

(2011) 12 AP CK 0085

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1681 of 2011

Mohd. Haleem @ Sajid and another

APPELLANT

Vs

Dr. Shafiuddin Ali Ahmed and another

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Guardians and Wards Act, 1890 — Section 12, 7

Citation : (2011) 12 AP CK 0085

Hon'ble Judges : R. Subhash Reddy, J

Bench : Single Bench

Advocate : Mirza Safiulla Baig, for the Appellant; P. Keshava Rao, for the Respondent

Final Decision : Allowed

Judgement

R. Subhash Reddy

1. This civil revision petition, under Article 227 of the Constitution of India, is filed by the respondents in O.P. No. 131 of 2010, questioning the order dated 22.03.2011 passed, in I.A. No. 211 of 2010 in, by the learned III Additional District Judge, Warangal.

2. The aforesaid O.P. is filed under the provisions of the Guardians and Wards Act, 1890 (for short "the Act") for grant of custody of minor ward - baby Shaika Ali Ahmed. Pending adjudication of the claim in the said O.P., they filed I.A. No. 211 of 2010 u/s 12 of the Act for grant of interim custody of the minor ward.

3. The said I.A. is filed with the allegations which read as under:

In the year 2004, the 1st respondent had to go to East Africa on his job assignment and the 2nd respondent was staying at Kazipet along with her in-laws. They were blessed with twins and as the Doctor advised to keep them separately to avoid infections, and as the petitioners are not having children, they were given custody of their minor ward temporarily. Later, they shifted to

Hyderabad and used to visit their daughter once in a week and also used to bring her to Hyderabad during festivals and other occasions. It is alleged that from 2005 onwards, petitioners are claiming that the minor baby is their child, but at their instance, petitioners have executed a document dated 16.03.2005 admitting that the stay of the minor ward with them is temporary and they will hand over to the respondents whenever they request. Pleading that in spite of their request from the year 2005 onwards, petitioners are avoiding to hand over their minor ward to them and as they have no legal right on her for her custody, respondents have moved the I.A. for interim custody and also for visiting rights. It is alleged by the respondents that petitioners are not bestowing proper care to their daughter; as such they prayed for interim custody and also for visiting rights.

4. Petitioners herein, opposing the I.A., have filed counter. While denying the allegations of the respondents, it is the case of the petitioners that the minor ward was born on 25.04.2001 and on 02.05.2001, i.e. on the 9th day after birth, custody was given to them with complete willingness and consent and they have been looking after the child with care; she is aged about 9 years and she is not willing to join the respondents-parents.

5. In the aforesaid I.A., no evidence was let in by the parties, but the learned III Additional District Judge, Warangal, by the impugned order, by recording a finding that paramount consideration for grant of custody is the welfare of the minor and after enquiring with the minor ward, who has bluntly refused to go with the respondents, has rejected the claim of the respondents for custody of the minor during pendency of the proceedings. But, the I.A. was partly allowed permitting the respondents to have the visiting rights on the child on every 1st and 3rd Sunday between 3.00 to 7.00 p.m., at the house of the petitioners or at any place at Hanamkonda agreed by both parties, till the disposal of the O.P.

6. In this revision petition, it is contended by Sri Mirza Safiulla Baig, the learned counsel for petitioners, that the court below has committed serious error by permitting the respondents to have visiting rights. As the minor ward is not willing to spare any time even for visiting rights and in spite of her blunt refusal when she was examined, in spite of the same, the impugned order is passed. It is further contended that in view of the various steps taken by the respondents before filing of the I.A., if visiting rights are allowed, as ordered by the court below, it will affect the studies as well as the overall welfare of the child.

7. In support of his arguments, the learned counsel for petitioners has relied on a decision of the Hon"ble Supreme Court in Smt. Anjali Kapoor Vs. Rajiv Baijal,

8. On the other hand, it is contended by Sri P. Keshava Rao, the learned counsel for respondents that as it is not in dispute that respondents are the natural parents, they are entitled for custody of the minor ward and also for visiting rights; as such, there is no illegality in the order under challenge wherein visiting rights were granted to them to visit the minor on every 1st and 3rd Sunday. It is

further contended that as the minor ward is staying with the petitioners for the last several years, to maintain relationship and contact with her, such visiting rights are essential and therefore the same are granted by the court below. The learned counsel, in support of his contentions, relied on the following decisions.

