Susmitha Mohan Vs. Rajesh

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Court : Kerala

Decided On : Mar-31-2005

Reported in : 2005(3)KLT88

Judge : Pius C. Kuriakose, J.

Acts : Constitution of India - Article 227; Guardians and Wards Act, 1890 - Sections 7, 9, 12 and 25; Family Courts Act, 1984 - Sections 7(1), 9, 10 and 13; Advocates' Act, 1961 - Sections 30; Code of Civil Procedure (CPC) - Order 14, Rule 2(2); Family Courts (Procedure) Rules, 1989 - Rules 5, 5(1) and 9

Appeal No. : W.P.(C) No. 1983 of 2005

Appellant : Susmitha Mohan

Respondent : Rajesh

Advocate for Def. : V.R. Kesava Kaimal and; N.M. Madhu, Advs.

Advocate for Pet/Ap. : P. Gopakumaran Nair and; C.S. Dias, Advs.

Judgement :

Pius C. Kuriakose, J.

1. Petitioners in this Writ Petition under Article 227 of the Constitution of India are the respondents in Ext.P1 Original Petition presently pending before the Family

Court, Ernakulam, at the instance of the respondent under Section 7, 12 and 25 of the Guardians and Wards Act, 1890 read with Section 7(1) of the Family Courts Act, 1984 for guardianship and custody of a minor child. The writ petitioners are respectively the mother, the material grandfather and the maternal grandmother of the child. The 1st writ petitioner and the minor child are presently residing at Bangalore and the child is being educated there. A preliminary objection was raised by the 1st petitioner before the Family Court on the basis of the documents Exts.P3 to P10 produced along with the Writ Petition that the Family Court does not have territorial jurisdiction in terms of Section 9 of the Guardians and Wards Act to entertain Ext.P1 O.P. According to the writ petitioners, a similar objection was raised by writ petitioners 2 and 3 even before the 1st petitioner entered appearance before the Family Court. That preliminary objection was answered by the Family Court holding the same to be too premature and that the same will be considered if the 1st writ petitioner who is the concerned respondent in Ext.P1 enters appearance. Thereafter, the 1st petitioner entered appearance before the Family Court and filed Ext.P4 preliminary objections. The grievance of the 1st petitioner is that the Family Court has not so far passed any orders on Ext.P4. Yet another grievance of the 1st petitioner is that she sought the permission of the Court to allow her legal assistance for defending herself in Ext.P1 and also to argue Ext.P4 preliminary objections. Ext.P11 application was filed by her in that regard. She complains that the Family Court has allowed Ext.P1 I only on condition that the 1st petitioner appears for counselling before the Family Court on 24.1.2005 failing which the application will stand dismissed. On the basis of the various detailed averments contained in the Writ Petition and the various grounds raised therein, the petitioners have filed the Writ Petition seeking the following reliefs:--

'(i) Direct the Family Court, Ernakulam, to grant permission to the petitioners' Advocate to conduct Ext.P1 Original Petition and argue Ext.P4 preliminary objection, without insisting for the personal appearance of any of the petitioners till final orders are passed on Ext.P4.

(ii) Direct the Family Court, Ernakulam to hear and dispose of Ext.P4 preliminary objection, before directing the 1st petitioner to appear in person or undergo

counselling.

(iii) Direct the Family Court, Ernakulam to raise a preliminary issue on the question of its territorial jurisdiction to try O.P.(G&W;) No. 899 of 2004 filed before it, as provided under Clause (a) of Sub-rule (2) of Rule 2 of Order XIV of the Code of Civil Procedure'.

2. Even though the respondent has entered appearance before this Court through counsel, he has not so far filed any counter-affidavit controverting the averments contained in the Writ Petition.

3. I have considered the Writ Petition and the documents Exts.P1 to P12 produced along with the same. I have heard the submissions of Sri.P. Gopakumaran Nair, learned counsel for the writ petitioners and Sri. N.M. Madhu, learned counsel for the respondent.

