
(2010) 06 AP CK 0060

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1034 of 2010

Mrs. Rehana Begum and Another

APPELLANT

Vs

Mrs. Masarathunnisa and Another

RESPONDENT

Date of Decision : 14-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100

Guardians and Wards Act, 1890 — Section 17, 19, 25, 25(1), 7

Citation : (2010) 06 AP CK 0060

Hon'ble Judges : Vilas V. Afzulpurkar, J

Bench : Single Bench

Advocate : Mir Masood Khan, for the Appellant; V. Srinivas, for the Respondent

Final Decision : Dismissed

Judgement

Vilas V. Afzulpurkar, J.—This revision is directed against the interlocutory order passed by the Judge, Additional Family Court, City Civil Court at Hyderabad, dated 22-01-2010 in I.A. No. 196 of 2009 in O.P. No. 1247 of 2009.

2. The said O.P. together with interlocutory application was filed by respondents 1 and 2 herein seeking relief as follows:

This Hon'ble Court may be pleased to declare and appoint the petitioners who are the natural parents as the guardians and direct to the respondents to handed over the minor child into the custody of the petitioners of the person of the minors by name Azhar Ali Khan @ Anas Ali Khan aged 4 months and pass any such other orders.

3. The interlocutory application No. 196 of 2009 was moved by the respondents herein against the petitioners herein for interim custody of their aforesaid son till disposal of the main petition. Under the impugned order the Family Court has ordered the interim custody in favour of the respondents herein and aggrieved thereby the present revision petition is filed by the petitioners herein.

4. The facts which lead to filing of the aforesaid Guardianship O.P. are as follows:

a) The respondents herein are husband and wife and are natural and biological parents of the minor child. It is alleged that the respondents begot 3 sons after they were married on 24-02-2003. They were blessed with this minor child i.e., third son on 04-05-2009. The first respondent - mother was however suffering from high Blood pressure (B.P.) and other medical problems during the prenatal and postnatal period and as she had undergone two caesarean operations as well as family planning operation she was advised three months complete bed rest and was also advised that it would be appropriate to entrust the care of the newly born infant to any member of the family as the first respondent was unable to produce milk required for the child.

b) The mother-in-law of the first respondent i.e., the mother of the second respondent was already taking care of the two sons of the respondents and on account to the old age and as she has her own health problems, expressed inability to take care of the newly born infant and advised the respondents to entrust the responsibility to the petitioners herein who are none other than the sister-in-law and brother of the second respondent herein.

c) Accordingly, the first petitioner accepted to look after and take the responsibility of the infant. It is also stated that the petitioners are well educated who are issueless and were also interested in raising the infant. After recovering from the health problems the first respondent - natural mother was advised by the Doctors that now she is physically eligible to take care of the responsibility of the infant and accordingly, the respondents requested the petitioners to return the infant. But it is alleged that the petitioners kept on postponing the same and ultimately refused to part with the infant leading to the petitioners approaching the Additional Family Court, Hyderabad by filing O.P. No. 1040/2009 for relief of injunction against the respondents and obtained temporary injunction in I.A. No. 23/2009 filed therein whereby they secured an interim injunction against the respondents from interfering with the custody of the child. The respondents there upon approached the Additional Family Court seeking vacation of injunction and also filed the present O.P. No. 1247 of 2009 together with an application I.A. No. 196 of 2009 for temporary custody.

5. It is stated that after hearing both sides I.A. No. 23 of 2009 in O.P. No. 1040 of 2009 was dismissed by the Family Court by vacating the interim injunction order earlier granted in favour of the petitioners herein. Subsequently, the petitioners withdrew O.P. No. 1040 of 2009 by filing a memo before the Family Court. The present impugned order is thereafter passed by the Family Court granting temporary custody to the respondents herein. It is in these circumstances that the present Civil Revision Petition was moved by the petitioners inter alia on the ground that neither there was any notice in the I.A. No. 196 of 2009 in O.P. No. 1247 of 2009 and the petitioners were neither heard nor had opportunity of filing counter or engaging counsel.

6. This Court by order dated 08-04-2010 admitted the Civil Revision Petition and while ordering notice, granted interim stay of the impugned order as well. The respondents have now moved CRP M.P. No. 2462 of 2010 seeking vacation of the interim order and when the said vacate petition came up both the learned Counsel agreed and argued the Civil Revision Petition itself, which is being disposed of now.

7. Sri Mir Masood Khan, learned Counsel for the petitioners has very strenuously and ably argued that the order of the Court below granting interim custody to the respondents is passed without keeping in mind the paramount consideration as to the welfare of the minor and is contrary to the mandate under Sections 7 and 25 of the Guardians and Wards Act, 1890 (hereinafter in short referred to as "the Act" for the purpose of convenience). It is also contended that the petitioners are closely related to the infant as they are paternal uncle and aunt of the minor and they being childless they have reared the minor child during the ill-health and difficulties of the first respondent - mother. It is also contended that the minor child was voluntarily handed over to the custody of the petitioners for the purpose of rearing the minor child during his infancy and that both the petitioners are well educated and are financially well-off and well capable of taking care of all the needs of minor child. The learned Counsel therefore, submitted that the irrespective of the legal rights of the parties, the Family Court ought to have kept in mind the paramount consideration with respect to welfare of the minor child.

