

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY
AND
THE HON'BLE SRI JUSTICE M.LAXMAN
FAMILY COURT APPEAL No.157 OF 2018

JUDGMENT: *(Per Hon'ble Sri Justice M.Laxman)*

1. The present appeal assails the order and decree dated 02.01.2018 in G.O.P.No.119 of 2015 on the file of the Judge, Family Court, Khammam (for short, trial Court), wherein and whereby the application filed by the respondent herein for change of custody of the minor child viz., Ganji Sai Gnyanesh from the custody of petitioner herein was allowed.

2. The appellant herein is the respondent and the respondent herein is the petitioner in GOP.No.119 of 2015. For the sake of convenience, the parties hereinafter are referred to as they are arrayed before the trial Court in the said GOP.

3. The case of the petitioner is that the respondent is his own sister. The petitioner married one Ganji Durga and the minor child Ganji Sai Gnyanesh was born to them on 19.07.2008 at Khammam. 40 days after the birth of the child, the wife of the petitioner died. When the petitioner was under shock and sorrowful condition, at the instance of his old aged parents, he reluctantly agreed to handover the custody of the minor child to the respondent.

4. It is the further case of the petitioner that the respondent married to Syed Abdul Quddus. Even though the child was in the temporary custody of the respondent, the petitioner had been regularly visiting the child and he was taking care of the child. On 09.01.2015, the petitioner went to the house of the respondent to bring the minor child back for Pongal holidays, but the respondent resisted and refused to allow the custody. In the said circumstances, the petitioner filed the said GOP.

5. Contesting the GOP, the respondent admits that the child was born to the petitioner and his deceased wife. She also admits the circumstance under which the custody of the minor child was handed over to her from the petitioner. She also admits that she married to Syed Abdul Quddus. She claims that the petitioner voluntarily handed over the minor child to her for taking care, welfare and maintenance when the child was of tender age. She had been taking care of the minor child as a foster mother and the minor child was given good education and he is studying 2nd class in Narayana Foundation School, Khammam. She further claims that the child's name was changed as 'Syed Meer Rashid Ali'. She further claims that her husband is also very cooperative in looking after the welfare of the minor child and the minor child is also happy, peaceful and comfortable with her. She denied the claim of the petitioner that she refused to hand over the custody of the minor child to the

respondent. According to the respondent, there is no cause of action.

6. In the trial Court, the petitioner to support his case, examined P.Ws.1 to 3 and relied upon Exs.A-1 and A-2. The respondent, to support her case, examined herself as R.W.1, but she did not let in any documentary evidence.

7. The trial Court, after considering the evidence on record, found that the petitioner has made out case for change of custody of the minor. Accordingly, the trial Court allowed the said GOP and ordered for change of custody of the minor from the respondent to the petitioner. Hence, the present appeal by the respondent.

8. Heard both sides.

9. The only point that arises for consideration is whether the welfare of the minor is better in the custody of the petitioner or the respondent?

10. The undisputed facts are that the custody of the minor was handed over to the respondent when the wife of the petitioner died after 40 days of giving birth to the child. According to the petitioner, his parents were old aged, and on account of their pressure, and considering the tender age of the child, temporary custody of the minor was given to the respondent, who is no

other than his own sister. The respondent has claimed that the petitioner has voluntarily handed over the minor child to her and she is taking care and welfare of the minor.

11. As per Section 6 of the Hindu Adoptions and Maintenance Act, the custody of the child upto five years is legally with the mother and thereafter, father is entitled for custody. Section 11 of the said Act says that irrespective of legal rights of the parents, the paramount consideration for deciding the custody of the minor is welfare of the child. The rights of the parties are subservient to the welfare of the child.

12. In this regard, it is relevant to refer to the decision of the Apex Court in **Gaurav Nagpal v. Sumedha Nagpal**¹, wherein at para 24, it was observed as under:

“24. In *Mc Grath, Re*, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.”

13. A reading of the above decision, the welfare of the child is not to be measured in money or physical comfort, but it has a wider sense to include even moral or religious welfare of the child apart from physical well-being. It is also held that tie of

¹ Civil Appeal No.5099 of 2007, dated 19.11.2008

affection cannot be disregarded. In dealing with the welfare of the child, the Court must take into consideration the ordinary contentment, health, education, intellectual development, favourable circumstances, maintenance apart from physical comfort, moral and ethical values.

14. In case of **Rosy Jacob v. Jacob A.Chakramakkal**², the Apex Court held that right of the father as a natural guardian cannot be deprived unless it is shown that if the custody is given to the father, there is no promotion of welfare of the child.

15. Guided with the above principles, we have to examine whether the trial Court erred in giving the custody of the minor to the father. The evidence on record clearly shows that the respondent is the own sister of the petitioner. The custody was given under the circumstance that the mother of the child died after 40 days of birth of child and the child was of tender age. At that time, no woman was there to take immediate welfare of the child, since the parents of the petitioner were old aged and all other family siblings were married. The petitioner claimed that he agreed for handing over temporary custody of the child under mental pressure created by his parents on account of their old age and the circumstance of shock and sorrow due to sudden

² (1973) 1 SCC 840

demise of his wife. Whereas, the respondent set up the plea that the petitioner voluntarily gave custody of the child to her.

16. The evidence of the petitioner clearly shows that the permanent custody was never intended and it was temporary custody to meet the immediate necessity of the child on account of his tender age. The respondent has not made out any circumstance from the evidence on record to show that the father, who is the natural guardian of the child, and who is having a legal right to have the custody, was disqualified on account of any of the existing circumstance which would be detrimental to the welfare of the child. The only ground taken by the respondent is that the child is being given good education and he is comfortable with her and her husband is also very cooperative in taking care of the child.

17. As adverted to herein before, the welfare is not to be measured in money or physical comfort. The moral and physical, including the religious welfare, is also to be taken care of. The admitted case of the respondent shows that her marriage is a love marriage and she married a Muslim person and the child is projected as the child of the respondent and her husband. Unfortunately, even the name of the child was changed from Ganji Sai Gnyanesh to Syed Meer Rashid Ali. These circumstances would indicate that the child is being

grown as a Muslim instead of Hindu. This circumstance itself shows that the religious welfare of the child is not properly taken care of by the respondent. Further, there is no evidence of disqualification of the petitioner to hold the custody and no circumstances are brought that if the change of custody was given to the natural father, there is no promotion of welfare of the minor in the hands of the petitioner.

18. The Apex Court in **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari**³ held as follows:

“34. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.”

19. In the said circumstances, the trial Court has rightly appreciated the evidence and rightly held that the petitioner is

³ (2019) 7 SCC 42

entitled for change of custody. Hence, such findings do not require any interference.

20. In the result, the appeal is dismissed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

A.RAJASHEKER REDDY, J

M.LAXMAN, J

Date: 23.03.2022
TJMR