

(2019) 02 KAR CK 0006

In the Karnataka High Court

Case No : Writ Petition No. 1372 Of 2019 (GM-RES)

Nidhi Luharuwalla

APPELLANT

Vs

State Of Karnataka And Ors

RESPONDENT

Date of Decision : 07-02-2019

Acts Referred:

Guardians and Wards Act, 1890 — Section 7, 25
Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 2(14), 3, 29(2),
37(1)(d)
Constitution of India, 1950 — Article 15, 39(e), 39(f), 45, 47

Citation : (2019) 02 KAR CK 0006

Hon'ble Judges : Alok Aradhe, J

Bench : Single Bench

Advocate : Lakshmy Iyengar, Varun Vedachala, Y.D. Harsha, S. Manju, Rajev Pandit, G.M. Srinivasa

Final Decision : Disposed Off

Judgement

1. Smt.Lakshmy Iyengar, Senior counsel along with Sri.Varun Vedachala, learned counsel for the petitioner.

Sri.Y.D.Harsha, learned Additional Government Advocate for respondent No.1
Sri.S.Manju, learned counsel for the respondent No.2. Sri.Rajeev Pandit, party in person. Sri.G.M.Srinivasa Reddy, learned counsel for respondent No.3.

2. The writ petition is admitted for hearing. With consent of the parties, the same is heard finally.

3. On admitted facts, the question of law which arises for consideration in this writ petition is whether during the pendency of the proceeding, seeking custody of the minor child under the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Guardians Act' for short) pending before the Family Court, the Child Welfare Committee-1 (hereinafter referred to as 'the Committee' for short) constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015

(hereinafter referred to as 'the Act' for short), can in purported exercise of powers under Section 37(1)(d) of the Act, handover custody of a minor to either of the parent who are parties to the proceeding before the Family Court.

4. Before proceeding to deal with the issue involved in this petition, it is apposite to deal with the application for impleadment filed by one Mr.Rajiv Pandit who claims to be a child right activist. When a query was put to Mr.Pandit who appeared in person and is resident of Bhopal as to whether he is in any manner related either to the parent or to the child, the answer was in negative. Admittedly, aforesaid Mr.Pandit is neither a member of the Committee nor does hold any office under the provisions of the Act and Rules framed thereunder. Thus, the proposed intervener appears to have no locus in the matter, as by stretch of imagination, he can be said to be an aggrieved person. None of his legal rights are either involved nor have been infringed in any manner by this proceeding which arises out of an order passed by the Committee under the Act. In the application filed by aforesaid Mr.Pandit, it is stated that he is a public spirited citizen and since last more than 3½ years working as child right activist across India. However, aforesaid Mr.Pandit has not annexed any documents in support of his activities as a child right activist. It is pertinent to mention here that in paragraph 3 of the application, the aforesaid Mr.Pandit has made averments against the petitioner with regard to her character and the affidavit in support of the application merely states that contents of the application are true and correct to his knowledge and belief. The impleading applicant has not disclosed the source of information and has made reckless averments in the application. Therefore, in the considered opinion of this Court, he is an officious intervener and appears to be a busy body. Therefore, the impleading application is sans substance. Accordingly, the same is dismissed.

5. Admittedly, the petitioner and respondent No.3 were married on 20.11.1999. Out of the wedlock, a male child namely, Dev was born on 22.02.2007. Admittedly, the petitioner has filed a petition under Sections 7 and 25 of the Guardians Act before the Principal Judge, Family Court, Bengaluru, on or about 01.07.2017 in which she has sought the custody of the minor son namely, Dev. In the aforesaid proceeding, on 27.04.2018, the Family Court granted visitation right to respondent No.3 for summer vacation. However, despite there being any order, the petitioner in order to ensure that the child namely Dev is not deprived of his father's affection, handed over the custody of the child to respondent No.3 for a period from 27.12.2018 to 01.01.2019. It appears that on the day when the petitioner handed over the custody of the child to respondent No.3, he made a complaint to the Committee in which it was allegedly stated that the child is scared of the petitioner and he feels safe with respondent No.3.

6. Thereupon, the Committee initiated the proceedings on 27.12.2018 and on 03.01.2019 the petitioner was also summoned. The Committee in the proceeding dated 03.01.2019 recorded the fact that though it does not have jurisdiction to decide custody matter, yet when the child seeks care and protection under the

Act with a complaint in writing, the Committee is compelled to hear the child and provide appropriate temporary relief as a precautionary measure in the interest of the child. In the presence of petitioner and respondent No.3, and taking into account the statement made by the child, the respondent No.3 was given the custody of the child. In the aforesaid factual background, the petitioner has approached this Court.

7. Learned Senior counsel for the petitioner submits that the Committee does not have any power to give custody of the child, taking it from one of the parent and giving it to another parent. In support of her submissions, learned Senior counsel for the petitioner has placed reliance on the decisions in the cases of 'PRIYA YADAV Vs. STATE OF M.P. AND ORS.' 2017(1) JLJ 324, 'Dr.SHARMISTHA KAR PUROKAYASTHA Vs. STATE OF WEST BENGAL & ORS.' IN W.P.No.21904 (2) of 2010 (Calcutta High Court), 'SEVA CHAKKARA SAMAJAM Vs. THE CHAIRMAN, CHILD WELFARE COMMITTEE AND ORS.' (2012) 5 LW 293 AND 'SANUMOL, C.C. AND ORS. Vs. SUNNY', P.C.' ILR 2015 (3) KERALA 1072.