Sripur Paper Mills Ltd. and Others Vs. The Govt. of A.P. and Others, Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi, Mohd. Zafarullah Khan v. Yasmeen 1988 (2) ALT 708 Baddi Reddi Bulliraju Vs. Kedam Surya Rao,

9. Having heard the learned counsel for the parties, I have perused the order under challenge, the affidavit filed in support of the I.A. and also the counter filed there against.

10. It is to be noticed that the minor ward was born on 25.04.2001. Whereas it is the case of the respondents that they left the child with the petitioners when the 1st respondent was proceeding to East Africa on an assignment, on the other hand, it is the case of the petitioners that respondents were blessed with twins; the child was handed over to them on the 9th day after birth, i.e. on 02.05.2001 with complete willingness and consent; they have admitted the child in a good school in Warangal and are taking good care of her. It is stated that the minor ward is not willing to spare any time with respondents.

11. In normal course, when visiting rights are given to natural parents, this court is slow in interfering with such orders passed during pendency of the main proceedings. The learned III Additional District Judge had enquired the wishes of the child. Further, when it was represented that the minor ward is not willing to spare any time with the respondents, even for visiting, on 13.09.2011, I personally enquired the wishes of the child in the presence of the parties and their counsels. When the child was asked whether she was willing to spend some time with the respondents, she started crying instantaneously and bluntly refused to go with the respondents. However, it is the case of the respondents that she was tutored not to go with the respondents; as such she is reluctant to join the respondents. But, the conduct of the child, when I examined her on 13.09.2011, would go to show that she has developed some sort of fear and is unwilling to spare any time with the respondents. It appears, respondents themselves are responsible for developing such attitude on the part of the child, by taking steps against the petitioners and the child. As evident from the additional material placed before this court and the averments made in the counter filed by the petitioners to the I.A., it is clear that respondents have not proceeded fairly to claim custody of the minor ward at initial stages. The 1st respondent herein, who is the natural father of the child, has filed CrI.M.P. No. 9618 of 2008 before the XI Additional Chief Metropolitan Magistrate, Secunderabad alleging that the petitioners herein are demanding a ransom of Rs. 1 crore to hand over the child by kidnapping her and obtained a search warrant. It appears, in pursuance of the order passed by the learned Magistrate, search was carried out in the house of the petitioners and as the minor ward was not found, the Police went to the School of the minor ward, took her and produced

before the learned Magistrate. Ultimately, after examining the minor ward and also her grandparents, the learned Magistrate has passed the following order:

Police, Trimulgherry produced the baby by name Sheeka Ali Ahmed at 5.00 PM. On examination of both the persons and also baby, the baby has informed before the Court she want to go along with Mohd. Haleem, and wants to live with them. The grandfather and grandmother were also present and stated that they have given the baby for adoption. Hence it shows there is no criminal act for kidnap of the child. If at all there is any dispute with regard to the ownership of the child both parties are directed to approach the concerned court as this court has no jurisdiction. Hence baby was returned back to the respondent. Hence petition is closed.

12. Against the said order, respondents have filed CrI.R.C. No. 289 of 2009 before this court, which was dismissed by a learned single Judge, by order dated 18.03.2009 confirming the order passed by the XI Addl. Chief Metropolitan Magistrate, Secunderabad. Further, alleging that the minor ward was detained illegally, respondents filed W.P. No. 6409 of 2009 under Article 226 of the Constitution of India seeking a Writ of Habeas Corpus for production of the minor ward. The same was dismissed by a Division Bench of this court by order dated 03.06.2009.

