

HIGH COURT OF ANDHRA PRADESH

**FRIDAY, THE TWELFTH DAY OF APRIL
TWO THOUSAND AND NINETEEN**

: PRESENT:

THE HONOURABLE THE ACTING CHIEF JUSTICE C.PRAVEEN KUMAR

AND

THE HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

IA No. 2 OF 2018

IN

WP NO: 30964 OF 2018



Between:

Shri Pavan Kumar Namineni, S/o. Syamasundara Naidu Namineni, Aged about 41 years, Presently residing at 19-14-11, Kesavayana Gunta, Raghavendranagar, Tirupati, Andhra Pradesh.

...Petitioner-in-person / Respondent No.4 in WP NO 30964 of 2018

AND

1. The State of Andhra Pradesh, Rep. by its Principal Secretary, Home Department, Secretariat Buildings, Andhra Pradesh.
2. The Director General of Police, Andhra Pradesh State, Andhra Pradesh.
3. The Station House Officer, Chittoor Police Station, Chittoor, Andhra Pradesh.

...Respondent Nos. 1 to 3 in WP NO 30964 of 2018.

4. Smt.Maheswari Ramineni, D/o. Munaswamy Naidu Ramineni, Aged about 38 years, R/o. 7500 Kirby Dr Apt.121, Houston, Texas 77030, The United States of America, Presently residing at 2-311/1A, S.V. College Road, Kongareddi Palli, Chittoor, Andhra Pradesh - 517001.

...Respondent No.4/ Petitioner in WP NO 30964 of 2018

Counsel for the Petitioner: SRI N Pavan Kumar(party-in-person)

Counsel for the Respondent Nos 1 to 3: AGP Attached to AG (AP)

Counsel for the Respondent No.4: SRI T S ANIRUDH REDDY

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to reopen the above writ petition No. 30964/2018, dismissed as withdrawn per order dt. 15.11.2018 in the above WP, and pass pending disposal of WP No. 30964 of 2018, on the file of the High Court.

The court while directing issue of notice to the Respondents herein to show cause as to why this application should not be complied with, made the following order.(The receipt of this order will be deemed to be the receipt of notice in the case). The Court made the following

ORDER

THE HON'BLE ACTING CHIEF JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

I.A. No. 2 of 2018

in

W.P.No.30964 of 2018

ORDER : (Per Hon'ble Sri Justice M.Satyanarayana Murthy)

The petition, under Section 151 C.P.C., is filed to re-open the Writ Petition No.30964 of 2018, which was dismissed as withdrawn by the writ petitioner vide order dated 15.11.2018.

2. It is the case of the petitioner that the petitioner was arrayed as respondent in the main writ petition and the respondent No.4 herein was the petitioner before this Court in the Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of *Habeas Corpus*. The petitioner and the 4th respondent were wife and husband and she filed the writ petition in the month of August, 2018 seeking relief of return of their son to go to USA, who was residing at Tirupati, Andhra Pradesh, since 2017. She obtained an interim order against the petitioner herein by making misrepresentation in the 3rd Circuit Court, Michigan, USA. The petitioner produced the child before this court as ordered on 12.9.2018. The Writ petition was coming up for hearing from time to time and on 14.9.2018, the court recognizing that the petitioner was given legal custody of the child pursuant to the judgment dated 21.1.2016 of the Michigan Court, USA, ordered two days temporary custody to the mother of the child i.e., 4th respondent herein, subject to her depositing passport, since she was seen as a flight risk and also on submitting an affidavit that she will not remove the child from the jurisdiction of the Court. In pursuance of the direction issued by this Court at an interlocutory stage, the child's custody was given to the 4th respondent and returned to the lawful custody of this petitioner at 5 PM on 16.9.2018.

