

**THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CIVIL MISCELLANEOUS APPEAL NO.149 OF 2017

JUDGMENT: (per Hon'ble Sri Justice T.Amarnath Goud)

This Civil Miscellaneous Appeal is filed by the husband challenging the Order and Decree dated 12.02.2017, in I.A.No.524 of 2016 in O.P.No.930 of 2016, on the file of the Court of the Judge, Additional Family Court, City Civil Court at Hyderabad (for short, the trial court), whereby the learned Family Court has rejected the request of the appellant to continue his care and custody of his 23 months old boy, Khaja Areebuddin.

2. The appellant (husband) filed O.P.No.930 of 2016 before the trial court under Sections 7 to 10 of the Guardian and Wards Act, 1890 read with Sections 7 and 25 of the Family Court Act, 1984, for seeking permission to continue his care and custody of his 23 months old boy, Khaja Areebuddin, keeping in view of the boy's safety, security, welfare and future by restraining the respondent (wife) and her relatives and her agents not to interfere with his custody of child. In the said OP, the appellant filed I.A.No.524 of 2016 seeking the same relief. He stated that the respondent is his legally wedded wife. After the marriage, the respondent joined his company and lead happy marital life only for few days. After three months of marriage, he came to know that the respondent is having an extra-marital affair with her lover, Aamer Mohammed, who is her classmate. In spite of his specific requests to leave her extra-marital affair, the respondent did not mend her ways.

Moreover, the respondent threatened him and his family members. They were blessed with a male child. He alleged that the respondent is not having any love and affection towards the child. Due to her negligence and irresponsible attitude, the boy fell down on the ground and sustained head injury. Many times, the respondent threw the boy from the cot, due to which, the boy sustained severe injuries. Thereafter, the respondent and her brothers threatened him with dire consequences. The respondent also filed a case against him and his three sisters, under Section 498-A IPC and Sections 3 and 4 of the Dowry Prohibition Act, which was registered as Crime No.262 of 2016, on the file of the Sanathnagar Police Station. The respondent has engaged contract killers to kill him and his child.

3. The respondent filed counter affidavit before the trial court denying the allegations of her negligent attitude towards the minor child and throwing him from the cot. She denied her extra-marital affair with her classmate. When the appellant and his sisters did not permit her to enter into the house, she filed the aforesaid criminal case. She denied the allegation that she and her brothers engaged contract killers to kill the appellant and the minor child.

4. While dealing with the case, the trial court relied upon a judgment of the Allahabad High Court in **Vakil Ahmad Vs. Aqila Khatoon**¹ and also Section 352 of the Mohammedan Law and dismissed the IA. The operative portion of the impugned order reads as under:

¹ LAWS (ALL) 1994-2-23

“14. The contention of the petitioner that his life is in threat on filing case under Ex.P.1 cannot be considered for disposing the present petition. That as per law laid down on the citations relied by the respondent according to Muslim Law, the custody of the child up to seven years is with the mother, the respondent herein and in support of her contention, she relied on a citation of the Hon’ble High Court of Allahabad reported in:

LAWS (ALL) 1994-2-23

Vakil Ahmad V. Aqila Khatoon

Wherein His Lordship held that:-

“..... A reading of the aforesaid judgments of the Hon’ble Supreme Court shows that in disputes for the custody of the children is between the parents, the considerations of the welfare of the child play a predominant role in determining as to who should have the custody of the child. The question of the welfare of the child cannot be weighed in golden scales and a person who is, in law, entitled to the custody of the child, cannot be deprived of that right simply because the other parents may bring up the child in a slightly better way. In the case before me, there is nothing in the judgments of the courts below to show that the mother is not well equipped to bring up the child whose custody she is, admittedly, entitled to under the Muslim Law. It is necessary for the better development of the child that, at this age, he should receive the motherly affection and care in full measure and, in my view, the father cannot compensate for the loss that the child would suffer from being deprived of the motherly affection and care...”

Section 352 of the Principles of Mohamedan Law by Mulla provides that mother is entitled to the custody of her male child until he completes the age of seven years, and the said right continues even if she is divorced by the father of the minor, unless she marries a second husband in which case the custody would belong to the father. Thus, the right of the mother to have custody of her minor son is limited up to seven years of his age under the Mohamedan Law.

15. Hence from the above preposition of the citations relied by the respondent counsel, the custody of the minor son shall be with the respondent herein. The contention of the prima facie case of the possession with the petitioner and balance of convenience in his favour

cannot be considered ignoring the *Principles of Mohamedan Law and Settled Preposition of Law*. Hence the custody of the minor child, by name, Khaja Areebuddin herein the petitioner to continue care and custody of 23 months old boy cannot be permitted. Hence, the petition is devoid of merits and liable to be dismissed accordingly. This point is answered accordingly.”

