
(1982) 10 AP CK 0002

In the Andhra Pradesh High Court

Case No : Letter Patent Appeal No. 90 of 1982

Mohammed Jameel Ahmed Ansari

APPELLANT

Vs

Ishrath Sajeeda and Others

RESPONDENT

Date of Decision : 05-10-1982

Acts Referred:

Guardians and Wards Act, 1890 — Section 17, 7

Citation : AIR 1983 AP 106

Hon'ble Judges : Rama Rao, J;Raghuvir, J

Bench : Division Bench

Advocate : C. Narasimha Chari, for the Appellant; P. Sithapathi, for the Respondent

Judgement

Raghuvir, J.—This appeal arises under the Guardians and Wards Act No. 8 of 1890 as to the custody of a child born on October 1, 1970. His name is Mohd. Aquil Ahmed Ansari alias suheel in 1982 he is studying in VIth Class in the city of Hyderabad in standard public school at Kilwat at Lad Bazar. The parents of the child were married on Jan, 8, 1970 and were divorced on December. 28, 1970. The wife married again on August. 30, 1974 to one jawood Ali and left for Saudi Arabia on November. 29, 1976 she has three issues from the second marriage: the husband also re-married on December. 11, 1975 and has another son by the second wife.

2. The father of the child by application on June 12, 1973 sought the custody of his child, principally, on the ground that he is the legal guardian. In the application, he alleged his father, Mohd. Barkat Ahmed Ansari, mother Mukdoo Bee. His second wife, Aliya all are willing to take the custody of the child that among his three brothers Mohd. Khaleel Ahmed Ansari, sister, Zubaida Begum, the two in addition, are willing to look after the child. It is alleged, the mother left the child to her parents. Between the parties, an agreement on December. 28 1970 was referred wherein the parents inter alia, agreed, the mother will not claim "Maher" claim maintenance for the child till "sharai" period, known as "

Hizna" which prescribes the age of seven years. The child it was agreed will be entrusted to the father before the expiry of " sharai" period if she so desired. In the petition, it is further alleged the mother was studying B.Sc in women's college at Kothi (even after birth of child) and as student, from morning to the evening, moves about and cannot look after the child. He sent his friends, relatives. Neighbours and all his attempts failed. Finally the father issued a lawyer's notice on May 29, 1973 in which it was alleged the father was not allowed to see the child. The mother "not even accepted the clothes, fruits. Chocolates and biscuits brought for the minor but bluntly refused". In reply notice on June 24, 1973, it was stated, the child was 2 years and 8 months, therefore, cannot live without mother, cannot be looked after properly except by the mother. The mother resisted the petition in the Court she averred, for the first time, in June 1973 a paltry sum of Rs. 25 was sent; except that the child was neglected for three years by the father. Even this amount was sent with the ulterior motive to substantiate the illegal claims over the minor. It was added the father is an L.D.C. in Unani Dispensary at Narayanguda, therefore not a person to be entrusted with the child.

3. The Additional chief Judge, city civil Court, Hyderabad dismissed the application July 26, 1978 holding merely because the petitioner happens to be the father he must not necessarily be given custody of the minor. On appeal, a learned single Judge of this Court considered the circumstances; interviewed the child in chambers and found the child was willing to stay with maternal grandparents. It was found, from the birth of the child, till the date of Judgment (January. 25, 1982), for eleven years, the child grew up at grand-parents' house. That the father never took interest in the child for eleven years. That from Saudi Arabia. The mother is sending money for the upkeep of the boy, that the mother's father is a retired Tahsildar; owns buildings in Hyderabad and lands. His two other sons are in Saudi Arabia and they are sending monies to him for maintenance therefore the maternal grandfather was in a position to take good care of the child. The learned single Judge observed, the father did not take any interest in the minor. The father has married again and has also a child. It is true that his present wife also averred in the Court that she would take care of the minor. But that was before the child was born. There is no knowing as to how she would treat the minor when he is sent to the petitioner-appellant's house and it would psychologically affect him if he is asked to go and stay with the petitioner-appellant. That would completely transplant him from the present surroundings and it may tell upon his mental health. The order of the single Judge is assailed in the Letters patent appeal.

4. The learned counsel for the appellant argued that the father is the legal guardian and is not held "unfit" so long, it is not so held, the father is fit person; the father should have the custody of the child. The personal law of Muslims in s. 352 of the principles of Mohammadan law, 16th Edition, was referred. We see from the order under appeal. The learned single Judge did not advert to the evidence, therefore, we think it proper to consider the evidence.

