

C.S. Reddy Vs. Yamuna Reddy

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Court : Karnataka

Decided On : Sep-20-1974

Reported in : AIR1975Kant134; ILR1975KAR537; 1975(1)KarLJ306

Judge : C. Honniah and ;M.S. Nesargi, JJ.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 6 and 13; [Guardians and Wards Act, 1890](#) - Sections 7, 17, 17(1), 17(2) and 25; [Hindu Marriage Act, 1955](#) - Sections 9

Appeal No. : Misc. First Appeal No. 474 of 1972

Appellant : C.S. Reddy

Respondent : Yamuna Reddy

Advocate for Def. : M.R. Janardhana, Adv.

Advocate for Pet/Ap. : B. Krishna Rao, Adv. for ;B.K. Ramachandra Rao, Adv.

Judgement :

Honniah, J.

1. This is an appeal from the decision of the District Judge, Bangalore, on petition presented by the father of two minors under Section 6 of the Hindu Minority and Guardianship Act 1956, hereinafter referred to as the H. M. G. Act, read with

Section 7 of the Guardians and Wards Act 1890, hereinafter referred to as the G. and W. Act for custody of the minors.

2. The parents of the minors were married in Feb. 1962. After the marriage the petitioner and respondent resided together in Bangalore. The girl by name Usha was born in November 1962. The respondent left Bangalore in December 1963 to Madras where her mother was living for the delivery of the second child, In December 1964 the boy by name Udaya was born at Madras. Thereafter, the respondent did not return to Bangalore to reside with the petitioner.

3. The petitioner says that the respondent did not show inclination to return with the children, to Bangalore and she put forward lame and untenable excuses for not returning. During respondent's stay in Madras, he was sending from time to time money and presents to children. He waited for a considerable time for the respondent to return, with children but she did not. Therefore, he went to Madras and requested her to go with him but she refused.

4. Having waited sufficiently long, he made an application in the court of the Civil Judge, Bangalore under Section 9 of the [Hindu Marriage Act, 1955](#) for restitution of conjugal right against the respondent. They arrived at a compromise under which the respondent agreed to live with the petitioner at Bangalore. The petition was dismissed. Respondent came to Bangalore in October 1967 along with her mother and children and lived with the petitioner for some time. The petitioner says that the mother of the respondent started picking up quarrels and be-fan to instigate the respondent and the children against him. In spite of the troubles given by the respondent and her mother, he was looking after their comforts as desired by them. In spite of this the respondent clandestinely left the house in December 1967 with the children. The petitioner says that the atmosphere in which the children are being brought up is not in the best interest of the minors.

5. The respondent in her lengthy statement says that the petitioner began to ill-treat her. After the birth of the 1st child he did not take care of her and the child. In spite of the hostile behaviour of the petitioner she came and lived with him and being unable to bear the cruelty both physical and mental, she left to Madras. According to her, during her short stay with the petitioner, he did not show any

kind of affection to the children and even ill-treated them. She has made some allegations against the petitioner touching his character. Ultimately she says that the atmosphere in the house of the petitioner is not congenial for the children and their interest will suffer.

6. The petitioner and the respondent have fallen out. They have made allegations and counter-allegations against each other. They are not living together now. We hope wisdom will dawn and Doth square up their differences and live amicably. Therefore, it is not necessary to go into their differences in these proceedings.

7. The petitioner belongs to a respectable family. He is doing business in Electrical goods and motor spare parts. He is a representative of MICO and Lucas Electrical Tractor Service. He has Head Office in Bangalore and four branches, one at Anantapur, another at Bangalore city, one at Mysore and another at Hassan. He is said to be a successful businessman. He appears to have wide social contact. Similarly, the respondent comes from a respectable family. Her father was a big landlord and an influential man. The respondent is a Director in P. J. Saswatha Nidhi, She has independent income. She owns a house worth rupees two lakhs or so, in Madras. Her sister is a law graduate and employed. She is unmarried. The mother of the respondent has a house in which the respondent and her sister are living. Her mother herself has some income. The girl is living with the mother practically since she was born, except for a brief period when the respondent lived with the petitioner for some time till she left Bangalore for confinement of the second child and thereafter for some days in pursuance of a compromise between them.

8. The children are being educated at Madras in one of the best schools. They are being looked after, as one expects, by the mother. There are no allegations touching the character of the mother. The fact is that from the beginning the children have been in the care and custody of the mother and the father now asks to have them returned to him. We have to consider what will be the best interests of the minors.

9. Under Section 6 of the H. M. G. Act, the natural guardian of a Hindu minor in respect of the minor's person as well as in respect of the Minor's property is the

father and after him is the mother. But the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. Normally, the natural guardian is entitled to the custody of the minor. In deciding the question of custody, the welfare of the minor is the paramount consideration. This is in conformity with Section 18 of the H. M. G. Act. Section 7 of the G. and W. Act lays down the same universal rule. Section 17(1) of that Act further provides that in appointing or declaring the guardian of a minor, the court shall, subject to the provisions of that 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.

10. Sub-section (2) of Section 17 of the G. and W. Act also lays down the factors which the court will have to take into account while considering the welfare of the minor. If a natural guardian neglects his duties or acts against the interest of the minor, the court may appoint a legal guardian; such appointment of legal guardian supersedes the natural guardian, as provided by the G. and W. Act.

