

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.5419 of 2018

ORDER :

Heard Sri Pulla Rao Yellanki, learned counsel for petitioner and
Smt. Umadevi Nama, learned counsel for respondent.

2. This Revision is filed under Article 227 of the Constitution of India challenging the order dt.31-08-2018 in I.A.No.1013 of 2018 in G.O.P.No.136 of 2018 of the Judge, Family Court at Khammam.

3. Petitioner herein is respondent in the G.O.P.

4. The respondent had filed the said G.O.P. against her stating that petitioner is his wife, that they have two children, a boy Lohit Sai born on 28-02-2012 and a daughter Tanuswi, born on 04-05-2014; that they are studying in V.V. Central Public School, Khammam; that the petitioner harassed him and was adamant towards the children; and she left his company 6 months prior to the filing of the G.O.P. and is residing at Muthyalampadu cross roads in Tekulapalli Mandal leaving the children with respondent. He alleged that he was taking care of the minor children and they were happy with him. He alleged that petitioner is staying in a remote village where there are no schools and if the petitioner takes the children to the village, the children will not have good education. He alleged that petitioner was threatening to file a criminal case alleging that respondent kidnapped the children

and so he had filed the O.P. to appoint him as guardian of the person of the children and to grant him custody.

5. Counter was filed by petitioner in the O.P. denying the said allegations. While admitting that she was married to the respondent on 16-12-2010 and that two children were born to them and they were studying at V.V. Central Public School, Khammam, she denied that she was adamant towards the respondent and was harassing him. She also denied ill-treating the children. She alleged that there were English Medium schools at Muthyalampadu and Tekulapalli. She denied that she threatened to file case for kidnap against respondent. She alleged that respondent took dowry from her parents and that respondent was leading adulterous live with other ladies. She alleged that the respondent kept a teenage girl in the house claiming that she is a maidservant and he is leading adulterous life with her and when she questioned him, he necked her out from the house and she was forced to live with her parents along with children. She alleged that on 06-06-2018, respondent came to the house of her parents and forcibly took away the minor children throwing the petitioner and her parents and therefore she lodged a complaint with SHO, P.S.Tekulapalli on 08-06-2018 for the custody of the minor wards. She alleged that she came to know that respondent married the maid servant, that there was no safety for the children to live in the company of the respondent and she being the natural mother and guardian, she should be given custody of the children.

6. Pending O.P., the respondent filed I.A.No.1013 of 2018 in the said G.O.P. seeking grant of interim custody of the minor children to him pending the O.P. reiterating the contents of the O.P.

7. Petitioner filed a counter reiterating the contents of the counter-affidavit filed by her.

8. Before the Court below, the respondent marked Exs.P-1 and P-2 and petitioner marked Exs.R-1 to R-4.

9. The Court below allowed the said application on 31-08-2018.

10. It recorded that on 28-08-2018 learned counsel for petitioner insisted the Court to direct the respondent to produce the minor wards before the Court to enable the petitioner to see her children; so the Court directed the respondent to produce the children by 4 p.m. on 29-08-2018 and he produced them; when the respondent along with children were about to enter into the Court hall, the petitioner and some others shouted loudly in the Court hall, rushed towards the respondent and took away the minor children from the hands of the respondent. The Court below recorded that it warned the petitioner to return the children to the respondent, but in spite of the same the petitioner did not handover the children to the respondent. So, the Court called the Constable attached to the Court to take the children from the petitioner and gave them to the respondent. It observed that counsel for petitioner though he was sitting in the Court hall, never tried to stop the aggressive behaviour of the petitioner and supported

the petitioner and even made allegations against the Court. It stated that the Court enquired from the minor children whether they intend to go with their mother, and the boy refused to join with the petitioner stating that he did not want to leave his father, and the girl child did not state anything, but stated that she need not want to see the face of her mother. It recorded that the girl child also refused to join the mother, when questioned repeatedly by the Court.

11. It also took note of Exs.P-1 and P-2 showing that the children were residing with respondent and studying in V.V.C. Central Public School at Khammam.

12. It also referred to Ex.R-1, the FIR lodged by the petitioner and noted that it only recorded that respondent had beaten the petitioner and there was no allegation leveled by petitioner that respondent took away the children forcibly and it was also registered under Section 324 r/w 34 I.P.C. It observed that since the children's welfare is important and they are studying in V.V. Central Public School, Khammam and since they had declined to go with the petitioner and they did not show any affection towards the petitioner, the interim custody of the minor children is given to the respondent.