5. The father Moh. Jameel Ahmed Ansari deposed to have demanded the custody of the child on several occasions. He visited the house of his father-in-law to see the child, but was not allowed to see. When his father wanted to see the child, he was not allowed to enter the house. Though his father and his mother-in-law are brother and sister. His father reported to have been refused to see the child and asked him to take legal steps. Thereafter, the witnesses, sent his elder sister, brother-in-law to inquire the welfare of the child. They were similarly treated; not allowed to see the child. Thereafter he sent his friend. Mr. Kishen a lecturer in Hindi arts college. It is the evidence of the lecturer that he knows the father ever since 1964. He attended his marriage. In 1973. At the request of the father visited the house of the wife's parents along with another friend Mohd. Osman to see the child. His request was refused. He was asked to convey, for all intents, the father to forget the child. Thereafter, the father sent vizarath Ali pasha, a neighbour and a friend to the maternal grand-parents of the child to settle the matter. Pasha informed the witness, grand-parents have informed he may forget him the child. The witness deposed, prior to May 29, 1973 he sent Rs. 30 for the use of child through one Asraf jahangir and in the year 1971 through his father and elder brother but the money was refused. He states his second wife is an employee. She is working in the ECIL. When the child was ill in 1972. That fact the father was not made aware of a lawyer's notice on May 29, 1973 was sent. On date of evidence the witness was working in Nizam's general Hospital as a Lower Division Clerk Hospital as a Lower Division Clerk on Rs. 500 per month. Now he is a practising advocate in the city courts. It was suggested to the father, the child will be entrusted to his sister, Zubaida Begum by him who is issueless. The suggestion was denied.

6. Aliya, the second wife of the father, deposed on November. 9, 1977, "I have no issue till now. If the minor is brought I am prepared to look after him as my own child". It is her evidence, she was informed of the conditions of the "khula" agreement she agreed to take the custody of the child even before her marriage was settled.

7. The child's paternal grand-father, Haji Mohd. Barkath Ahmed Ansari deposed that his daughter-in-law has divorced her husband she is in Saudi Arabia and got three children from the second husband. One among the three died and two are living with them. The paternal grand-parents of the child are willing to look after the minor child. They complain, the child is kept away from them. Haji Mohd. Barkath Ahmed Ansari stated from January. 1975 he has been residing in Hyderabad permanently.

8. Syed Shabir Ali the father of Jaweer ali, deposed his son is now married to the mother of the child. It is his evidence, the mother did not bring the child to his house and added, there is no possibility of his son returning to India at present as he is employed there.

9. The child's maternal grand-father, Mohd. Khairath Ahmed Ansari Deposed, till the date of his evidence the mother of the child remitted Rs. 1,700 for the

maintenance of the minor that he himself has got an income of Rs, 1,500 per month and is looking after the child dutifully. He denied that Kishen Zaheer Ahmed Osman and some other friends of the father requested him to show the minor at any time and he has refused. Biliquis Fatima, the maternal grandmother deposed the intention of her son-in-law is not to give the child to Zaheda Begum his elder sister, who has no issues. That her daughter is not working at Jeddah. Shakeela Begum, Abdul Rahman and Wajira Begum, Abdul Rahman and Wajira Begum were examined, but their evidence is not of much relevance.

10. The evidence shows, ever since the birth, the child was in the custody of mother. She in her turn, entrusted the custody to her parents or perhaps, after she was married or when she left for Saudi Arabia in 1976.

11. In the face of the evidence the question is what is the approach of the Court? This aspect was considered by this Court in the decisions collected in *L. Chandran Vs. Venkatalakshmi and Another*, . The old cases are collected in *Reginald Danieal Vs. Sarojam and Another*, where it is observed that only if the father is unfit to be the guardian, can the question of the welfare of the child come into consideration by the courts. It is observed "in the first class of cases, it must be established that any Act or conduct of the husband or father renders him unfit for guardianship: the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations". In *(Kode) Atchayya Vs. Kosaraju Narahari*, on the same aspect, it is observed:

"when the guardian of the person of a ward applied for the custody of the ward he is only seeking the Court to help him to discharge the duty cast on him by law, with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of its guardian and retained in the custody of the person against whom the application is made, the father has therefore a paramount right of the custody of his children of which he cannot be deprived unless it is clearly shown that he is unfit to be their guardian".