3. The petitioner filed counter along with counter-claims in the writ petition, when the writ petition was listed on 27.9.2018, fervently requested the court to protect the child against the high handed threats of the 4th respondent and her efforts to control administration. The petitioner also contested the Court proceedings in Michigan and the case filed by the 4th respondent was dismissed by the 3rd Circuit Court, Michigan, USA, declining the jurisdiction vide order dated 1.10.2018 holding that the jurisdiction is conferred on the Indian courts. While so, on 25.10.2018, when the petition filed for issuance of *Habeas Corpus* came up for hearing, T.Anirudh Reddy, the counsel on record, sought an adjournment for three weeks and the writ petition was posted on 15.11.2018. On 15.11.2018, the petitioner, to attend the court, leaving his child at his residence in Tirupati with his parents, came down to Hyderabad. While he was at High Court on 15.11.2018, when the writ petition was listed at serial No.35 in Court No.15, the petitioner came to know through his counsel Sri C.Sumon Reddy at about 11.15 AM that the respondent No.4 was going to withdraw the case. Immediately, he requested him and his senior counsel Sri C.V.Mohan Reddy in the corridor outside his chambers and in the Advocate bar room, to press for counter-claims and protection of his son. He waited for reaching his case on the date, but the writ petition was not called, since it was not pressed by making mention before commencement of the court proceedings. But, the petitioner came to know that the 4th respondent, along with 2 others, had barged into the house at Tirupati and took away the child by assaulting his mother and servant maid. Despite the best efforts of his mother, she could not protect the child from the forcible removal of the child from her custody. Thereafter, a case was registered in crime No.250 of 2018 for the offences punishable under Sections 452, 324, 363 read with Section 34 I.P.C. in Tiruchanur Police Station, Chittoor District, A.P. and it is pending for investigation. The 4th respondent surreptitiously

withdrawn her writ petition and committed an offence and she is not entitled to the custody of the child and requested to set aside the dismissal order dated 15.11.2018 as withdrawn.

4. During hearing, the petitioner, as party-in-person, appeared before the Court, contended that the 4th respondent took away the child forcibly from the custody of the mother of this petitioner, when he was at High Court appearing before the High Court at Hyderabad and he made a counter-claim in the petition, but the Court, without considering the counter-claim set up by this petitioner, dismissed the writ petition erroneously.

5. He furnished copies of the judgment of various Courts. He relied on a judgment in **Kiran Tandon Vs. Allahabad Development Authority and another**¹ to contend that the petitioner can be transposed, when the respondent No.4 herein, who was the petitioner in the writ petition, withdrawn her claim in the writ petition for issuing of *Habeas Corpus* to protect the rights of the parties. He also drawn the attention of this Court to the order of the Delhi High Court in W.P.(CRL) No.1922 of 2016, dated 28.11.2016; order of the Delhi High Court in W.P. (CRL) No.1922 of 2016, Crl.M.A.Nos.12882 of 2016 and 1343 of 2017, dated 3.5.2017 and order of the Delhi High Court in W.P. (CRL) No.1922 of 2016, Crl.M.A.Nos.12882 of 2016 and 1343 of 2017, dated 25.5.2017; and finally the order of the Delhi High Court in W.P. (CRL) No.1922 of 2016, Crl.M.A.Nos.12882 of 2016 and 1343 of 2017, dated 1.8.2017 in **Pooja Arora v. NCT , Delhi & another** in support of his contention and requested to set aside the order of dismissal restoring the writ petition to its original number on the file, in the registers, besides counter-claim set up by this petitioner-in-person.

6. None appears for the respondent.

¹ 2004 AIR SCW 2089

7. It is a case where the 4th respondent filed a petition for issuance of writ of *Habeas Corpus* to produce the child, but the litigation for one reason or the other is multiplied, both in India and USA on account of filing petitions successively on the file of different courts, including Michigan and Texas in U.S.A. and a petition before the competent civil court for custody of the child, so also writ petition. While the matter stood thus for one reason or the other, an interim order was passed granting interim custody of the child for a period of 2 days at the request of the 4th respondent herein i.e., the petitioner in the writ petition. Accordingly, the child's custody was given to her for two days and she returned the child at 5.00 PM on 16.9.2018. While so, on 15.11.2018, when the petitioner was out of station and appeared before this Court in connection with the above writ petition, the respondent allegedly barged into the house along with her supporters and took away the child forcibly and thereafter shifted to Chennai, from Chennai to Delhi and then Kathmandu, Nepal and later China, from there to USA. Now, the 4th respondent, along with the child, are in USA. The 4th respondent was the petitioner, who sought relief of production of the child by issuing a writ of *Habeas Corpus*. When she does not want to prosecute the proceedings, she can as well withdraw the proceedings at any stage, but if she obtained any interim order and withdrawn the writ petition, then the consequences would be otherwise. In the instant case, she obtained interim order and handed over the child to this petitioner at 5 PM on 16.9.2018 itself. Since the interim direction was complied by both the petitioner and the 4th respondent, the child is deemed to be in the custody of the petitioner. In such circumstances, the interim order obtained during the pendency of the writ petition will not have any impact on the order passed by the Court withdrawing the writ petition itself. The normal rule is that when an interim relief was obtained and not pressed the main petition, the interim order is deemed to have been merged into

the final order, thereby the parties cannot be allowed to take advantage of the interim order and withdraw the same.