4. Sri.P. Gopakumaran Nair submitted that it was clear from the various documents produced along with the Writ Petition that the Family Court, Ernakulam does not have territorial jurisdiction to entertain Ext.P1. According to learned counsel, it was unjust and illegal on the part of the Family Court, Ernakulam, a Court without jurisdiction, to insist that his client, the 1st respondent in Ext.P1, should appear before that Court for counselling as a condition for the grant of an application for engagement of an advocate mainly to argue the position that the Family Court does not have jurisdiction. Mr. Nair further submitted that both the 1st petitioner, the respondent and the minor child are at present residing at Bangalore and yet the respondent instituted the O.P. before the Family Court, Ernakulam with the sole objective of compelling the 1st petitioner and the minor child to travel all the way from Bangalore to Ernakulam. According to counsel, if only the learned Judge of the Family Court had conducted the preliminary examination envisaged by the Family Courts (Procedure) Rules, 1989, he would have been convinced on a mere scrutiny of the allegations in Ext.P1 O.P. that the minor child was not ordinarily or permanently residing within the limits of the Ernakulam Family Court and therefore that Court does not have jurisdiction over the Original Petition. There are no provisions either in the Statutes or in any of the Rules framed thereunder which prohibit filing of any preliminary objections. Referring to Section 10 of the

Family Courts Act. Mr. Gopakumaran Nair submitted that as far as the procedure is concerned, the provisions of the Code of Civil Procedure have been made applicable and therefore a preliminary issue regarding the Court's jurisdiction should have been raised by the Family Court as envisaged by Order XIV of the Code. Assistance of a legal practitioner was required more in this case where it is a question of law, i.e., the question pertaining to the jurisdiction of the Court, which is to be argued. The Court has practically agreed that the 1st petitioner is in need of legal assistance but it has taken the view that legal assistance will be given only if the counselling procedure fails. According to learned counsel, the Court's view that engagement of legal practitioner under Section 13 will be allowed only after the counselling procedure is over is incorrect. Under Rule 5(1) of the Family Courts (Procedure) Rules, 1989 plaints could be sent by registered post acknowledgment due and therefore the insistence of the Court upon personal appearance of the party for everything is not justified. Mr. Gopakumaran Nair in this context relied on the judgment of this Court in Achuthan v. Family Court, 2000 (3) KLT 951. According to learned counsel, arguments on the preliminary objections will not take much time and once it is found that the Court does not have jurisdiction, the entire exercise of counselling conducted by the Court will become otiose. According to Mr. Nair, the 1st petitioner has only recently secured an employment in Bangalore and being on probation she will find it extremely difficult to get leave and if she takes leave now, she stands the risk of losing the job, apart from all the ordeals which she and the minor child will have to undergo because of the long distance up-and-down journey between Bangalore and Ernakulam. Learned Counsel cited before me the judgment of a Division Bench of the Andhra Pradesh High Court in R. Durga Prasad v. Union of India, AIR 1998 Andhra Pradesh 290, also, in support of his submissions.

5. Sri.N.M. Madhu, learned counsel for the respondent placed strong reliance on the observations of the Division Bench of the Andhra Pradesh High Court in R. Durga Prasad (supra) itself to support the order passed on Ext.P11 by the Family Court.

According to the learned counsel, counselling procedure was a mandatory procedure to be undergone by all litigants who come to the Family Court. No

litigant can claim to have a legal right to be represented in the Family Court by a legal practitioner. The Family Court has got absolute discretion to grant or not to grant legal assistance to the parties in the matter of prosecuting or defending proceedings before that Court. But, according to counsel, Section 13 which enables the Family Court to permit parties to engage legal practitioners contemplates engagement of practitioners only beyond the stage of impossibility of reconciliation. So, the first thing to be done was to explore the possibility of reconciliation between the parties and this was why the Judge of the Family Court directed the 1st petitioner to appear before the Court for counselling. If counselling turns fruitful and if parties are able to arrive at a reapproachment, then the entire proceedings before the Family Court can be closed as compromised. Even otherwise, as father of the child, respondent is entitled to have a glimpse of his only son even if it be in the Court's counselling room, Mr. Madhu submitted. The order cannot be said to be vitiated in any manner and therefore there is no justification for invoking the supervisory jurisdiction of this Court for correcting the same.