The cases of the Court in *M. Basavalingam v. Swarajyalakshmi*, AIR 1957 A P 704; *Narasima Rao v. Manikyamma* (168) 1 ALT 132; *Vegesina Venkata Narasaiah Vs. Chintalapati Peddi Raju*, were referred in case *L. Chandran Vs. Venkatalakshmi and Another*, and it is held:

"..... we do not therefore consider that it would be in the interests of the minor child to be handed over from the care and custody of the active and loving maternal grand-mother to the passive and silent paternal parents. We have seen the child in this Court. It looks not only very healthy but also very happy with its maternal grand-mother. The maternal grand-mother appears to us to be rearing up the child for all these months with great love and affection".

It is in this regard the case in *Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar*

Kapoor, and the observations made therein and in regard to a parsi family in the case of Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, were cited.

12. The observations in case L. Chandran Vs. Venkatalakshmi and Another, were heavily relied on by the learned counsel for the maternal grand-parents to contend that if father has the right the Court can ignore the rights of the father and hold the interests of the minor are better served, if the child is allowed to remain in the custody of the maternal grand-parents.

13. We have understood the law on this aspect to be in the following terms; That children are normally expected in the custody of the legal guardians. Under Muslim law, after the age of 7 years, it is the father who is entitled to the custody of the child, unless the Court holds on evidence, the father is not a fit person or that it is not conducive to the health whether physical or mental of the child. Ordinarily, the children are to be with the father.

14. In the instant case, it is the father who is seeking the child. The child is above seven years. The trial court in the instant case. Has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father. The learned single Judge observed for eleven years, the child was not taken care of cannot be sustained for the reason that till the child attained seven years, the child was to remain with the mother because she was the legal guardian. Even in the "Khula" agreement it was understood between the parties, if for some reason, within the sharai" period she was to deliver the child, the father was willing to take the child. When he was married, he informed his second wife that it was her duty to maintain the child. The second wife agreed. She was willing. She swore to that fact in the bos. The father made attempts sent his friends, his brother-in-law, his sister his father to see the child. All of them in the evidence state they were not received; they were not allowed inside the house to see the child. The contention that he has not maintained the child properly or that has not cared to maintain the child is unsustainable for it was agreed, till the child attains seven years of age, the mother will not claim any maintenance. In 1973 the father sent money; that was refused. His friends informed him that the grand-parents communicated them, he may treat for intents, the son does not exist for him. There is no credible evidence to hold, if the child is entrusted to his custody, he is likely to hand over the child to his elder sister. The grand-parents from the paternal side, both are anxious to have the child. In the face of this evidence when the father is not stated as not a fit person. What is the course to be adopted? The learned single Judge had not adverted to evidence; did not hold the father is not a fit person. We have considered the evidence to see whether anything was suggested to show the father was not a fit person. It is seen, he is a practising Advocate. His parents are living with him at Hyderabad since 1975 and they are willing to have the custody of the child, whether in the counter or in reply notice on May 29, 1973 or on June 24, 1973 nothing is stated as to the fact that the father is not a fit person. In the face of such a record, we are unable to hold, the welfare of the

child is not served better if the child is entrusted to the father. The courts will have to give proper regard to the circumstances that he is willing to take the child. He has examined his second wife: he has examined his parents who are willing to take the child. There is thus nothing to hold the father is not a fit person or it is not conducive to the safety and health of the child to entrust the child.

15. In the decision in Audiappa Pillai Vs. Nallendran Pillai, , the following observations are apposite:

"The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children. The learned vakil for the appellant relies on Bindo v. Shamlal, ILR(1907) All 210 which seems to lay down that if the father marries again, he ought to be deprived of his legal right of guardianship. The learned Judges refer only to S. 17 and say that the welfare of the girls is the primary consideration. There is no doubt that that would be the consideration which would influence the Court ultimately: at the same time, it ought not to be forgotten that the legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of her near relations on the other. In the first class of cases, it must be established that any Act or conduct of the husband or father renders him unfit for guardianship the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty the same sanctity does not attach to the rights claimed by the other relations....."

16. We are of the view that on the evidence since nothing is brought out against the father to show he is unfit we hold, he is entitled to the custody of the child. We allow the appeal direct the child be delivered to the father. The appeal is allowed No costs.

17. The learned counsel for the respondents orally sought leave to the Supreme Court. The question raised in the appeal is a question of fact. No substantial question of law arises in the appeal which requires to be considered by the Supreme Court of India leave. Therefore, is refused.

18. Appeal allowed.