

Bench: D Mohapatra, S V Patil

CASE NO.:

Appeal (civil) 1685-1686 of 2001

PETITIONER:

R.V.SRINATH PRASAD

Vs.

RESPONDENT:

NANDAMURI JAYAKRISHNA & ORS.

DATE OF JUDGMENT: 02/03/2001

BENCH:

D.P. Mohapatra & Shivaraj V. Patil

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T..J

D.P.MOHAPATRA,J.

Leave granted.

The controversy raised in this case relates to the interim custody of the two minor sons of the appellant. He has filed this appeal assailing the judgment/order dated 16th November, 2000 of the High Court of Madras in which a Division Bench of the Court ordered that interim custody of the children should be with the maternal grand-parents, the respondents herein, till the matter is finally decided by the competent court. The Division Bench also directed the Family Court to number the petition filed by the respondents for custody of the children and dispose of the same as early as possible within three months of the date of receipt of the order. It is stated in the judgment/order that interim custody of the children is to be given to their maternal grand-parents for their better welfare and also to perform the rituals/karma of their deceased mother. The Court permitted the appellant and paternal grand- parents of the children to visit them, if they so desire, twice a month with prior intimation till the matter is finally decided. The High Court also granted liberty to the parties to move the Court under the Guardians and Wards Act and also to move for an interim custody, after withdrawing the petition filed before the Family Court. It was made clear that any observation made in the judgment/order will not prejudice either side and the arrangement made in the order is only an interim arrangement and will not create any right or prejudice to the case of either side. The facts of the case leading to the present proceeding, shorn of unnecessary details, may be stated thus: R.V.Srinath Prasad the appellant was married to Kumudini, daughter of respondent no.1. Two sons, Jay Viraj, now aged about 5 years and Neal Krishna aged about 3 years were born of the said wedlock. Both the parties belong to well to do families. While respondent no.1 is the son of late N.T.Rama Rao, the appellant is a businessman engaged in commercial activities in U.S.A. After their marriage in 1993 the couple lived in USA till December, 1999 and during the said period the two children were born, one in 1995 and the other in 1997. The wife returned to India with the two children in December, 1999 and lived with her parents-in-law at Chennai between January to July, 2000. On 24th October, 2000 the wife consumed some poisonous material in her friend's house and

fell ill. After remaining in coma from 24th October, 2000 she expired on 29th October, 2000. Shortly before the tragic incident happened the wife with her two children had shifted to a flat purchased by her father - at Chennai. Before going to her friend's house on 24th October, 2000 she had left the children with her parents-in-law. The cremation of her body was done in Chennai. The respondent no.1 filed a petition in the Family Court at Chennai seeking custody of the minor children on 7th November, 2000. On the same day he filed a writ petition in the High Court seeking, inter alia, a writ of Mandamus to the Family Court, Chennai to dispose of the petition expeditiously. In the said writ petition, an application for interim order was filed with the prayer, which reads as follows: "For the reasons stated in the accompanying affidavit, the petitioner herein prays that pending disposal of the above writ, this Honourable Court may be pleased to direct the respondents, to handover the interim custody of the Two grand children Jay Viraj Prasad and Neal Krishna to the petitioner to enable him to take them to Hyderabad for performing the Karma of their deceased mother and the petitioner's deceased daughter Kumudini on 8.11.2000 and continue to have the custody of the said two grand children until further orders of this Honourble Court and pass such other further order or orders as this Honourble Court may deem fit and proper, under such circumstances of this case."

(Emphasis supplied)

The writ petition and the interim application came up before a single Judge of the High Court on the same day i.e. the 7th November, 2000 on which day the learned single Judge while ordering notice of motion returnable by four weeks passed an ex- parte interim order, the operative portion of which reads as follows:

"Accordingly, there shall be a direction to the Commissioner of Police, Chennai to trace out the children Jai Viraj and Neal Krishna immediately and handover the said children to the custody of the counsel on record for the petitioner Ms.B.Saraswati. When the children are handed over, they must be accompanied to Hyderabad with Police protection and the children must be allowed to perform obsequies. It is also made clear that the petitioner who is the maternal grand father of the children must be responsible for the safe custody of the children."

(Emphasis supplied)

The said order was challenged before the Division Bench in Writ Appeal No.1954 of 2000 filed by the appellant herein. In the said appeal an application for interim order being CMP No.17059 of 2000, was also filed. The Division Bench disposed of the writ appeal as well as the application for interim order by the order dated 16th November, 2000 which is under challenge in this appeal.

