner did not comply with the order passed by the Court below and filed this Revision. She had also sought stay in I.A.No.1 of 2018 of the proceedings in the Court below. Merely because the dates fixed by the Court below were over by the date of filing of the CRP, it cannot be said that she is not entitled to question the impugned order, since contempt proceedings have been initiated by the respondent against the petitioner. So it is necessary to go into the correctness of the impugned order.

23. It is settled law that in matters of custody the paramount consideration is the welfare of the minor child.

24. In **Gaytri Bajaj v. Jiten Bhalla**¹, the Supreme Court had declared:

“ 14. ...an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which

¹ (2012) 12 SCC 471

is the crucial and ultimate consideration that must guide the determination required to be made by the court.”

This principle has been reiterated in several other cases too.

25. Also it is settled law that the Court exercises *parens patriae* jurisdiction in child custody matters.

26. In **Kakumanu Pedasubhayya v. Kakumanu Akkamma**², the Supreme Court explained:

“ 14.the theory is that the Sovereign as *parens patriae* has the power, and is indeed under a duty to protect the interests of minors, and that function has devolved on the Courts. In the discharge of that function, therefore, they have the power to control all proceedings before them wherein minors are concerned. They can appoint their own officers to protect their interests, and stay proceedings if they consider that they are vexatious. In Halsbury’s Laws of England, Vol. XXI, p. 216, para 478, it is stated as follows:

“Infants have always been treated as specially under the protection of the Sovereign, who, as *parens patriae*, had the charge of the persons not capable of looking after themselves. This jurisdiction over infants was formerly delegated to and exercised by the Lord Chancellor; through him it passed to the Court of Chancery, and is now vested in the Chancery Division of the High Court of Justice. It is independent of the question whether the infant has any property or not.”

27. In **Ashish Ranjan v. Anupma Tandon**³, the Supreme Court had declared:

² AIR 1958 SC 1042

³ (2010) 14 SCC 274

*“18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of **stare decisis** remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the “moral and ethical welfare of the child must also weigh with the court as well as his physical well-being”. The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its **parens patriae** jurisdiction arising in such cases. (Vide **Gaurav Nagpal v. Sumedha Nagpal**⁴)”*

28. In the instant case, the fact that petitioner and the respondent have been living separately for more than 4 years is not disputed. The respondent himself admitted in the affidavit filed by him in June 2018 in I.A.680/2018 that he had not seen the child since January 2018 and that the child was in the custody of the petitioner/mother.

29. When serious allegations were leveled about sexual abuse by the respondent of the child by the petitioner in the counter filed by the petitioner to the OP and also to the I.A.No.680 of 2018, the Family Court, in my opinion, ought to have atleast interacted with the child once before passing the impugned order to ascertain the

⁴ (2009) 1 SCC 42

desire of the child. It seems to have been carried away by the urgency pleaded by the respondent about his birthday on 17-6-2018 and his mother's birthday on 26-6-2018 and simply relied upon some photographs filed by the respondent and passed the impugned order. In my opinion it has passed the order in undue haste without due care and caution or keeping in mind the circumstances of the case.

30. Therefore the impugned order cannot be sustained. It is accordingly set aside.

31. Admittedly this CRP was not listed after it was adjourned on 20-7-2018 till 17-12-2018. But the petitioner was arrested by the police in a case filed by the respondent on 17-12-2018 and the respondent then took away the custody of the child from the petitioner's father.

32. The respondent had not been permitted by the Court below or this Court to take the custody of the child. Merely because he is the natural guardian, he was not entitled to take away the child without obtaining the permission of the Court. This action of the respondent amounts to taking custody of the child illegally. Thus the respondent, who had no custody of the child since January, 2018, illegally obtained the custody of the child on 17-12-2018 almost one year later.

33. It may be that this Court on 21-12-2018 found that the child was comfortable in the company of the respondent and was not frightened of him.

34. But this Court had not also noted in its docket order that the child had said anything adverse against the petitioner. The averments in the counter affidavit of the respondent that this Court on that day had orally observed that the petitioner is poisoning the mind of the child, cannot be accepted since the said fact was not noted in the docket order dt.21-12-2018.

35. Prior to 17-12-2018 for more than 5 years admittedly petitioner alone had custody of the child and not the respondent. Such state of affairs cannot be allowed to be disturbed during the pendency of the FCOP. A child of such a tender age, cannot be deprived of the love and affection of his mother, and ought to be restored to her custody forthwith. Moreover, the respondent, who obtained illegal custody of the child, cannot be allowed to retain the child in his custody. This direction is being given in exercise of the *parens patriae* jurisdiction vested in this Court.

36. Since the matter is pending in the Court below I am not expressing any opinion on the allegations leveled by the parties against each other or on the Final reports submitted by the police etc.

37. The CRP is accordingly allowed and the order dt.23-6-2018 in I.A.No.680 of 2018 in FCOP No.367 of 2018 is set

aside. The respondent is directed to forthwith restore custody of the child Agastya to the petitioner.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 28-01-2019
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