

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.360 of 2020

&

IA No.2 of 2020

In/And

Civil Revision Petition No. 735 of 2020

COMMON ORDER :

These two Revisions are filed under Art.227 of the Constitution of India challenging order dt.23.12.2019 in IA No.91 of 2019 in HMOP.No.117 of 2019 on the file of the Additional Metropolitan Sessions Judge for Trial of Jubilee Hills Car Bomb Blast Court-cum-Additional Family Court-cum-XXIII Additional Chief Judge-cum-IX Additional Metropolitan Sessions Judge, Hyderabad (for short “the Court below”).

2. The said HMOP was filed on 12.9.2019 by the petitioner in CRP.No.360 of 2020/respondent in CRP No.735 of 2020 (hereinafter referred to ‘NVV’ i.e., the husband) under Section 13(1)(i)(a) of the Hindu Marriage Act, 1955 (for short “the Act”) alleging that the respondent in CRP.No.360 of 2020/petitioner in CRP No.735 of 2020 (hereinafter referred to ‘SS’ i.e., the wife) had treated him and his family members with cruelty and sought relief of dissolution of the marriage solemnized between them on 02.08.2012.

3. No counter affidavit has been filed by SS in the OP till date.

4. NVV and the SS have two minor children by name Baby Rishita (aged between 4 to 5 years) *and* Baby Rama Sri Vidya (aged less than 3 years).

5. Pending the OP, NVV filed I.A.No.91 of 2019 under Section 26 of the Act for custody of both the children every week and during school holidays.

6. Though a counter affidavit was filed by SS in the Court below opposing the grant of above relief to NVV, during the course of hearing of the IA No.90 of 2019, SS, through her counsel stated that she had no objection if the custody of the children is given to NVV on every Sunday from 8 AM to 6 PM.

The order of the trial court in IA No.91 of 2019

7. In the order dt.23.12.2019 in I.A.No.91 of 2019, the Court below took note of the contentions of the parties and the legal position relating to grant of visitation rights and held that the children ought to get the love and affection of both parents. It therefore granted custody of the elder child Baby Rishita to NVV on every Saturday from Friday 5 PM to Monday 10 AM; and also granted custody of the younger child Baby Rama Sri Vidya on every Sunday from 9 AM to 6 PM to him until further orders. It directed that NVV shall pick up and drop off the children as per the above schedule.

8. It is not in dispute that the NVV had availed visitation rights of the elder child on every week end from Saturday evening to Sunday

evening and during summer vacation as per orders of the High Court in W.P.No.10142 of 2019, which has since been disposed of.

CRP No.360 of 2020

9. In CRP No.360 of 2020 filed on 05.02.2020 against the order of the Court below, NVV seeks modification of the said order and seeks (a) permission to take both children at the same time and for the same duration and (b) for custody of the both children during summer holidays of the children also.

10. In CRP.No.360 of 2020, notice was ordered to SS on 14.02.2020. She received the notice and engaged Ms. S.Vani who entered Vakalat on 25.02.2020.

11. Thereafter, on 07.04.2020, I.A.No.3 of 2020 was filed by NVV alleging that SS did not allow NVV to pick up the elder child on 03.04.2020 on the pretext of Corona Virus situation and adamantly refused to comply with the order passed by the Court below.

12. Counsel for NVV also placed before the Court the legal notice dt.04.04.2020 issued by SS's counsel to him and his response dt.14.04.2020 thereto through a Memo dt.24.04.2020.

13. When this IA was listed on 24.04.2020, counsel for the respondent sought time to file counter and on 27.4.2020 counter affidavit has been filed.

14. On 27.4.2020, detailed interim order was passed in IA No.3 of 2020 after hearing both sides and pending further orders, SS was directed to handover the two children by name Baby Rishita and Baby Rama Sri Vidya to NVV/his representative on 29.04.2020 at 10 AM and NVV was further directed to hand them over back to SS on 30.04.2020 by 10 AM; and the CRP No.360 of 2020 was directed to be listed on 1.5.2020.

15. This arrangement went smoothly without any hitch.

CRP.No.735 of 2020

16. In the meantime on 29.4.2020, SS filed CRP.No.735 of 2020 challenging the order dt.23.12.2019 in I.A.No.91 of 2019 in HMOP No.117 of 2019 passed by the Court below.

17. CRP No.735 of 2020 and CRP No.360 were listed on 1.5.2020 and elaborate arguments were heard from counsel for the parties.

