

Akash and Another Vs. State of Andhra Pradesh

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Court : Andhra Pradesh

Decided On : Dec-21-1999

Reported in : 2000(1)ALD773; 2000(2)ALT373; II(2000)DMC490

Judge : V.V.S. Rao, J.

Acts : [Constitution of India](#) - Articles 226 and 261(3); Guardianship Act , Sections 4 and 9(1)

Appeal No. : WP No. 25986 of 1999

Appellant : Akash and Another

Respondent : State of Andhra Pradesh

Advocate for Pet/Ap. : M/s. Thripurasundari and ;KVR Kalyani, Advs.

Judgement :

ORDER

1. The first petitioner is a minor aged nine years. The second petitioner is the first petitioner's maternal grand father aged 70 years. Both of them are residents of different localities in the city of Trivendrum, Kerala. They approached this Court under Article 226 of the [Constitution of India](#) by filing this writ petition. The relief prayed is that this Court be pleased to declare that the Family Court, Secunderabad has no jurisdiction to pass any order concerning a minor child living in Trivendrum under sub-section (1) of Section 9 of Guardians and Wards Act,

1890 (hereafter called the Guardianship Act for brevity) and further declaration that a minor child has a fundamental right to stay with the person according to his wishes.

2. The first petitioner is the grand child of the second petitioner and son born out of wedlock between one Mr. K. V. Balasubramanyam and Dr. K. Radhika (daughter of the 2nd petitioner). Unfortunately, the mother of the first petitioner left her husband along with the first petitioner to her parents in Trivendrum on 10-5-1998. The husband filed OP No. 116 of 1998 before the Family Court, Secunderabad under Section 13(1)(a) of the Hindu Marriage Act read with Section 7 of the Family Courts Act, 1984 (the Act, for brevity). The husband also filed another OP being OP No. 117 of 1998 claiming/praying the custody of the child, the first petitioner herein.

3. By an order dated 20-11-1999 in OP No. 116 of 1998, the Family Court, Secunderabad passed an order dissolving the marriage between Mr. Balasubramanyam and Dr. K. Radhika. By another separate order in OP No. 117 of 1998, the Family Court gave the custody of the first petitioner to the mother, Dr. K. Radhika, subject to condition that Dr. K. Radhika should send the minor child to Mr. Balasubramanyam during Onam, Christmas and summer vacations. A condition was also imposed that in case the mother fails to comply with the order of the Family Court, the father can apply for alteration of the order of custody of the minor child. Aggrieved by the order in OP No. 117 of 1998, Mr. Balasubramanyam appears to have filed an appeal.

4. In spite of this, the mother did not send the child to the father during Onam festival. Therefore, Mr. Balasubramanyam filed IA No. 528 of 1999 and IA No. 529 of 1999. The first IA is filed praying to commit the mother to civil prison for contempt of Court and the second IA is filed seeking to alter the order regarding the custody of the minor child and to give custody of the minor child to the father. After receiving the notice, Dr. K. Radhika, the mother of the child, appeared before the Family Court. She submitted before the Family Court that from 1-8-1999 her father (the 2nd petitioner herein) was hospitalised and, therefore, her presence at Trivendrum had become essential and, therefore, she could not bring the child

personally to Secunderabad and hand over the child to the father. During the pendency of the proceedings before the Family Court, it was her case that her father, the 2nd petitioner herein was accompanying the child and as he was hospitalised, he cannot travel and she could not bring the child to Secunderabad. She also further stated before the Family Court that the child is aged nine years and, therefore, he cannot travel alone from Trivendrum to Secunderabad and the mother cannot take the risk of handing over the child to any other person. While submitting these difficulties, she tendered an unconditional apology for not bringing the child during Onam holidays and for the failure on her part to hand over the minor child to the father. However, she gave an undertaking before the Family Court to send the child to the father during ensuing Christmas and summer holidays. While accepting the unconditional apology tendered by the mother of the first petitioner, the Family Court directed the mother to send the child, the first petitioner herein, to the father during the holidays as per the orders in OP No.117 of 1998 from Christmas 1999 without fail. The said order of the Family Court was passed on 27-11-1999.

