

(2013) 10 AP CK 0080

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 5210 of 2012

Kotholla Komuraiah and Kotholla Kondavva

APPELLANT

Vs

Kotholla @ Bikkanuri @ Gorlakadi Kanaka Laxmi

RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2014) 1 ALD 362 : (2014) 1 ALT 138

Hon'ble Judges : A.V. Sesha Sai, J

Bench : Single Bench

Advocate : K. Govind, for the Appellant; D. Pramada, for the Respondent

Final Decision : Allowed

Judgement

A.V. Sesha Sai, J.—This Civil Revision Petition, under Article 227 of the Constitution of India, is filed assailing the order dated 3.10.2012 passed by the Court of VI Additional District Judge, Medak at Siddipet in I.A. No. 340 of 2012 in O.P. No. 120 of 2012. By virtue of the said order, the learned Judge allowed the said I.A., appointing the respondent herein as guardian of the ward Master G. Anil Kumar, till the disposal of the main O.P. The facts and circumstances leading to the filing of the present revision are as under:

2. The respondent herein filed O.P. No. 120 of 2012 on the file of VI Additional District Judge, Medak at Siddipet against the petitioners herein under Sections 6, 7, 8, 10, 11, 12, 48 and 49 of the Guardians and Wards Act, 1890 (hereinafter called "the Act") seeking the following relief:

To order for appointing the petitioner as guardian and order for the custody of ward namely Master Anil Kumar S/o Narsimulu, aged 06 years, presently residing at Pamulaparathi village to the petitioner by directing the respondents to hand over the ward to the petitioner with costs.

3. Along with the said Original Petition, the respondent herein filed I.A. No. 340 of 2012 u/s 12 of the Act, seeking the following relief:

To direct the respondents 1 and 2 namely (1) Kotholla Komuraiah S/o Narsaiah, age 80 years, R/o Pamulaparthi village, Revenue mandal, Vargal (2) Kotholla Kondawa W/o Komuraiah, age 70 years, R/o Pamulaparthi village, Revenue mandal Vargal who are having the custody of the minor shall produce the minor before this Court on at the Hon"ble Court pleases to specify and appoint the petitioner as guardian for the minor for interim protection of the petitioner.

4. The affidavit filed in support of I.A. No. 340 of 2012 states that the petitioner/respondent herein is the widow of one Kotholla Narsimulu and their marriage took place on 22.2.2003 and out of their wedlock, they begot a son namely Gorlakadi Anil Kumar on 19.12.2006, who is hereinafter referred to as ward; Kotholla Narsimulu passed away on 9.2.2007 and after his death, his parents drove her out of their house and since then, she has been residing with her parents at Theegul village; the respondents (petitioners herein) are the parents of her deceased husband; at about 12 months back, she married one Bikkanuri Raju of Itikyala village and residing with him; she got admitted the ward (Master G. Anil Kumar) at Gayathri Vidyalayam, Theegul on 21.6.2010 and in the month of January 2011, just one week prior to Sankranthi festival, the respondents (petitioners herein) came and took away the ward without any notice and kept him with them and now they made the Boy as Shepard to look after their flock of the sheep; the respondents herein (petitioners herein) became old and unable to do work to maintain themselves and they are having just half acre of land at Pamulaparthi village and they took away the Boy with their selfish and ill-motive to get the services of the ward; her father Gorlakadi Mallaiah and mother have affectionately maintained and looked after the ward at Theegul and prepared to provide good education by admitting him in English Medium School i.e. Gayathri Vidyalaya at Theegul and if the ward is allowed to remain in the custody of the paternal grand parents, the future of the ward would be ruined; her present husband is prepared to take the ward in adoption and has agreed to bear expenses to meet the future education for a bright future of the ward and the paternal grand parents are illiterates and cannot maintain the ward decently and the paramount consideration is the welfare of the ward rather than other circumstances; in spite of number of requests, paternal grand parents bluntly refused to handover the ward and on 7.1.2012 and 25.5.2012, she went to their house and demanded the grand parents to give custody, but the same was refused; the paternal grand parents have no right to act as parents, nor they have right to keep the ward in their custody.

Pleading so, the respondent herein sought her appointment as guardian for the minor pending O.P.