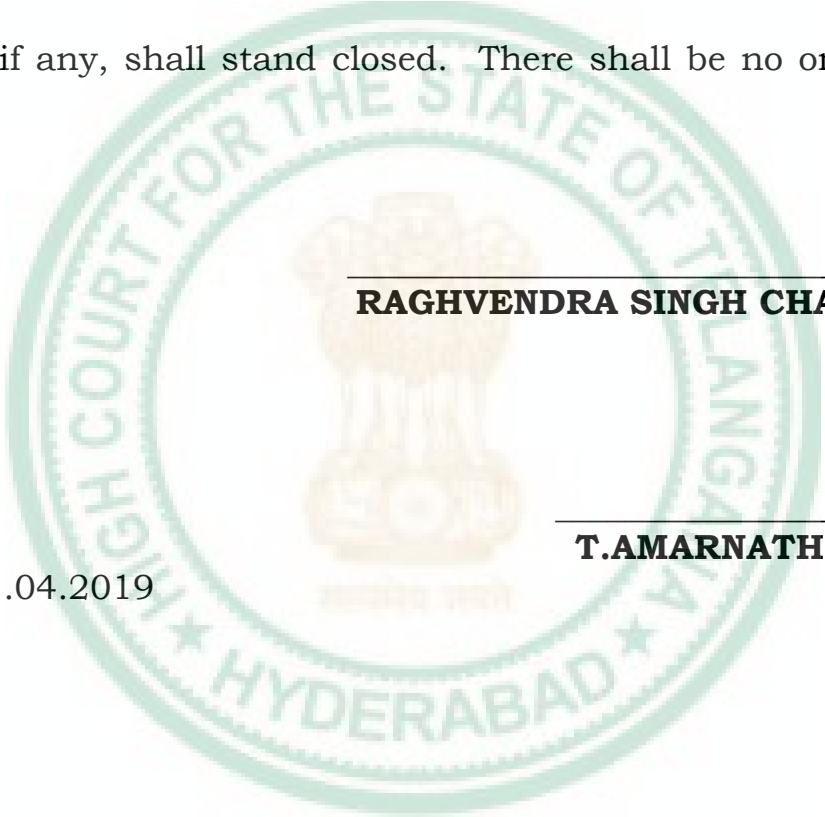
5. It is to be noted that the principles of law in relation to the custody of a minor child are well settled. It is trite to state that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child, and not the rights of the parents under a statute. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts; decided cases can hardly serve as binding precedents insofar as the factual aspects of the cases are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents, or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts

and circumstances, bearing in mind the welfare of the child as the paramount consideration.

6. A bare perusal of the impugned order, it is clear that the trial court dismissed the IA basing on the law laid down by the High Court of Allahabad in **Vakil Ahmad**'s case (supra) and also basing on Section 352 of the Mohammedan Law. The trial court did not take into consideration the severity of the allegations made by the appellant with regard to her extra-marital affair with some other person; her act of throwing the minor child from the cot, etc. It is apparent from the impugned judgment that the respondent never filed a petition seeking custody of the child or visitation rights. The trial court did not consider all these aspects and proceeded to dismiss the IA. Therefore, the impugned judgment is liable to be set aside.

7. In the present case, as per the contentions of the parties, the boy is presently in the custody of the appellant. As the allegations leveled by the appellant against the petitioner i.e., she is having extra-marital affair with another; due to the negligent and irresponsible attitude of the respondent, the boy fell down on the ground and sustained head injury; she has thrown the boy from the cot, due to which, the boy sustained severe injuries; and she is trying to kill the appellant and the minor boy, are serious in nature. Therefore we are satisfied that the paramount welfare of the minor child is with the appellant.

8. For the reasons stated above, the Civil Miscellaneous Appeal is allowed. It is directed that interim custody of the minor child shall remain with the appellant. The Order and Decree dated 12.02.2017, in I.A.No.524 of 2016 in O.P.No.930 of 2016, on the file of the Court of the Judge, Additional Family Court, City Civil Court at Hyderabad, is hereby set aside. The learned Judge is directed to dispose of the main O.P., within a period of six months from the date of receipt of a copy of this order, uninfluenced by any of the observations made in this order. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.



RAGHVENDRA SINGH CHAUHAN, J

T.AMARNATH GOUD, J

Date: 01.04.2019
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