8. The learned Counsel has placed reliance upon Tarun Ranjan Majumdar and Anr. v. Siddhartha Datta AIR 1991 Calcutta 76 wherein the Division Bench of the Calcutta High Court considered the provisions of Section 25 of the Act and held that the power to return the ward under the said provision is available only on satisfaction of the Court that it is for welfare of the ward. It was further held that even after the child is in the custody of one who has no legal right and the welfare of the child is reasonably looked after, the legal guardian cannot claim an order of return or recovery merely on the basis of his legal right.

9. Learned Counsel also placed reliance upon Rosy Jacob Vs. Jacob A. Chakramakkal, for the proposition that whether under the Act or any other Act controlling consideration was the welfare of the child and not the right of their parents. He has also placed strong reliance on Mohammad Shafi v. Shamin Banoo AIR 1979 Bombay 156 in support of the above propositions.

10. Per contra Mr. V. Srinivas, learned Counsel for the respondent contended that admittedly, the respondents are the biological and natural parents of the minor and in good faith; the care of the minor was entrusted to the second respondent's brother and his wife. Now the first respondent is medically assessed as capable of taking care of the minor child; there was no other impediment whatsoever for the respondents to have custody of the minor child. He submitted that the petitioners do not have any legal right whatsoever to hold on to the custody of the minor and the respondents being natural and biological

parents have exclusive right to the custody over any other person. The Court below having vacated the injunction obtained by the petitioner in their O.P. No. 1040 of 2009 has rightly considered the interlocutory application and has rightly permitted the interim custody to the respondents. He also placed strong reliance upon the Division Bench decision of this Court in Mohammed Shaheryar Khan Vs. Mrs. Humaira Khan, wherein this Court considered Sections 17 and 25 of the Act and though the welfare of the minor is of paramount consideration the natural mother was held entitled to the custody. He has also placed strong reliance upon the decision of the Bombay High Court in Abdul Kadir Karim Shaikh, Zakiyab Abdul Kadir Shaikh v. Zaveed Pharukh 2005 MHLJ (1) 924 for the proposition that even if the natural parents are financially not well-off as against the persons denying the custody, the said ground could not be relevant as the law recognizes the just right of the natural parents. A decision of Calcutta High Court in the matter of Lovejoy Patell and another⁶ was relied upon by the Bombay High Court.

11. In the light of these rival contentions the point for consideration is: Whether the impugned order is justified u/s 25 of the Act?

12. Point:- During the hearing of this Civil Revision Petition though both the learned Counsel have placed reliance on several decisions as referred to above and though various submissions were made on the factual aspects as well, it is to be remembered that the order impugned is an interim order passed by the Family Court and the main O.P. as such is yet to be heard and decided.

13. Several allegations and counter allegations are made in the pleadings available on record including an allegation that the respondents herein are attempted to sell away the child to a third party. I feel it appropriate to leave all these matters for the Family Court for its consideration after appreciating the evidence, which will be let in by the parties in the main O.P. At this stage, therefore, it is not possible to record any positive finding nor it is desirable to make any observation on the factual questions argued, as it should not prejudice either of the parties during the hearing of the main O.P. It is stated that the petitioners have also filed O.P. No. 101 of 2010 seeking permanent custody of the minor child and it is, therefore, apparent that the present O.P. No. 1247 of 2009 filed by the respondents and the O.P. No. 101 of 2010 filed by the petitioners will have to be heard and disposed of by the Family Court after recording evidence, if any, that the parties would lead. The observations and findings recorded herein are therefore, merely prima facie and for the purpose of disposal of this revision petition and it is made clear that the same shall not influence the Family Court while dealing with the main O.Ps., in accordance with law.

14. The facts in brief as stated above are not in controversy as much as the petitioners are in the capacity of foster parents of the minor child whereas the respondents are biological and natural parents of the minor child. It is also not in dispute that the child was voluntarily entrusted to the care and custody of the petitioners on account medical and other problems of the first respondent -

mother. There is no adverse allegation against the petitioners with respect to the care they have taken for the minor child from its infancy till now and the child is said to be about 10 months old. In the background of these facts the question of interim custody has to be considered in the light of Sections 7 and 25 of the Act together keeping in view the mandate of Section 19 of the Act. For the sake of convenience Sections 7, 19 and 25 of the Act are reads as follows:

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.