13. Assailing the same, this Revision is filed.

14. Pending the Revision, the children were produced before this Court on 23-11-2018. This Court counseled the parties and they agreed that the petitioner can take the children from the school after

completion of Tuition at 8 p.m. every Saturday and keep them with her till 6 p.m. on the next day i.e. Sunday; and the respondent was directed to pick them up from the house of petitioner at 6 p.m. on Sunday.

15. Thereafter an order was passed on 24-04-2019 initially permitting the children to stay with petitioner till 15-06-2019 during their Summer Vacation, but the said order was modified on 01-05-2019 since the petitioner approached the police and forcibly took the custody of the children and also because the petitioner refused to permit the respondent to see the children once a week during the said period.

16. So, on 01-05-2019, this Court passed the following order:

“Admittedly, custody of the children is with the respondent in I.A. No.2 of 2019 since 27.04.2019. The respondent in I.A. No.2 of 2019 shall deliver the minor children at Khammam to the custody of the petitioner in I.A. No.2 of 2019 on 07.05.2019 and from that day till 16.05.2019, the children shall be with the petitioner in I.A. No.2 of 2019. Again on 17.05.2019 petitioner in I.A. No.2 of 2019 shall hand over the custody at Khammam to the respondent in I.A. No.2 of 2019 and from 17.05.2019 till 26.05.2019 custody shall be with the respondent in I.A. No.2 of 2019. The respondent in I.A. No.2 of 2019 shall hand over the custody of the children to the petitioner in I.A. No.2 of 2019 at Khammam on 27.05.2019 till 05.06.2019.”

17. Thereafter counter-affidavit was filed by respondent and the matter was heard on 25-06-2019.

18. Learned counsel for petitioner contended that petitioner being the natural mother of the children, is entitled to have custody of the children pending O.P. and respondent is not entitled for interim custody also. She contended that there are English Medium schools in and around the village where petitioner resides and if she is given custody, she would also provide good education for the children. He relied on the decisions in **Roxana Sharma Vs. Arun Sharma**¹, **Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi**², **ABC Vs. State (NCT of Delhi)**³ and **Vikram Vir Vohra Vs. Shalini Bhalla**⁴.

19. Learned counsel for respondent, however, refuted the said contentions and pointed out the conduct of the petitioner in the trial Court which is recorded in the impugned order i.e. forcibly taking away the children when they were produced by the respondent in the trial Court and behaving in a threatening manner towards the respondent in the Court premises. He also referred to the examination of the children by the Court below wherein the children did not show any inclination to go with the petitioner. Learned counsel for respondent relied on **Surender Vs. Sushma**⁵.

20. I have noted the contentions of both sides.

¹ (2015) 8 SCC 318

² (1992) 3 SCC 573

³ (2015) 10 SCC 1

⁴ 2010(3) ALT 1 (SC)

⁵ AIR 2016 P&H 199

21. The O.P. had been filed on 20-06-2018 before the Family Court, Khammam by the respondent against petitioner alleging that he is having custody of the children and that petitioner had gone away to her parents house in Mutyalampadu village by leaving the children with him 6 months prior to the filing of the O.P.

22. Though it is denied by the petitioner and she alleged that respondent kidnapped the children forcibly from her parents house and took them away on 06-06-2018, it is important to note that petitioner claims to have given police complaint against respondent on 20-06-2018 (Ex.R-1). Ex.R-2 is the charge sheet in the said criminal case. In Ex.R-1 complaint dt.20-06-2018, there is only mention by petitioner that respondent beat her, but there is no allegation that children were forcibly taken away by respondent against her will. If really the children were taken away forcibly from her custody by respondent on 06-06-2018, the same would have been mentioned in the said complaint dt.20-06-2018 by petitioner. Learned counsel for petitioner is unable to explain this omission in the plaint filed by petitioner against respondent on 06-06-2018. Therefore, *prima facie* the case of the petitioner that respondent taken away the children from her custody on 06-06-2018, is not established and her plea appears to be false.

23. It is the admitted case of petitioner that she is staying along with her parents in the interior village called Mutyalampadu and she is not residing in Khammam. Exs.P-1 and P-2 are the Study and

Conduct Certificates of the minor children filed by respondent which indicate that the children are studying in V.V.C. Central Public School in Khammam town.