11. Again in Section 25 of the G. and W. Act it is said that the , court may order the return of the ward to the lawful custody of the guardian only if it thinks it necessary in the interest of the minor. Therefore, in deciding the question of custody, the welfare of the minor is the paramount consideration.

12. In *Mt. Mansa Devi v. Makhar*, AIR 1938 Pesh. 207, Middleton I. C. said that the word 'welfare' meant both material and spiritual welfare of the minor. In *Ram Prasad v. District Judge of Gorakhpur*, (AIR 1920 All 80), the Allahabad High Court held that the word 'welfare' meant not only material but 'moral' welfare as well. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the minor must be considered as well as its well being. Nor can the ties of affection be disregarded.

13. The real test is as has been laid down in *Re Gulbai and Lilbai*, (1908) ILR 32 Bom 50:--

'In making orders appointing guardians for the persons of minors the most paramount consideration for the Judge ought to be - what order under the circumstances of the case would be best for securing the welfare and happiness of

the minors? With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive?.'

14. The dominant factor for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money or by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being (In re Mc Grath (Infants) (1893) 1 Ch D 143).

15. The principal considerations laid down in Section 17 of the G. and W. Act to secure the welfare of the minor are:--(a) age, (b) sex, (c) religion, (d) character and capacity of the proposed guardian (e) his nearness of kin to the minor, (f) the wishes, if any, of the deceased parent, (g) any existing or previous relations of the pro-posed guardian with the minor or his property and (h) if the minor is old enough to form an intelligent preference, that preference. The application of these tests casts an arduous duty on the Court. But as has been repeatedly pointed out amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act.

16. In this case, the girl though aged 12 years and the boy aged 10 years now, need care, protection and guidance of the mother, who has practically brought them up from their birth. She is the most interested person. We may not be misunderstood when we say that the mother alone is the most interested. The father is also interested. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others. The girl will be soon attaining age and in that difficult period it should be the mother who should be in custody of the girl and not the father, He is living with an old mother and he has to attend to his business the whole day and he has to go out of Bangalore more often. In such surroundings, there is every likelihood of the girl running serious risks. The girl has expressed her willingness to be with the

mother. Same must be in the case of the boy. In the circumstances it is also essential that both the girl and the boy are brought up together. This aspect also has got to be taken into consideration. The minors have been brought up by the mother. They have lost touch of the father. Where that sort of thing happens, it is inevitable that the natural inclination and desire of the minors will be to be with the mother, who has been closest. That apart, human nature is much the same all the world over and in our opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years.

17. Although it is suggested that the environment in which the minors are being brought up is not congenial to them, the evidence in this case shows that the children are being brought up in the best of traditions by the mother.

18. The parents unfortunately are not living together. The father having other occupations will have to entrust the actual upbringing and charge of the minors to somebody else other than his mother, as she is an old woman. Under these circumstances we are of opinion that the mother is the proper person to be in custody of the minors.

19. The father has a natural right, he being the natural guardian of the minors. He remains the natural guardian. But under the H. M. G. Act, we have to consider what will be in the best interest of the minors. This is always a painful subject. But at the same time the right of the mother to the custody of her young children is undoubtedly recognised in this country. Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty to apply to court. In this case the father can apply to court at any time, if he thinks that the minors are not being brought up as expected.

20. To bring about an understanding between the father and mother and affection between the father and the minors, we think it desirable that the minors spend some time during the year in their school holidays with the father. We, therefore, give the following directions: The mother shall take the two minors to the father during school vacations, which are a week or more in duration, so that the children will spend at least 3/4 of those holidays with their father. Thereafter the father shall

take the two minors to Madras and leave them with their mother. The father may also go to Madras and bring the children during vacations and the mother also may go over to Bangalore and take the children back to Madras. The exact time and date of departure and arrival will be fixed by the parties and after exchange of letters between them at least one month prior to the commencement of each vacation. As the father is well off, of the two and in view of submission made at the time of arguments we direct him to pay the school expenses of the two minor children. The exact amount may be ascertained by the father from the school authorities. The mother may also furnish the information to the father.

21. Before departing, we would like to express our earnest hope that the mother and the father would forget the past and turn a new leaf in their family life and live together for the sake of happiness of their own children for which they are entitled. In this connection we would like to quote the following observation of the Supreme Court in a similar situation in *Rosy Jacob v. Jacob* : [1973]3SCR918 and hope that in the interest of the children the mother and the father live together:

'Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring whom destiny has entrusted to their joint parental care. Incompatibility of temperament has to be endeavoured to be disciplined into compatibility and not to be magnified by abnormal impulses or impulsive desires and passions. The husband is not disentitled to a house and a house wife, even though the wife has achieved the status of an economically emancipated woman, similarly the wife is not a domestic slave, but a responsible partner in discharging their joint parental obligation in

promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have, therefore, to co-operate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home'.

22. We, therefore, direct that the custody of the minors, until further orders, be with the mother. The appeal is dismissed subject to the aforementioned directions. No to costs.

23. Appeal dismissed.

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