5. The respondents in I.A. No. 340 of 2012 who are the paternal grand parents of the ward and who are the petitioners herein filed a counter affidavit, denying the allegations that they drove away the respondent herein from the house after the death of their son and that they had taken away the ward from Gayathri Vidyalayam, Theegul in January 2011 without the knowledge of the mother of

the ward and that they made the ward as Shepard and that they took away the ward for selfish ends and ill-motive to get the services from him and that the future of the ward will be ruined. In the said counter affidavit, the petitioners herein also stated that their age is wrongly shown as 80 and 70 years; after the death of their son, the respondent herein did not bother to observe customs and tradition and the respondent herein and her parents, within a month after the death, voluntarily opted to sever the relationship with the petitioners herein and she left Pamulaparthy by taking Rs. 22,000/- by executing a document on 3.4.2007, wherein she categorically admitted to give custody of the boy to them in the event of her contacting second marriage and the same was signed by village elders; after the alliance was fixed with Raju, the respondent herein and her parents sent a word to take away the boy and accordingly they went to Theegul and brought the boy to their village Pamulaparthi during Sankranti days of 2011 and they got the child admitted in Arunodaya English Medium School at Pamulaparthi, which has Bus facility also; the boy is regularly attending the school and best education is provided to him; they are having land and the same is transferred in the name of boy through registered sale deed vide document No. 6638 of 2007 executed by the petitioner and they are also having some other land and house besides herd of 150 sheep with good income; they are less than 60 years of age, energetic and capable of working hard with all enthusiasm for another two decades and that the petitioner/respondent herein is living with her new husband and there is no question of giving the boy in adoption and they cannot live without the boy and are seeing in him their son and are prepared to do anything or everything for the welfare of the boy and are determined to bring him up in most civilized manner and have urge to provide good education for the boy and strong desire to provide all opportunities and the boy is very happy with them and he enjoys lot in their company; the boy was fully infected with allergy and skin disease, particularly arm pits, hands and private parts before he was brought to their place and they got him treated by Dr. Naresh Babu; petitioner/respondent herein received half of the amount of Rs. 2,00,000/- when the land in Sy. No. 147 admeasuring extent of Ac. 1.00 was sold in favour of Pitla Ramulu of Pamulaparthy during the lifetime of their son.

Pleading in the above said manner, the respondents/petitioners herein prayed for dismissal of I.A. No. 340 of 2012.

6. In order to substantiate her case, the petitioner in I.A. No. 340 of 2012/respondent herein filed Exs.P1 to P6 and the respondents/petitioners herein filed Exs.R1 to R11 and no oral evidence was adduced. The learned Judge passed an order dated 3.10.2012 allowing I.A. No. 340 of 2012. The operative portion of the said order reads as under:

In the result, petition is allowed. The petitioner is appointed as guardian of the ward Master G. Anil Kumar till the disposal of the main O.P. The respondents are directed to handover the custody of the child on or before 17.10.2012; otherwise, the petitioner can enforce the order. The respondents are permitted to

visit the child during the week ends and the petitioner shall not object for the same.

7. Felt aggrieved by the said order dated 3.10.2012, the present revision has been filed, principally urging the following grounds:

1. The Court below erred in granting interim custody though not sought pending the main O.P. for appointment of Guardian, unless the respondent is appointed as guardian she is not entitled for interim custody.

2. The Court below ought to have seen that the respondent lost her right over the child the moment she got remarried. Granting interim custody is not in the interest of child, mere natural mother does not entail her to become the guardian.

3. The Court below ought to have seen that the dominant factor for consideration of the court is the welfare of the child. The moral and ethical welfare of the child must weigh with the court.

4. The Court below ought to have seen that petitioners as grand parents entitled the custody of the children and there are no circumstances to the contrary which disentitles the petitioners depriving of the custody.

5. The Court below ought to have seen that the fact that moment Hindu Mother got remarried disentitles her interim custody being not the member of the fan welfare and interest of the child. The respondent having abandoned the child immediately after remarriage also cannot claim custody of child.

6. The Court below ought to have seen that the petitioners prima facie have a paramount right to the custody of child being the child belongs to their clan and the respondent is unfit for custody being remarried and other circumstances such as her second husband has already divorced two wives and every possibility is there that hey may not give love and affection to the child as that of petitioners. If the transplantation is made at this age of the child, it will badly affect the child specially when the mother is remarried and the child is born to her in the new marriage.

