

**Sheela Vs. Jeevanlal**

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**Court :** Andhra Pradesh

**Decided On :** Dec-24-1986

**Reported in :** AIR1988AP275

**Judge :** Amareswari and ;Bhaskararao, JJ.

**Acts :** [Hindu Minority and Guardianship Act, 1956](#) - Sections 6 and 13; Guardian and Wards Act, 1890 - Sections 17 and 25

**Appeal No. :** A.A.O. No. 1461 of 1985

**Appellant :** Sheela

**Respondent :** Jeevanlal

**Advocate for Def. :** T. Suryakiran Reddy, Adv.

**Advocate for Pet/Ap. :** R.V. Subba Rao, Adv.

**Judgement :**

**Amareswari, J.**

1. This appeal relates to the custody of three children, a boy of 13 years, a girl aged 12 years and a boy of 10 years. The appellant Sheela was married to the respondent Jeevanlal, both Hindus on 28-6-1972. The respondent was working as Chowkidar in the Chief Engineer's Office, Picket, Secunderabad drawing a gross

salary of Rs.843/- and after deductions a net of Rs.600/- and odd. The appellant was a house wife at the time of marriage. They had three children two sons and one daughter. The last child was born in 1977. After the birth of the last child the Appellant, underwent tubectomy operation. According to the appellant-wife the husband respondent never treated the family well, he was coming home in a drunken state and was often abusing the wife and children. He was playing cards and keeping bad company, it is her case that in September, 1985, he drove her out. She had taken a separate house in Olettuguda, next to the house of her mother and ever since, she has been residing there. The children who were till then studying in the defence school were admitted in the English medium school at Mettuguda, so that they may be newer to their new home. To support herself and the children, the, appellant had taken up a job and she was working as a Teacher in Pratapgiri Memorial School on a salary- of Rs.1200/-per month. In the year 1984, she filed O.P. No., 297 of -1984 for divorce, on the grounds of desertion and cruelty by the husband. The O.P. was allowed on 5- 12-1984 and an ex parte decree of divorce was passed. After waiting for six months she married one William on 10-6-1985. The marriage was solemnized under the Special Marriage Act. Mr. William is a Christian. She, has not changed her religion.

2. On 11-6-1985 i.e., the next day after her marriage with William the husband filed a petition to set aside the ex parte order after condoning the delay. The said petitions were allowed and the ex Carte decree was set aside. The wife carried the matter in revision to the high Court unsuccessfully. The petition for divorce on the ground of cruelty impending.

3. During these proceedings, the respondent husband made an attempt to take away the children The wife then filed O.S. No. 1994 of 1984 in the Court of the VIIIth Assistant Judge, City Civil Court for an injunction restraining the husband from interfering with the custody of children. The Civil Court ordered status quo as on 12-6-1985 (Ex. A-2). The children are thus with the mother always.

4. Thereafter the husband filed O.P. N0. 137 of 1985 out of which the present appeal arises for custody of the children under Section 25 of the Guardians and Wards Act, 1890. Later he amended the petition by including Section, 6 of the

Hindu Minority and, Guardian ship Act 1956.

5. The appellant resisted petition, contending that the husband was addicted to all vices, that he is a drunkard, he spends the entire salary on his bad habits and the minors interests would be adversely affected if t' are entrusted to the father. She also stated that he has a large family with parents, two sisters and three brothers and the meagre income he gets is hardly sufficient to have a decent living. She further stated that she has taken up the employment only to support the children and she gets a salary of Rs.1200/- per month.

6. In support of their contention the parties adduced evidence. On an evaluation of the material on record, the trial Court allowed the petition of the father and granted custody of the children to him.

7. Aggrieved thereby the wife has now come up in this appeal. The main contention of Mr, R. V. Subba Rao the learned counsel or the appellant is that the trial Court has committed a serious error in granting custody of the minor children to the father ignoring the paramount consideration, namely, the welfare of the minors. It is submitted that the circumstances relied upon by the Court below, namely (1) that the wife has married a Christian (2) That she has no independent source of livelihood and (3) that it is not advisable after remarriage by the wife to keep the children with her are incorrect.

8. On the other hand, it is contended by Mr. Suryakiran Reddy, the learned Counsel for the, Respondent that the father is the natural guardian and he cannot be deprived of that right on flimsy and light grounds, that the mother who has married a Christian cannot be expected to act in the interests of the minors and that it is not safe to entrust, custody of the children to such a woman.