18. Counsel for the parties reiterated the stand taken by their clients in their respective pleadings and the legal notices exchanged between them.

Consideration by the Court

19. I have noted the same.

20. In CRP No.735 of 2020, the counsel for SS raised the following contentions:

(i) that in view of Corona Virus Pandemic situation prevalent since 22.3.2020, her client SS is not obliged to comply with the order passed by the Court below in view of the possible risk of infection to the children; and that when the State and Central government have given moratorium on loan payments and extended time for many other things, there is no justification to make her comply with the order of the Court below;

(ii) that there were certain incidents mentioned in the legal notice issued by SS on 4.4.2020 which justify her client's refusal to comply with the order of the Court below;

(iii) that NVV does not care about the health or safety of the children and so he cannot be permitted to have temporary custody.

(iv) that NVV is using illegal means to bypass the lockdown to travel to the house of SS and there is a possibility of he being apprehended by the police;

(v) and recently on 30.4.2020 in a case decided by the Supreme Court **Tanuj Dhawan v. Court on it's own motion**¹, the Supreme Court had suggested that electronic contacts instead of visitation rights can be adopted in matters of this nature.

21. The principle on the basis of which the trial court granted temporary custody rights i.e., that the children ought to get the love

¹ Order dt.30.4.2020 in W.P.No.(Civil) Diary No.11058/2020

and affection of both parents was not questioned by the Counsel for SS.

22. From 23.12.2019 (when the Court below had passed the order in IA No.90 of 2019), till 29.4.2020 (when she filed CRP No.735 of 2020), for more than 4 months, SS had not challenged the order passed by the Court below and in fact admittedly complied with it till 03.04.2020.

23. NVV's counsel contended that the filing of the CRP No.735 of 2020 by SS is an afterthought since she wanted to avoid the temporary custody orders passed by the trial court taking advantage of the lockdown consequent on the Corona Virus pandemic situation in Hyderabad. I find considerable force in this submission.

24. Coming to the COVID-19 situation prevalent in the city of Hyderabad and the apprehensions expressed in that regard by SS, NVV's counsel has stated that NVV had taken/he will continue to take proper precautions while transporting the children from the house of SS to his house and while dropping them back.

25. He also stated that the police were shown the order of the trial court and this court and they had always allowed NVV to go to the house of SS, pick up the children and drop them back. Counsel denied that his client has done anything illegal while transporting the children from house of SS to his house and back. No material is placed by SS

in support of her allegation that NVV was violating the law. Hence I disbelieve it.

26. Also since the police would always facilitate the implementation of a Court order and would not willfully thwart it as they might face charges of Contempt of Court for preventing implementing the court orders, the apprehension of SS is baseless.

27. As recently as 29.4.2020, NVV was able to pick up the children from the house of SS and drop them back on 30.4.2020. After the lock down was announced on 22.3.2020 also, on 28.3.2020, NVV had taken the children without any impediment and dropped them back.

28. In my opinion, SS cannot imagine possible police objections for the movement of the children as a ground to refuse to comply with the temporary custody orders passed by the court below particularly when NVV had taken all possible precautions to ensure the children are transported by his own car and are not exposed to any risk.

29. It is not as if SS was dropping the children in NVV's house and bringing them back and she had any difficulty.

30. In fact, SS has admitted in her pleadings that she had taken the elder child to a religious congregation on the occasion of Sri Rama Navami on 2nd April, 2020 in a local temple. If she can do so without exposing the child to risk, NVV cannot be accused of exposing the children to risk by acting as per the temporary custody orders obtained

by him and taking them to his house and dropping them back. There cannot be one rule for her and another for NVV, the father of the children.

31. The analogy of moratorium on payment of loans during Corona Virus situation prevalent in the country mentioned by the counsel for SVV is not at all apt and is wholly misplaced as the obvious reason for this moratorium is that inability to do business due to lockdown would result in lack of income/revenue and consequent inability to pay the loans borrowed by them on time. The instant case is of a totally different situation.

32. Even the decision of the Supreme Court in **Tanuj Dhawan (1 supra)** cannot be of any assistance to SS, because the said order was passed *suggesting* that, if there is *inability* to enforce visitation orders and on account of the lockdown visitation could not take place, then electronic contact through possibly video conferencing, can be done. The Supreme Court only made a 'suggestion' at the request of the parties in that case. There is no statement of law therein and doctrine of precedent cannot be invoked by SS.