7. The Court below ought to have seen that the petitioners are entitled for custody of the child being the natural grand parents, whose responsibility is to look the welfare and interest of the child and they are discharging their duty beset in the interest of child. The court ought not to have given custody without taking will of the child.

8. The Court below erred in granting custody of child to the respondent and not considering the fact that the custody of minor child cannot be decided on the basis of legal rights of the respondent. The custody of child has to be decided on the sole and predominant criterion of what would be the interest and welfare of the minor.

9. The Court below ought to have seen that the child is prosecuting the studies in Arunodaya School at Pamulaparthu. There is no education facility at Itikyal where

the respondent lives, more over the distance between Itikyal and Pamulaparthi is about 15 k.m.

10. The Court below ought not to have granted interim custody though not prayed. By granting interim custody to the respondent there will be disturbance to the education and it is not desirable to grant interim custody during academic year.

8. Reiterating the contents of the counter affidavit filed in support of I.A. No. 340 of 2012 and the grounds of the present revision, it is contended by Sri K. Govind, learned counsel for petitioners herein that the predominant factor which needs consideration in the matters of this nature is welfare, interest and the wish of the child and that the grand parents are entitled for the custody of the child and that there are absolutely no circumstances prevailing which disentitle them from acting as guardians of the ward. It is further contended by the learned counsel for the petitioners that the respondent contacted second marriage and as per Ex.R1 agreement, the respondent cannot claim the custody of the ward and it is further contended that the petitioners herein are giving good education to the child and that the petitioners prima facie are having paramount right as the ward belongs to their clan and since the respondent contacted second marriage, she is unfit for custody and that the second husband of the respondent herein is a divorcee of two marriages and he cannot give love and affection to the child and if there is any change of custody of the child, it would badly affect the child. It is further contended that the petitioners herein are natural grand parents and are entitled for custody of the child and that the custody of minor child cannot be decided on the basis of legal rights and the interest and welfare of the minor would be predominant criteria for deciding the custody and that the child is prosecuting the studies at Pamulaparthi in Arunodaya School and there are no educational facilities in Itikyal village where the respondent is residing with her husband and the distance between Itikyal and Pamulaparthi is about 15 k.m. and if interim custody of the ward is given to the respondent herein, it would disturb the education of the ward. Contending so, the learned counsel for the petitioner has requested this Court to set aside the impugned order.

9. In support of his contentions and pleadings, the learned counsel for petitioners placed reliance on the judgments in Smt. Anjali Kapoor Vs. Rajiv Bajaj, , Vishnu and Others Vs. Jaya, Nil Ratan Kundu and Another Vs. Abhijit Kundu, , Shyamrao Maroti Korwate Vs. Deepak Kisanrao Tekam, Mausami Moitra Ganguli Vs. Jayant Ganguli, and Athar Hussain Vs. Syed Siraj Ahmed and Others,

10. Per contra, it is contended by Smt. D. Pramada, learned counsel for respondent that the Court below is perfectly justified in passing the order impugned in the present revision and being the natural guardian of the minor child, the respondent is entitled for the custody of the child u/s 6 of the Hindu Minority and Guardianship Act, 1956. It is further contended by the learned counsel for respondent that the second marriage of the respondent would not disentitle the respondent from having the custody of the minor child. It is further

submitted that since the learned Judge passed the impugned order by meticulously considering and appreciating the entire material available on record, the present revision deserves to be dismissed. It is also contended that the petitioners herein are old aged and they cannot look after the welfare of the child and they cannot give good education to the ward. It is also contended that the respondent has no chance of further children also. In support of the case of the respondent, the learned counsel placed reliance on the judgments in *Deram Seethamahalakshmi alias Dabir Latha and others v. Kala Seethamahalakshamma* 1982 (2) ALT 392 and *Lekha Vs. P. Anil Kumar*,

11. Now the point for consideration of this Court in the present revision is whether the Court below is justified in granting interim custody to the respondent herein in view of the facts and circumstances of the case and having regard to the welfare, interest and wish of the ward?