6. It is true that under Section 9 of the Family Courts Act the Court has the duty to make every endeavour in the first instance to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and in this context the Family Court is entitled to follow such procedure as it deems fit subject to the rules made in that regard by the High Court. It is also true that no litigant is entitled as of right to be represented by a legal practitioner in a proceeding before the Family Court. It is somewhat clear from the impugned order that it was in view of the obligations cast upon the Court by Section 9 of the Family Courts Act that the Court thought that even before the petitioners are given permission to have legal representation, it is necessary to explore the possibilities of a settlement. But, then, the present one was a case where the 1st writ petitioner lodged a preliminary objection contending that the Court does not have territorial jurisdiction over the Original Petition. Having regard to Section 9 of the Guardians and Wards Act, the preliminary objection is at least apparently strong in the light of the various documents produced by the writ petitioners. Section 10 of the Family Courts Act makes the provisions of the Code of Civil Procedure applicable to proceedings like the present one before the Family Court. Neither in the Statute

nor in any of the Rules framed thereunder we find anything which prohibits the parties from filing preliminary objections before proceeding further with the case. In the instant case also while writ petitioners 2 and 3 filed preliminary objections, the Family Court did not take the view that preliminary objections were not maintainable in law but only indicated that the same is too early and that it is for the concerned respondent to raise the same.

7. The principles relating to the grant of permission to parties to engage legal practitioners have been stated by a Division Bench of the Andhra Pradesh High Court in R. Durga Prasad (supra). In fact, the quintessential point decided in that decision which is authorised by B. Subhashan Reddy, J. (as His Lordship then was) for the Division Bench is that notwithstanding Section 13, there is no total embargo for permitting the parties to engage legal practitioners and that the parties can be given permission to engage legal practitioners of their own choice and the power of the Court to seek assistance of legal experts as amicus curiae is apart from that. The Division Bench even referred to Section 30 of the Advocates' Act, 1961 which confers rights on advocates to practice as of right in all Courts and stated in that context that it is needless to mention that Family Court is a Court. Nevertheless, in view of Section 13, the Division Bench held that the party will have to apply to the Family Court and obtain permission. It is Rule 9 of the Family Courts (Procedure) Rules, 1989 which deals with grant of permission by the Family Court for representation by a lawyer. Rule 9 reads as follows:--

9. Permission for representation by a lawyer.--

(a) The Court may permit the parties to be represented by a lawyer in Court. Such permission may be granted if the case involves complicated questions of law or fact, and if the Court is of the view that the party in person will not be in a position to conduct his or her case adequately or for any other reasons. The reason for granting permission shall be recorded in the order. Permission so granted may be revoked by the Court at any stage of the proceedings if the Court considers it just and necessary.

(b) Time for making application.-- An application by a party for being represented by a lawyer in Court shall be made by such party to the Court after notice to the

other side. Such an application shall be made not less than two weeks prior to the date fixed for hearing of the petition.

(c) Application not to be entertained at the hearing.- An application shall not be entertained after the petition is placed for hearing on the daily board of the Court, unless there are exceptional circumstances ustifying such late application.

It will be apposite in this context to refer to the decision of the Bombay High Court in Kishorilal v. Dwarkabai, 1992 Maharashtra L.J. 997, wherein the Bombay High Court laid down certain norms which Family Courts should follow while permitting a party to be represented by a legal practitioner:--

'(a) That it be ascertained from the parties at the initial stage of the proceeding itself as to whether there exists need for the engagement of an advocate and, if so, what are the grounds in support thereof.

(b) The Judge shall ascertain from the status of the parties, i.e., the age, educational qualifications, etc., as to whether they appear to possess the requisite capacity and qualifications to conduct the proceeding in person. This shall be all the more necessary in cases where the parties appear to be uneducated or semi-educated.