5. In this writ petition, the second petitioner who is not a party either in OP No. 116 of 1998 or OP No. 117 of 1998 filed affidavit. While narrating the unpleasant married life of his daughter with Mr. Balasubramanyam which ultimately culminated in divorce, the 2nd petitioner submits that when the child was produced before the Court during the pendency of the proceedings in the OP, the child was very much scared of his father, that he rushed and took shelter behind the learned Judge and that the child became sick as and when he was taken to the father besides getting psychologically upset. Therefore, he submits that the order of the Family Court directing the mother of the child to hand over the custody of the child during Christmas and summer holidays is contrary to the provisions of sub-section (1) of Section 9 of the Guardianship Act. If the mother of the child is compelled to travel 1400 KMs., from Trivendrum to Secunderabad and hand over the custody of the child to the father against the wishes of the child, the same would deprive the first petitioner's fundamental right to life.

6. The writ petition is wholly misconceived. 'Guardian' is defined under clause (2) of Section 4 of Guardianship Act as to mean a person having the care of the

person of a minor or his property or both his person and property. A reading of the order of the Family Court dated 27-11-1999 shows that in OP No. 117 of 1998 the Family Court granted custody of the first petitioner to his mother, Dr. K. Radhika. By virtue of clause (g) of Explanation to sub-section (1) of Section 7 of the Act, the Family Court has jurisdiction to entertain proceedings in relation to the guardianship of the person or the custody of the minor. Therefore, the jurisdiction of the Family Court in granting the custody of the first petitioner to his mother cannot be questioned. Secondly, the mother of the first petitioner herself gave an undertaking before the Family Court in IA Nos. 528 and 529 of 1999 that she would send the child to the father during Christmas and summer holidays. In view of this, the 2nd petitioner, in my opinion has no locus to question the order of the Family Court. Because, as per the provisions of clause (2) of Section 4 of the Guardianship Act read with the order of the Family Court in OP No. 117 of 1998 and IA Nos. 528 and 529 of 1999, the mother of the first petitioner, Dr. K. Radhika, is alone entitled to represent the first petitioner. Chapter III of the Guardianship Act provides for duties, rights and liabilities of the guardians and as per Section 24 of the Guardianship Act, a guardian is charged with the custody of the ward and must look to his support, health and education and such other matters.

7. The facts in this case disclose that the Family Court, Secunderabad entertained OP No. 116 of 1998 filed by the husband for divorce and also OP No. 117 of 1998 filed for custody of the minor child. At that point of time, the person really aggrieved, namely, Dr. K. Radhika did not raise any question of jurisdiction. In fact, she appeared on both the occasions and gave an undertaking that she would send the child to the father. In view of this, the maternal grand father cannot be permitted to raise a question that the Family Court has no jurisdiction to pass such an order in view of the provisions of Section 9 of the Guardianship Act which confers jurisdiction on the District Court where the minor ordinarily resides or, where the property of the minor is situated etc. At the relevant time when the Family Court entertained the OPs., for divorce as well as custody of the minor child, the first petitioner as well as his mother and father were ordinarily residents of Hyderabad and, therefore, the Family Court, Secunderabad has territorial jurisdiction. In view of this, it cannot be said that the order passed by the Family Court on 27-11-1999 in 1A Nos. 528 and 529 of 1999 and OP No. 117 of 1999 is

without jurisdiction and contrary to the provisions of Section 9(1) of the Guardianship Act. Therefore, as already observed, the writ petition is wholly misconceived.

8. The learned Counsel for the petitioner, however, submits that it is not possible for the child to travel alone from Trivendrum to Secunderabad. If there is any difficulty for the mother to send the child to the father, nothing prevented her to approach the Family Court with an application seeking modification of the order dated 27-11-1999 as to the travel arrangements of the first petitioner or the mother or request the Family Court to direct the father himself to go to Trivendrum to fetch the child. There is a lingering doubt in the mind of the Court as to whether the mother is misusing the process of the Court. Having got free from the contempt jurisdiction of the Family Court after tendering unconditional apology and giving an undertaking to send the child during the Christmas and summer holidays to the father, it appears that she has now got this writ petition filed through her father. The orders passed by the Family Court cannot be allowed to be stultified in this manner. Whether the mother of the first petitioner is in Trivendrum or beyond the territorial jurisdiction of the Indian Courts, she is bound to obey the orders of the Family Court in OP No.117 of 1998 and the orders in IA No.528 and 529 of 1999 dated 27-11-1999.

9. Indeed, Article 261(3) of the Constitution provides that final judgments or orders delivered or passed by civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law. Therefore, the mother of the first petitioner, having obtained an order from the Family Court for custody of the child cannot be allowed to flout the order of the Family Court only on the ground that after divorce she has been forced to live in Trivendrum. Such an attitude on the part of the mother of the first petitioner is reprehensible.

10. For the above reasons, I do not see any merit in the writ petition.

11. The writ petition is accordingly dismissed at the admission stage. No costs.