To decide this controversy, it is necessary to refer to the relevant Provisions of the Guardians and Wards Act, 1890 and the Hindu Minority, and Guardianship, Act, 1956. The Guardian and Wards Act is the earlier Act and the Hindu Minority and Guardianship 'Act of 1956 is the later Act, S. 2 of the later Act says that the provisions of the Act shall be in addition to and not in derogation of the Guardianship and Wards Act, 1890. The present petition is admittedly filed after

the Hindu Minority and Guardianship, 1956 came into force. We find there is not much difference in the provisions concerning the custody of the children between the two acts. S. 6 of the later Act says that the natural guardian of a Hindu minor in the case of a boy or an unmarried girl is the father and after him the mother. We are not concerned with the other provisions as they have no relevancy to the present case. The reason for conferring such a right on the father is apparent, namely that in our society it is usually the male member that earns the bread for the family. But in reality it is the mother who devotes all her life for the children looking after their interests. However, the rights of the father or mother are not absolute. They are subject to the other provisions of the Act. Section 13 of the Hindu Minority and Guardianship Act is as follows:

'13. Welfare of minor to be paramount consideration:- (1) in the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration'

Thus it is plain that it is the minors' welfare and their welfare alone that is relevant and any right of the father or the mother is subordinate to that. S. 17 of the 1890 Act prescribes the matters to be taken into consideration in appointing guardian. S. 17(1) which emphasises on the welfare of the minor says that regard must be had to the age, sex and religion of the minor, besides the character and capacity of proposed guardian and his nearness or kinship to the minor and if the minor is old enough to form an intelligent preference to give consideration to that also.

9. Bearing these principles contained in S. 13 read with S. 17 we will now examine the evidence in the case. Out of the three minor Children two are boys and one is a girl aged about 12 years. To ascertain their wishes, we have interviewed them in the chambers. The eldest boy aged about 13 years gave very intelligent answers and said that he cannot live without his mother, that she bestows a lot of attention on all the children and that they do not want to live with their father. The girl who is aged about 12 years also expressed in the same manner. Both the minors appear to understand life and matters and are aged enough to exercise a preference. The third boy also said the same thing, but he is too young to form an opinion. But all the three lived together from their childhood and it is desirable that they should all

stay together. They indicated their preference in favour of the mother.

10. The appellant is employed as a teacher and gets a salary of about Rs.1200/- per month. The trial Court observed that there was no proof of her income. Now, she filed her Bank pass Book showing her monthly salary as Rs.1125/- as additional evidence. The entries in the pass book show that she is employed from 1983 onwards. Since this is a relevant piece of evidence, we deem it fit to allow the petition. The pass book is marked as Ex. B-11. The Mother is employed and drawing a higher salary than the respondent who gets a net salary of about Rs.640/- and he has to support his aged parents and number of sisters and brothers. The children were always with the mother right from the time of their birth as there can be no substitute for the affection and love of a mother.

11. The only factor to be considered is whether it would be in the interests of the minors to entrust the custody to the mother, who married another man belonging to a different religion.

12. In *Shila v. Soli Phirozsha Shroff* : AIR1981 Bom175 , it was held that conversion to a different faith cannot be regarded as a disqualification for custody of the minor so long as the guardian is capable of providing a congenial comfortable and a happy home for the minor. In the present case, the mother has remarried six months after she obtained a decree of divorce. Thus, she married a person belonging to a different religion But she has not changed her religion. She still remains a Hindu. The marriage was solemnized under the Special Marriage Act. Her Second husband is working in Kuwait. He sends her money regularly. She supplements that with her income. After the birth of the, last child in 1977 i.e., and before her second marriage, she had undergone tubectomy operation and there is no chance of having any more children. She has now filed a certificate to that effect by way of additional evidence before us. The certificate is issued by a Doctor attached to the Government Maternity Hospital Hyderabad that she underwent sterilisation on 18-7-1977. We see no reason to disallow this relevant piece of evidence. It is accordingly ordered. In fact, no counter is filed to the petition for receiving the additional evidence. In the circumstances, the second marriage of the mother with a person belonging to a different religion cannot be a

negative factor.

13. Serious allegations are made against the respondent, that he was treating the appellant cruelly and has driven her out. Whatever might be the truth of these allegations, the fact remains that there are differences between the parties and they are living separately. The Divorce Proceedings are pending. What is to be done with the Children? We think that in the interests and welfare of the minors, they should be allowed to remain with the mother. This is also their wish. The mother is better placed financially and has the help of her mother to look after the children when she is away at School. There is nothing against the mother which prejudicially affects the Children.

14. In the result, we allow the appeal and set aside the order of the Court below. No costs.

15. Appeal allowed.

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