(c) The normal place of residence, occupation, economic capacity and the feasibility of the party attending the Court in person without abnormal and undue hardship shall also be ascertained and if it appears that the party would be subjected to considerable difficulty, loss or inconvenience by having to attend the Court in person, it would be advisable to permit representation.

(d) The complexities of the case on both sides will have to be gleaned from the proceedings, for instance, the question as to whether any specialised medical, psychiatric or other specialised knowledge is called for or whether the conduct of the case would require special skill of an experienced cross-examiner, all of which it would be unreasonable to expect from a lay litigant.

(e) If it appears that the parties are unevenly matched resulting in an obvious unfair advantage to one of them, the Court shall ensure that this handicap be

minimised by permitting legal assistance.

(f) In proceedings, such as petitions filed by consent of the parties, or where it appears that a contest on merits is minimum, undoubtedly, the presence of an advocate may appear redundant, but the trial Court shall apply the aforesaid tests for the purpose of ascertaining that the consent is free and fair and that no undue advantage is being taken by one of them. Instances are abundant in matrimonial proceedings where a grievance is subsequently projected that the implications of an admission or a consent were not known to the party, or that a party wrongly gave up certain rights, or that a party was unaware of the finality or otherwise of orders passed in these proceedings, or, for that matter, was unaware of what could be legally insisted upon. It is a misnomer, therefore, to assume that legal representation is entirely unnecessary even in this category of cases.

(g) Matrimonial litigations invariably envisage not only hurt-feelings but supercharged emotions, both of which provide valid justification for the view that parties involved in such a tussle would find it difficult to conduct a proceeding against the adversary and in these situations where a violent contest is apparent, the presence of Counsel could undoubtedly act as a shock absorber. More importantly, matrimonial proceedings often-times involve embarrassing details which would make it extremely difficult for the litigant to hand personally'.

At least on some of the aforequoted norms the 1st petitioner is entitled to legal practitioner's assistance. I may observe immediately that though I am generally in agreement with the above guidelines formulated by the Division Bench of the Bombay High Court, those guidelines should be treated as only illustrative and not exhaustive.

8. Now the question is whether permission to engage legal practitioner can be granted only after counselling procedure is over as the Family Court in the present case seems to think. As noticed by this Court in Achuthan (supra) and as indicated in Rule 5 of the Family Courts (Procedure) Rules, 1989, it is not the law that the party has to be personally present before the Family Court for each and everything. The learned Judge of the Family Court by allowing the application filed by the 1st petitioner under Section 13, conditionally though it be, found that the

petitioners are entitled for having assistance of a legal practitioner. That finding is necessarily correct since she sought legal assistance for the purpose of arguing a purely legal question -- the question of jurisdiction -- which the litigants unlearned in law will not be able to argue without the assistance of legal practitioners. The only question is whether the Family Court was justified in insisting that before the party argued the question of jurisdiction, she should enable the Court to explore the possibilities of a settlement. Having regard to the fact-situation projected before me by Mr. Gopakumaran Nair wherein it is revealed that the 1st petitioner stands the risk of losing her job and the offer of Mr. Nair at the Bar that if this Court so directs his client will certainly appear along with the child in the Family Court at Bangalore and thereby allow the respondent who also is at Bangalore to see the child and the apparent force of the contention regarding jurisdiction, I am of the view that the condition imposed by the Judge of the Family Court while granting Ext.P11 application was not justified.

9. The result is that the order passed on Ext.P11 will stand modified to the extent of deleting the condition that the 1st writ petitioner shall appear for counselling and the application I.A.No. 4594 of 2004 will stand allowed unconditionally. The Judge of the Family Court can make a peremptory posting for hearing on and consideration of Ext.P4 preliminary objections filed by the 1st writ petitioner. It is needless to mention that if the learned Judge is inclined to overrule the preliminary objections, the 1st writ petitioner will become obliged to appear before the Family Court, Ernakulam for counselling.

The Writ Petition is disposed of as above.