12. The legislations, which are germane and relevant for the purpose of resolving the controversy in the present case are "The Guardians and Wards Act, 1890" and "The Hindu Minority and Guardianship Act, 1956". The object and intention of these two legislations is to safeguard the interest and welfare of the minor children who are the future of our country. Unless their rights and future are well safeguarded, our country cannot have good citizens. Section 4(1), (2), (3) and Sections 6, 7, 8, 12 and 17 of the Guardians and Wards Act, 1890 read as under:

4. Definitions

In this Act, unless there is something repugnant in the subject or context,-

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(2) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property;

(3) "ward" means a minor for whose person or property or both there is a guardian;

6. Saving of power to appoint in other cases

In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.

7. Power of the court to make order as to guardianship

(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

8. Persons entitled to apply for order

An order shall not be made under the last foregoing section except on the application of-

- (a) the person desirous of being, or claiming to be, the guardian of the minor; or
- (b) any relative or friend of the minor; or
- (c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property; or
- (d) the Collector having authority with respect to the class to which the minor belongs.

12. Power to make interlocutory order for production of minor and interim protection of person and property

(1) The court may direct that the person, if any, having the custody of the minor, shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this sections shall authorise

- (a) the court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or
- (b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

17. Matters to be considered by the court in appointing guardian

(1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of

the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference, the court may consider that preference.

(4) (Omitted by Act 3 of 1951.)

(5) The court shall not appoint or declare any person to be a guardian against his will.

13. Sections 2, 4(1)(a) and (b), 6, 7 and 13 of Hindu Minority and Guardianship Act, 1956 read as under:

2. Act to be supplemental to Act 8 of 1890.-

The provisions of this Act shall be in addition to and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890).

4. Definitions.-

In this Act, -

(a) "minor" means a person who has not completed the age of eighteen years;

(b) "major" means a person having the care of the person of a minor or of his property or of both his person and property, and includes -

(i) a natural guardian,

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

6. Natural guardians of a Hindu minor.-

The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl -the

mother, and after her, the father;

(c) in the case of a married girl - the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

7. Natural guardianship of adopted son.-

The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

13. Welfare of minor to be paramount consideration.-

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

14. A comprehensive reading of the above mentioned provisions of law would make it manifest that the paramount consideration is the welfare of the minor child. Sub-sections (2) of Section 13 of the Hindu Minority and Guardianship Act, 1956 in a clear and unequivocal terms mandates that the custody of the minor child cannot be claimed as a matter of right under the provisions of the statute in the event of court coming to a conclusion that such natural guardianship will not be for the welfare of the minor.

15. In Smt. Anjali Kapoor Vs. Rajiv Bajaj, , the Hon''ble Apex Court at paragraph 21 of the said judgment held as follows:

Ordinarily, under the Guardians and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child.

16. In Vishnu and others v. Jaya (2 supra), the Hon''ble Apex Court at

paragraphs 6 and 7 held as follows:

6. The respondent admitted that the two children were living with their father continuously for the past seven years. She further admitted that during this period she had no access to the children or even a brief meeting with them.

7. Both the children were very clear and firm that they want to live with their father and they do not want to go with their mother. The elder son was not even able to recall the name of the mother.

17. In *Nil Ratan Kundu and another v. Abhijit Kundu* (3 supra), the Hon"ble Apex Court at paragraph 39, 42 and 52 held as follows:

39. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

42. In *Rosy Jacob Vs. Jacob A. Chakramakkal*, his Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship. The Court further observed that merely because there is no defect in his personal care and his attachment for his children-which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae*

jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

18. In *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam* (4 supra), the Hon"ble Apex Court at paragraph 10 held as follows:

If we analyze the above provisions, one thing is clear that in a matter of custody of a minor child, the paramount consideration is the "welfare of the minor" and not rights of the parents or relatives under a statute which are in force. The word "welfare" used in Section 13 of the Act 1956 has to be construed literally and must be taken in its widest sense.

19. In *Mausami Moitra Ganguli v. Jayanti Ganguli* (5 supra), the Hon"ble Apex Court at paragraph 14 held as under:

The principles of law in relation to the custody of a minor child are well settled. It is trite 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. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. 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 and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case 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 to 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.