Shri Shanti Bhushan, learned senior counsel appearing for the appellant strenuously urged that the entire approach of the Division Bench to the matter is grossly erroneous and that has vitiated the order passed by it. The Division Bench, submitted Shri Shanti Bhushan, has ignored the essential material facts; that the appellant, father of the minor children, is their natural guardian; that he has returned to India with a view to carry on business here; that he is staying with his parents at Chennai and that the children were staying with them. According to Shri Shanti Bhushan, no material was produced before the Division Bench and none has been noticed in the judgment/order under challenge which would even prima facie show that the custody of the minor children should be changed. Shri Shanti Bhushan further submitted that the children are attached to their father and miss him very much. Both the children were attending school at Chennai and their schooling had to be discontinued in view of the order directing interim custody of the children to be given to the maternal grand- parents. Refuting the observation in the judgment/order under challenge that the appellant stays in USA, Shri Shanti Bhushan filed an affidavit by the appellant containing a statement that he has decided to settle down in Chennai for the purpose of carrying on business. He has also set up a factory at the Export Processing Zone at Chennai. It is further stated in the affidavit that the appellant stays with his parents - respondent nos.2 and 3 herein; his sister, who is a medical practitioner running a hospital at Coimbatore has two children, a daughter aged 7 years and a son aged 3 years; she visits Chennai at least twice a month. Referring to the affidavit Shri Shanti Bhushan submitted that if custody of the children is left with the

appellant there will be no difficulty in giving them proper care and attention. They will have the company of the children of his sister. Shri Shanti Bhushan contended that the procedure followed by the Division Bench in hastily disposing of the writ appeal dealing with the interim custody of the children while leaving the matter to the Family Court for decision on merits is unsustainable and should be set aside.

Shri K.N.Bhat, learned senior counsel appearing for the respondents supported the contentions raised by Shri Shanti Bhushan.

Shri Rakesh Dwivedi, learned senior counsel appearing for the contesting respondents urged that there are materials on record to show that in the life-time of the deceased wife, the appellant had ill-treated and ignored her which caused serious mental torture to the lady compelling her to part company with her husband and return to Chennai. Ultimately she committed suicide. Sri Dwivedi relied on the note left by the deceased in support of his contention. It was the further submission of Sri Dwivedi that the deceased wife suspected that her husband was having an extra-marital affair with one Tania Kapoor, whose father is a business associate of the appellant. In the circumstances of the case, Sri Dwivedi submitted it is in the best interest of the children to place them in custody of such a person. Shri Dwivedi also raised the contention that the High Court has independent jurisdiction under the Letters Patent to decide the question of custody of minors and therefore, no exception can be taken to the impugned judgment/order on the ground of lack of jurisdiction.

Custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance.

At the outset, we would like to observe that it will not be fair and proper for us to delve deep into the merit of the case since the petition filed for custody of the minor children is pending before the Family Court at Hyderabad and any finding recorded or observation made by us in this proceeding may prejudice the parties. Therefore, we will try to avoid entering deep into the merits of the case as far as possible. On a perusal of the judgment/order passed by the Division Bench, we are constrained to observe that neither the manner of disposal of the proceeding nor the order directing the change of custody of the children from their father to their maternal grand-parents can be supported. The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom their father is staying and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately. It is relevant to state here that the respondent no.1 maternal grand-parents wanted immediate custody of the minor children for the purpose of performing certain obsequies in connection with the cremation ceremony of his deceased daughter and that purpose had been served by the order passed by the learned single Judge and such necessity for interim custody had ceased when the Division Bench passed the judgment/order under challenge. On the materials on record we are not satisfied that there was any urgency in disposing of the case with such haste without affording reasonable opportunity to the appellant to place material on record. The procedure followed by the High Court is neither fair nor proper.

The High Court appears to have overlooked the settled principle that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In a sensitive matter like this no single factor can be taken to be decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. Here we may refer to the decision of this Court in Jai Prakash Khadria vs. Shyam Sunder Agarwalla and another 2000(6) SCC 598. In such matters usually, Courts while granting the custody of minor children to one party extend the facility of visiting them

to the other. At the cost of repetition we may state that we are not discussing the merits of the case pleaded by the parties in detail since the application for the custody is pending for adjudication before the Family Court at Hyderabad. For the reasons set forth in the preceding paragraphs we are not persuaded to sustain the order passed by the High Court changing the custody of the minor children from their father to their maternal grand parents.

The appeals are allowed. The order passed by the Division Bench dated 16.11.2000 in Writ Appeal No. 1954/2000 and in C.M.P.No.17059/2000 is set aside. The respondent no.1 shall leave the minor children in the custody of the appellant. He will have the right to visit the children twice a month with prior intimation to the appellant. The appellant shall make necessary arrangements for the purpose. This order is passed without prejudice to the rights and contentions of the parties. There will, however, be no order for costs.