33. In the present case, admittedly there is no difficulty for NVV to travel and pick up the children and therefore the said decision cannot apply.

34. Also the instant case is one of temporary custody being granted to NVV and not one of only visitation by NVV at the residence of SS and so the said decision dealing with visitation does not apply.

35. A suggestion was made by counsel for SS for NVV to have visitation rights in the house of SS. Considering the very hostile and acrimonious relationship between the parties as is evident from the pleadings in the Court below and in this Court, accepting this suggestion would be a recipe for disaster. So I decline to accept this suggestion.

36. I hold that, in the light of her own conduct in (i) agreeing to the temporary custody in the court below, (ii) implementing it till 4.4.2020 and (iii) taking the elder child to a religious congregation on 2.4.2020, SS cannot object to the petitioner taking the children to his house from her house after taking all precautions and dropping them back.

37. Coming to the instances mentioned by the counsel for SS in the legal notice dt.4.4.2020 and counter affidavit in IA No.3 of 2020 in the CRP.No.360 of 2020, NVV has denied them in the reply legal notice issued by him on 14.04.2020 as well as in the counter affidavit filed by him in IA No.2 of 2020 in CRP No.735 of 2020.

38. As regards the allegations of SS that (i) the brother of NVV and his family, who have arrived from USA, are living with the petitioner and they would infect the children, it is denied by NVV and it is stated

by him that they are in New Jersey only. No material is filed by SS to prove that they are in India and are living with NVV.

39. On the contrary, NVV alleges that the younger sister of SS and her husband who live in Ameerpet regularly visit SS even during the lock down period. There is no denial of this allegation by SS.

40. As regards SS's allegation of sexual impropriety by NVV, this has also been vehemently denied by the petitioner and it is stated that these allegations are made with a *mala fide* intention by SS. Though counsel for SS sought to contend that the elder child informed SS about it, no date of the said incident is mentioned by SS. The elder child is aged 4-5 years, and the child of such tender age is unlikely to understand about issues of 'sex'. Also had this allegation been true, SS would not have continued to send the child along with NVV. This allegation thus appears to have been cooked up with a *malafide* intention to prejudice the mind of the court as an after thought.

41. It is next contended that NVV took the children to a swimming pool or mall or movie and had not supervised them and the children contacted a cold. Again no dates when these events are said to have occurred are mentioned by SS. These allegations are vehemently denied by NVV. Admittedly from 16.3.2020, the State Government had shut down all malls, swimming pools and movie theatres.

It is alleged by SS that NVV and his parents do not have time or feel necessity of monitoring the children when they allow the children to play with boys. This allegation is denied by NVV.

It is alleged by SS that NVV gives mobile phones tuned 'Youtube' and allows them to watch any program of their choice without any supervision. This is denied by NVV.

It is alleged by SS that the elder child was hurt on the jaw by a servant named Mani causing her pain, swelling and discomfort in chewing food. No date of this incident is mentioned by her. NVV states that the said child hurt herself once while playing with a plastic pen-pencil while trying to act as a doctor. He stated that he got the child examined by Dr.Srinath Reddy, a doctor and the latter found that there was no injury at all. This explanation cannot be brushed aside as false.

Next it is alleged by SS that on 23.3.2020, the younger child was improperly touched by one Pandu and Rajesh. NVV denied that such a thing ever happened and contended that one Isha Pandu is the daughter of sister of SS and the younger child told him that it was Isha Pandu who bit her on her back at the residence of SS.

42. Other allegations made by SS are also denied.

43. The suggestion of counsel for SS that this Court has to interview the children before deciding the case cannot be accepted because in my opinion, the children are of very tender age without the

requisite intelligence and understanding, and so determining their wishes would not help, particularly when there is also a serious possibility of they being tutored negatively by SS about NVV considering the adverse and hostile *animus* she has towards him by taking advantage of the fact that she has their permanent custody for the present.

44. Also there is no necessity to have the children examined by a psychologist or psychiatrist at this stage also for the aforesaid reasons. So IA.No.2 of 2020 is dismissed.

45. In fact certain allegations which had not been mentioned in the legal notice of the petitioner dt.04.04.2020 are now included in the counter affidavit filed by the respondent i.e., about the children being taken to the swimming pool and being made to watch You Tube on mobile phones.