13. It is not in dispute that the natural parents have preferential right for the custody of the child and in normal course they cannot be denied visiting rights of the child, but, the claim for visiting rights and custody are to be examined keeping in mind the welfare of the child, which is the paramount consideration. Such view is taken by the Hon''ble Supreme Court in number of decisions wherein it is stated that ward's welfare is to be taken as paramount consideration while considering applications for grant of interim custody and visiting rights. At this juncture, I refer to the judgment of the Supreme Court in the case of Anjali Kapoor (1 supra) wherein, while allowing the maternal grandmother of the ward to retain the custody of the child, the Hon''ble Supreme Court has held as under:

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.

14. Further, in the judgment in the case of Vishnu Priya and others (2 supra), relied on by the learned counsel for respondents, when the minor children refused to go with the father, the Supreme Court has held that forcibly putting children in the custody of the mother would traumatize them and do no good to

anybody. In such circumstances, it is held that better course would be to allow the mother to make initial contact with the children and build her relationship with them and gradually restore her position as mother. In the case of Kirtikumar Maheshankar Joshi (3 supra) when there was a claim for grant of custody of minor children by father as well as maternal uncle, the Hon"ble Supreme Court has held that though the father, being a natural guardian, has a preferential right to the custody, but, in the interest and welfare of the children, directed to hand over custody of the children to their maternal uncle instead of their father. Further, in the case of Mohd. Zafarullah Khan (4 supra), a learned single Judge of this court has indicated the factors to be taken into account in considering the question of granting interim custody of minors pending consideration of applications u/s 7 of the Act. From the said judgment, it is clear that, ultimately, the welfare of the child is the paramount consideration for the purpose of giving interim custody and also visiting rights. In this case, it is to be noticed that when wishes of the minor child were enquired into even by this court, she has bluntly refused to go with the respondents. Even with regard to grant of visiting rights, the same are not absolute and paramount consideration is to be given to the welfare of the child. The word "welfare" has no precise meaning. While considering the welfare of the child, various aspects such as wellbeing, happiness of the child and the surroundings in which the child is being brought up and also the education of the child are to be examined having regard to the facts and circumstances of each case. In normal course, natural parents cannot be deprived of visiting rights of their child. But, in the instant case, the approach of the respondents to have the custody of the minor ward is something different from that of a normal parents" approach. The child was born on 25.04.2001. It is the case of the respondents that they left the child with the petitioners in the year 2004. But, the same is denied specifically by the petitioners and it is the case of the petitioners that on the 9th day after the birth, the minor ward was given to them and since then she is with them. Practically, the child has grown with the petitioners and is treating them as natural parents. Instead of seeking custody of their child through the competent court of law, it is clear that respondents made a futile attempt to have the custody forcibly, by making false allegations of kidnap and demand of money by the petitioners and obtained search warrant. Pursuant to such warrant, not only search was made in the house of the petitioners, but also in the School of the minor ward and she was taken by the Police from the School to the learned Magistrate. It appears, after enquiring the wishes of the child and her grandparents, petition was closed. Thereafter, the said order was also confirmed in Criminal Revision Case filed by the respondents referred hereinabove. Even thereafter, when the respondents filed a Writ of Habeas Corpus before this court, the same too ended in dismissal. In view of such steps taken against the petitioners and the minor ward, it appears, a sort of fear is developed in her mind and thereby she is even refusing to spare any time with them. Such attitude of the child was clearly discernible when she was examined by this court. When her wishes were enquired, she started crying inconsolably. Therefore, it cannot be said that she was tutored by

the petitioners herein not to go with the respondents. For the aforesaid reasons, I am of the considered view that allowing visiting rights of the minor ward by the respondents, as ordered by the court below, will definitely have an adverse impact on the welfare of the minor ward and therefore I hold that the respondents are not entitled for any visiting rights of the minor ward unless a congenial atmosphere is developed.

15. For the foregoing reasons, civil revision petition is allowed. Order dated 22.03.2011 passed, in I.A. No. 211 of 2010 in, by the learned III Additional District Judge, Warangal, is set aside. Consequently, I.A. No. 211 of 2010 stands dismissed. No order as to costs.