24. I have already referred to the conduct of petitioner recorded by the trial Court in the impugned order wherein the trial Court found that petitioner had behaved very aggressively and with a group of persons even shouted in the Court hall on 29-08-2018 and taken away the minor children produced by respondent and refused to handover the children to respondent. The trial Court had noted that it took the help of Court Constable to restore the children and the counsel for petitioner also did not stop this aggressive behaviour of the petitioner. The Court below also recorded the reluctance of the children to stay with the petitioner.

25. The orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child (**Rosy Jacob Vs. Jacob A. Chakramakkal**⁶).

26. It is settled law that in matters of custody, the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody

⁶ (1973) 1 SCC 840

(**Athar Hussain Vs. Syed Siraj Ahmed and others**⁷). There should be sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect and there is a necessity for stability and consistency in the affairs and routines of children. (**Mausami Moitra Ganguli Vs. Jayant Ganguli**⁸).

27. In **Roxana Sharma** (1 supra) cited by the learned counsel for petitioner, there was a dispute about custody of a child aged below 5 years, and the Supreme Court had opined that ordinarily custody of such children should be with the mother, but the Court emphasized that the word ‘ordinarily’ ordains a presumption, albeit a rebuttable one, in favour of mother, and the Court referred Section 6 of the Hindu Minority and Guardianship Act, 1956 and held that onus is on father to prove that it is not in welfare of child to be placed in custody of his/her mother.

28. In **Kirtikumar Maheshankar Joshi** (2 supra) cited by the learned counsel for petitioner, the Court reiterated that wishes of the children are also relevant to assess their state of mind. In that case, the mother of the children having died, the custody was given to the maternal uncle with whom the children were living after taking the willingness of the children to remain with the maternal uncle and their wish that they did not wish to live with their father.

⁷ (2010) 2 SCC 654

⁸ (2008) 7 SCC 673

29. The decision in **ABC** (3 supra) dealt with the appointment of a guardian of a child born outside wedlock, and the Supreme Court held that mother's application for declaring her as a sole guardian deserves acceptance. Such is not the case here. So the said decision is inapplicable.

30. In **Vikram Vir Vohra** (4 supra) cited by the learned counsel for petitioner, the appellant father had lived without the child and got used to it, and so the Court held that custody of the child should be given to the mother since it is more conducive to the development and future prospects of the child. The facts of this decision are totally different from the instant case.

31. In my considered opinion, there is no absolute rule that in all situations custody of minor children aged below 5 years should be given only to the mother. As observed in **Roxana Sharma** (1 supra), if there is evidence on record to show that mother's conduct disentitles her to grant interim custody pending O.P., the Court need not give her interim custody of the children to the exclusion of other parent.

32. I am not inclined to grant custody of the children to the petitioner pending O.P. for the following reasons:

- (a) there is no evidence *prima facie* to show that respondent had kidnapped the children from the custody of the petitioner;

- (b) the children did not express their willingness to stay with the petitioner;
- (c) the children, for the last one year, have been in the custody of the father/respondent;
- (d) the respondent is taking care of the education of the children in Khammam town in an English Medium school as evidenced by Exs.P-1 and P-2;
- (e) there are no compelling circumstances warranting change of custody from the respondent to petitioner;

33. The judgment in **Surender** (5 supra) relied upon by the learned counsel for respondent is more appropriate because in that case also the mother was living separately from the minor children for many years and the children did not wish to go with her and so the custody of the children was given to the father by making provision for visitation rights to the mother.

34. Accordingly, I do not find any reason to interfere with the order passed by the Court below granting interim custody of the minor children to the respondent, but the said order is modified by giving temporary custody of the children during school working days from 8 p.m. on every Saturday to 6 p.m. on the following day i.e. Sunday, and she shall handover custody of the children to the respondent at the house of respondent at 6 p.m. on Sunday. During Dasara and Christmas/Sankranti vacation of children, for the first half of the

vacation, the custody of the children shall be with the respondent and for the second half of the vacation, the petitioner shall have the custody. During summer vacation of the children in 2020 and subsequent thereto, the parties shall have alternate week custody of the children starting with respondent having custody for the first week thereof. The parties are permitted to speak to the children every day once at a time to be arranged by the counsel for the parties when the custody of children is with other party, be whether it is petitioner or respondent.

35. Parties are given liberty to approach the Court below in case there is any difficulty in implementation of the order.

36. It is made clear that the observations made in this order are only for the purpose of deciding this Revision, and the O.P. shall be disposed of independently by the Court below uninfluenced by any observations made by it in its order or observations made by this Court in this order in the Revision.

37. The Civil Revision Petition is disposed of with the above directions. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 17-07-2019

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