46. Counsel for NVV has stated that his client cares for the children's health and safety as much as SS does, and had always properly supervised the children and will continue to do so and without any proof, SS is making false allegations. I find considerable force in his submissions. It is not as if only SS cares for the children and that NVV has no love and affection for them or that he would expose them to any risk. NVV, being the father of the children, would have possibly the same affection and love towards them as SS has

towards them and there is no evidence placed by SS to doubt this. That is why he sought temporary custody.

47. In considering grant of temporary custody/ visitation rights, it is settled law that welfare of the children is the paramount consideration.

48. Children cannot be deprived of affection of the non-custodial parent (NVV) by the custodial parent (SS) without adducing even *prima facie* proof, by making false allegations and raising highly exaggerated fears. I have already noted that SS had agreed for visitation rights being granted to NVV in the Court below.

49. I therefore do not find any merit in CRP No.735 of 2020. It is accordingly dismissed.

50. Coming to CRP No.360 of 2020, counsel for NVV contended that taking each child on a different day of a week and dropping them back on the same day as directed by the trial court causes hardship and it would be convenient to NVV if both children are handed over at the same time and they would be returned the next day; and it would also reduce the interaction between the parties and avoid unpleasant events. He also pointed out that during school holidays, temporary custody was not granted by the trial court of both children and there cannot be any valid objection to the same. However he stated that his client is not insisting on longer continuous temporary custody (for about a week at a time) of the elder child in this summer

vacation of 2020, but in the Dasara and Christmas vacations this year and in future as also summer vacations in April, May and June months in future both children should be allowed to stay continuously for a reasonable time with NVV.

51. I agree with the contention of counsel for NVV in this regard.

52. In my opinion, it is desirable to keep the interaction between NVV and SS to the bare minimum considering the strong negative feelings they have towards each other as is evident from the pleadings of the parties to reduce the scope of any unpleasant events. NVV going twice a week, morning and evening, to SS's house is not desirable.

53. Picking up and dropping children on different week days also would cause inconvenience to NVV and it is better that both children are handed over to him on every Saturday at 10 AM and dropped back by him the following Sunday before 10 AM. The children would also enjoy each other's company and play with each other.

54. While it is not desirable to grant temporary custody of the younger child for longer periods at this point of time in view of her very tender age, and the same can be considered after she crosses 4 years of age, there cannot be any such objection as regards the elder child (who is now more than 4 years), during the future Dasara, Christmas and Summer vacations.

55. Accordingly, IA No. 2 of 2020 in CRP No.735 of 2020 and CRP No.735 of 2020 are dismissed; and CRP No.360 of 2020 is allowed and the following directions are issued:

(i) Pending disposal of the HMOP No. 117 of 2019, SS shall hand over both the children Baby Rishita (aged between 4 to 5 years) *and* Baby Rama Sri Vidya (aged less than 3 years) at 10AM on every Saturday to NVV and he shall drop them back on next day Sunday before 10 AM.

(ii) During the school vacations of the elder child Baby Rishita starting from the coming Dasara vacation 2020, if the school vacation is 1 week, the first half shall be spent continuously by her with NVV ; if it is for 2 weeks, the first one week shall be spent by her continuously with NVV and the rest with SS; and if the vacation is 4 weeks or more, the elder child shall be with NVV continuously every alternative week, i.e, in the 1st , 3rd , 5th ,7th , 9th , 11th weeks etc. It must be ensured that she spends time atleast half the long summer vacation with NVV. SS shall arrange to handover the elder child to NVV as per the above schedule during such vacations every Saturday morning 10 am and NVV shall return her to SS the coming Saturday before 10 am. NVV is at liberty to take the elder child out of station during the vacations as well, after informing, through his counsel, the counsel for SS, but he must return the child at the end of this period.

(iii) After the younger child completes 4 years of age, she and the elder child shall spend time with NVV continuously as above during the school vacations.

(iv) NVV shall take good care and supervise the children when they are with him and keep them happy, safe and healthy.

(v) Both parties are directed not to poison the minds of the children against the other parent since it would not be in the best interest of the children.

(vi) Counsel for the parties shall advise the parties to comply with the above order scrupulously without fail.

56. It is made clear that the observations made herein are only for the disposal of these CRPs and the Court below shall decide the OP and the issues raised therein uninfluenced by any observations made in this order.

57. For the aforesaid reasons, CRP No. 735 of 2020 is dismissed and CRP.No.360 of 2020 is allowed as above.

58. As a sequel miscellaneous petitions pending if any, in these Civil Revision Petitions, shall stand closed.

M.S.RAMACHANDRA RAO, J

Date :01.06.2020

Ndr