20. In *Athar Hussain v. Syed Siraj Ahmed* (6 supra), the Hon"ble Apex Court at paragraph 32 held as under:

Section 12 of the Act empowers courts to "make such order for the temporary

custody and protection of the person or property of the minor as it thinks proper". In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

21. The above cited judgments manifestly show that the paramount consideration is the welfare and interest of the child.

22. In *Deram Seethamahalakshmi alias Dabir Latha and others v. Kala Seethamahalakshmmamma* (7 supra) and *Lekha v. P. Anil Kumar* (8 supra), this Court and the Hon"ble Apex Court held that remarriage of the mother cannot be a ground for denying the custody of the child to the mother and the paramount consideration should be given to the welfare of the child.

23. In *Gaytri Bajaj Vs. Jiten Bhalla*, the Hon"ble Apex Court at paragraphs 6, 8 and 14 held as under:

6. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.

8. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant - wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to "continue to live with their father and they do not want to go with their mother". This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children. However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse.

14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or 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 the 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 concerned parent 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 emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

24. As per the principle laid down in the above mentioned judgments, the desire of the ward and the congenial atmosphere for proper upbringing of the child play a prominent role while deciding the issue of custody of ward. At this juncture, it is relevant to refer to the judgment of the Hon"ble Supreme Court in Nil Ratan Kundu v. Abhijit Kundu (3 supra), wherein the Hon"ble Apex Court held that while deciding the aspect of custody of the minor child, the Court should keep in mind the relevant statute and the rights flowing from them and such cases cannot be decided solely by interpreting legal provisions and since it is a human problem, it is required to be solved with a human touch.

25. It would be very much evident from the principles laid down in the above referred judgments that the paramount consideration which is required to be kept in mind while deciding the issue of custody of the minor child is the welfare, interest and desire of the child. There is no rule of law that the ward above 5 years should always be kept in the custody of father or mother. It is the duty of the Court to take into account the facts and circumstances of each case. In the instant case, it is the allegation of the petitioners herein that the second husband of the respondent herein has brought another child from his relatives" side and is bringing up the child. The petitioners have also filed two third party affidavits, one by Jadala Kumar and another by Mukire Poshamma, stating that the respondent and her husband have taken a child by enclosing a photograph and the same are placed on record. The respondent has also filed a counter denying the said allegations. During the course of proceedings, this Court asked the petitioners and the respondent to be present before the Court and also requested the petitioners to produce the minor child and accordingly they appeared in the Chambers of this Court and this Court ascertained the views and pleas of the parties. In the present case, the minor boy has been in the custody of grand parents, even as per the mother, since Sankranthi 2011 and the boy is studying II class in Arunodaya School at Pamulaparthi i.e. the place where the petitioners are residing. Now the boy is nearly 6 years and 10 months old and he appears to be intelligent and is free in responding to the questions posed by the Court. Since the present application is only an interlocutory application pending the main O.P., this Court does not propose to record any findings on the responses given by the petitioners, respondent and the minor child on the questions posed. Admittedly, the respondent herein is not staying at Theegul, where her parents are residing and where she got the boy admitted earlier and she is staying at Itikyal along with her husband. Now the minor boy is studying at Pamulaparthi

in Arunodaya School where his grand parents are residing. Now we are in the middle of the academic year. In the event of giving custody to the respondent at this stage, the education of the boy will be disturbed. As per the wish of the minor boy, this Court deems it proper to continue the minor boy in the custody of his paternal grand parents who are the petitioners herein. In view of the above reasons and the principles laid down in the above referred judgments, this Court deems it appropriate to set aside the order impugned in the present revision. For the foregoing reasons, this Court deems it apposite to allow the present revision and accordingly, the C.R.P. is allowed, setting aside the order dated 3.10.2012 passed by the Court of VI Additional District Judge, Medak at Siddipet in I.A. No. 340 of 2012 in O.P. No. 120 of 2012. Keeping in view the delicate feelings of the mother, this Court deems it appropriate to permit the respondent herein to visit the child during week ends and for which, there shall be no objection from the petitioners. It is needless to observe that the Court below shall dispose of the main O.P. as expeditiously as possible, without being influenced by any of the observations made either in the impugned order or in the present order. As a sequel, the miscellaneous petitions, if any, stand closed. There shall be no order as to costs.