19. Guardian not to be appointed by the Court in certain cases: Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court to Wards, or to appoint or declare a guardian of the person-

(a) of a minor who is a married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person; or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor ; or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

25. Title of guardian to custody of ward - (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

15. It would be noticed that u/s 19 of the Act the Court is not authorized to appoint or declare any person as guardian of the proper custody of the Ward if the father of the minor is alive and is not unfit to be the guardian of the minor. As the pleadings now stand there is no adverse allegation against the respondents and except stating that the petitioners are well educated and

financially well-off, the respondents are said to be neither well educated nor financially well-off; nothing else is alleged against the respondents. It would therefore have to be presumed that the natural father and mother are not unfit to have the care and custody of the minor child.

16. The decision first cited was a case arising between competing claims of the father on the one hand and mother-in-law/grand parents on the other. The child involved in that case was about 11 months and was in the custody of the maternal grand parents against whom there was no adverse allegation and irrespective of the right of father as legal guardian u/s 25(1) of the Act; the Court was satisfied that welfare of the child was protected by remaining in the custody of the maternal grand parents. However, the Court had given liberty to the father to initiate appropriate proceedings for the custody of the child at the later stage by making out a case there for to the satisfaction of the Court.

17. The decision second cited was also a case where the competing claims between the wife and the husband for the custody of minor was considered by the Supreme Court. It is well settled that when both the natural parents are competing for such custodial rights the considerations would be entirely different as to with whom the paramount welfare of the child would be protected.

18. The decision of the Bombay High Court however, does not support the learned Counsel for the petitioner as it turned upon the interpretation of Section 19 of the Act which restricts the power of the Court to appoint a guardian when father of the minor is alive, unless he is found to be unfit to be guardian of the minor.

19. On the facts of the present case neither of the said decision would assist the learned Counsel for the petitioner. It is however, significant to notice the following observations of the Supreme Court in the decision second cited above:

In our opinion, the dominant consideration in making orders u/s 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children.

20. Similar observation in the decision of the Bombay High Court as extracted below would also be relevant:

The principle on which the Common Law Court acted was that the parents, as against other persons, generally had an absolute right to the custody of the children unless he or she had forfeited it by some gross misconduct. This absolute right of the parents was recognized because such a right was necessary for preserving the natural order and course of the family life which is the

foundation of society and the Court of Common Law did not interfere with parents except upon grave occasions or for reasons of urgency. The law recognized the natural rights of the parents because it recognized the natural duties of the parents. It is the natural affection of the parents for the child which is the security for the performance of the duties towards the child and the performance of the duties alone qualifies the parents to claim the absolute right. It is the natural affection which makes them the natural guardians. The rights of the parents are sacred rights and their duties are also sacred duties. Cruelty and gross immorality render the parents unfit to perform the sacred duties and therefore on proof of such misconduct they cannot be allowed to claim the sacred rights. Parents guilty of gross misconduct become unnatural parents and cease to be natural guardians and when they cease to be natural guardians they cannot legitimately claim the rights of a natural guardian. This is the principle on which, I apprehended, the Court of Common Law in England acted. There was, however, another jurisdiction which has been exercised by the Court of Chancery from time immemorial. It was what has been called the paternal jurisdiction derived from the prerogative of the Crown as *parens patriae*. Lord Cottenham L.C., observed in the case in (1847) 2 ph. 247 as follows:

I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the great seal.

21. Keeping in mind the above legal position, which was also noticed by this Court in decision 4th cited if we examine the impugned order the Family Court it is evident that it has taken into consideration the fact that the respondents herein are the natural parents and legally as well as morally a child cannot be separated from his natural mother. The Family Court, therefore, was *prima facie* of the opinion that the respondents herein are entitled to interim custody. I am therefore, unable to find any error in the impugned order warranting interference by this Court.

22. So far as the other contention of the learned Counsel for the petitioner with regard to the want of notice and opportunity to filing counter is concerned, the impugned order of the Court below itself records in paragraph No. 3 as follows:

Respondents mainly contended that they filed O.P.1040/09 for custody of the minor child by name Azahar Ali Khan therefore the pleadings of the main petition O.P.1040/09 may read as part and parcel of the counter.

23. The learned Counsel also states that had there been a notice, these petitioners would have filed a detailed counter and would have got an opportunity of making submissions but they are deprived of the same and as such impugned order wrongly records as if the respondents have been heard. The said

contention is liable to be rejected in view of the settled legal position that the statement of proceedings recorded in the judgment cannot be contradicted by the statements at the bar by affidavit or other evidence. The Supreme Court in Guruvayur Devaswom Managing Commit. and Another Vs. C.K. Rajan and Others, has recorded with approval the earlier decision of the Supreme Court in the State of Maharastra v. Ramdas Shrinivas Nayak it was held that:

The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

24. In view of the above, therefore, it is not open for the learned Counsel for the petitioner to contradict what is recorded in paragraph No. 3 of the impugned order and obviously the petitioners were heard before the passing of the impugned order.

25. In view of the conclusions above, the Civil Revision Petition is liable to be dismissed and is accordingly dismissed. However, custody granted to the respondents under the impugned order shall be subject to final orders of the Family Court in O.Ps. referred to above. There shall be no order as to costs.