It is further submitted that the instant writ petition be disposed of with a direction to the Family Court to hand over the custody of the child to the petitioner and to decide the issue with regard to the custody of the child. On the other hand, learned counsel for respondent No.3 submitted that the child may be interviewed by this Court and thereafter, appropriate orders may be passed. Attention of this Court has also been invited to Section 29(2) of the Act with regard to the powers of the Committee. It is urged that the respondent No.3 has also filed an application seeking custody of the child before the Family Court and the Family Court be directed to decide the issue with regard to custody of the child.

8. Learned counsel for respondent No.2 namely the Committee has invited the attention of this Court to Sections 2(14), 3 and 37(1)(d) of the Act and has submitted that the Committee has the power to place the child with fit person for a long term or temporary care. It is further submitted that the impugned order has been passed on the basis of the meticulous appreciation of material available on record and the same does not suffer from any infirmity. In support of her submissions, learned counsel for the respondent No.2 has placed reliance on the decision of the Hon'ble Supreme Court in the case of 'RE: EXPLOITATION OF CHILDREN IN ORPHANAGES IN THE STATE OF TAMIL NADU Vs. UNION OF INDIA AND OTHERS' in W.P. (Criminal) No.102/2007.

9. I have considered the submissions made by the learned counsel for the parties and perused the record. From the statement of objections and reasons appended to the Act, it is evident that Article 15 of the Constitution of India confers on the State powers to make special provisions for children. Articles 39(e), 39(f), 45 and 47 make the State responsible for ensuring that all needs of children are met and their basic human rights are protected. The United Nations Convention on the Rights of Children ratified by India, on 11.12.1992 requires the State parties

to undertake all appropriate measures with regard to the welfare of the child. Before proceeding further, it is apposite to take note of the relevant provisions of the Act namely Sections 2(14), 29(2) and 37(1)(d) of the Act. Section 2(14) defines the expression 'child in need of care and protection', which reads as under:

"14. "child in need of care and protection" means a child-

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or ...

29(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

37(1)(d) placement of the child with fit person for long term or temporary care."

10. In the backdrop of aforesaid statutory provision, facts of the case in hand may be examined. In the instant case, on the basis of the complaint made by the child, the Committee formed an opinion that the child is in need of care and protection. Thereafter, the Committee had to pass an order under Section 37(1) (d) of the Act by making an enquiry that the child before the Committee is a child in need of care and protection and may on consideration of social investigation report submitted by the Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature, could have placed the child with a fit person. However, the powers conferred on the Committee has to be exercised by the Committee in respect of the proceeding initiated under the Act only. It is well settled in law that when a statute gives a right and also provides for a forum for adjudication of the rights, the remedy has to be sought only under the provisions of that Act and the law does not permit any other Court, Tribunal, Authority or Forum to usurp the jurisdiction on any ground whatsoever. (See 'JAGMITTAR SAIN BHAGAT AND OTHERS Vs.

136. The Committee cannot be permitted usurp the jurisdiction of the competent Court exercising powers under the provisions of the Guardians Act. Admittedly, the proceeding under the Guardians Act is pending where the issue with regard to the custody of the minor is pending adjudication. In the instant case, the Committee, on the basis of the communication sent by the child to the Committee, has taken the custody from the petitioner and has handed over the custody of the child to respondent No.3. Under the provisions of the Guardians Act, the Court is empowered to make an order under Section 7 of the aforesaid Act. The said jurisdiction conferred by law cannot be taken away by the Committee which is a statutory body. In the fact situation of the case, even if the Committee was of the opinion that the child was in need of care and protection, it ought to have referred the matter for consideration before the Family Court where the issue with regard to the custody of the minor was pending consideration. The usurpation of jurisdiction by the Committee in a matter which is sub-judice before the Court of competent jurisdiction under the Guardians Act cannot be sustained in the eye of law. The impugned order passed by the Committee dated 03.01.2019 is quashed and set aside. It is pertinent to mention here that even in the absence of any order with regard to the custody to respondent No.3, the petitioner in good faith had handed over the custody of the child to the respondent No.3. However, respondent No.3 on expiry of the vacation ought to have handed over the custody of the minor to the petitioner. However, apparently at the instance of respondent No.3, the minor child has made a complaint to the Committee and thereupon the impugned order has been passed which has already been quashed by this Court. Therefore, the respondent No.3 is directed to handover the custody of the minor namely Dev to the petitioner who is the mother of the child and with whom the minor child was residing prior to 21.12.2018 on or before 11.02.2019 before the Family Court. So far as submission made by learned counsel for respondent No.3 that this Court should interview the child and take a decision is concerned, suffice it to say that since the Family Court is in the seisin of the matter, therefore, it is not necessary for this Court to interview the child as the scope of the present proceeding is confined to examination of the order passed by the Committee. The Family Court is directed to decide the issue of custody of the minor child expeditiously preferably within a period of 3 months from the date of receipt of certified copy of the order passed today. Needless to state that the parties shall co-operate with the Family Court for early decision of the proceeding.

Accordingly, the petition is disposed of.