8. The settled principle of law is that no litigant can derive any benefit from the mere pendency of the case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified technically. A party cannot be allowed to take any benefit of its own wrongs by getting the interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit or any party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. (Vide **Dr.A.R.Sircar v. State of Uttar Pradesh & Ors.** (1993 Supp.(2) SCC 734) ; **Shiv Shanker & Ors. v. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr.**, (1995 Suppl. (2) SCC 726); **the Committee of Management, Arya Inter College, Arya Nagar, Kanpur & Anr. v. Sree Kumar Tiwary & Anr.** (AIR 1997 SC 3071); **M/s. GTC Industries Ltd. Vs. Union of India & Ors.**, (AIR 1998 SC 1566); and **Jaipur Municipal Corporation v. C.L. Mishra**, ((2005) 8 SCC 423)). The same is reiterated in the later judgment in **Kalabharathi Advertising v. Hemant Vimalnath Narichanla & Ors.** (2010 (9) SCC 437).

9. In view of the law laid down by the Apex Court in the judgments referred to supra, whenever a party obtained interim order and gained

advantage, such order will merge into the order to be passed in the main writ petition. When the petition was dismissed, interim order, if any, granted is deemed to have been set aside, in view of the principle of merger. But, in the present facts of the case, though she obtained interim custody of the child for two days, she returned the child at 5 PM on 16.9.2018, as admitted in the last two lines of para No.4 of the affidavit filed by the petitioner. The child was in the custody of this petitioner, allegedly the child was forcibly took away by the 4th respondent, therefore, it cannot be held that the child was taken away in view of the interim order. In such case, the writ petition cannot be restored to its original file when she was not interested to prosecute the proceedings before this Court in W.P.No.30964 of 2018.

10. The major contention raised by this petitioner before this court is that he set up a counter-claim i.e., to ensure safety and security of the child during any visitations, and to restrain the petitioner therein i.e., 4th respondent herein from interfering with the peaceful custody of the ward in the hands of this petitioner and child's paternal grand parents at Tirupati, while declaring this petitioner as lawful guardian of the ward. The counter-claim consists of two parts. The last part is to declare the petitioner as lawful guardian is outside the jurisdiction of the Court in a writ petition filed for issuance of writ of *Habeas Corpus*. The petitioner, being father of the child, who is Hindu, is the natural guardian of the child and no declaration that he is the lawful guardian of the ward is required.

11. According to Section 4 of Hindu Minority and Guardianship Act, 1956, 'major' means a person having the care of the person of a minor or of his property or of both his person and property, and includes- (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards; in clause (c) the words "natural guardian" is defined and it means any of the guardians mentioned in Section 6.

12. Section 6 of the Hindu Minority and Guardianship Act, 1956 defines natural guardians of a Hindu minor. The natural guardian of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

13. Thus, it is clear from Section 6 of the Hindu Minority and Guardianship Act that only father is the natural guardian of a child and after him, wife i.e., mother of the child is the natural guardian. But, when it comes to the question of custody of the person of a minor, under normal circumstances, the natural guardian is entitled to have the custody of the minor child. Hence, the petitioner, being father, is a natural guardian and entitled to custody of the minor children, though in the case of girl under 5 years the mother has the right to custody of a minor as per the proviso. The controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents. But, different yardstick is to be applied in the

case when the minor is a girl below 5 years of age; as per the proviso, the mother is entitled to the custody of the minor daughter below the age of 5 years, even though the father is alive, because firstly, in Section 6(a) the word 'ordinarily' is used and secondly, the welfare of the minor is of a paramount consideration vide Section 13 of the Hindu Minority and Guardianship Act. Thus, ward is entitled to her custody being a natural guardian and he should not seek any declaration. But, the petitioner herein does not fall within Section 6 of the of the Hindu Minority and Guardianship Act. Section 8 of Guardians and Wards Act specify the persons who are entitled to file application to declare as guardian of the person or the property of the minor. But, the father is not included in the persons entitled to file an application for custody of the minor child under Section 8 of the Guardian and Wards Act.

14. In view of Section 8 of Guardians and Wards Act, the petitioner is not entitled to claim relief of declaration that he is the natural guardian. He is already a natural guardian in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956. Therefore, second part of the relief in the counter-claim cannot be maintained. The first part is to restrain the writ petitioner from interfering with the peaceful custody of the ward in the hands of this petitioner and child's paternal grand parents. But, the same is also cannot be decided in a writ petition under Article 226 of the Constitution of India for issue of writ of *Habeas Corpus*.

15. On the other hand, the petitioner did not pay even the Court fee on the counter-claim. Therefore, *prima facie* the petitioner is not entitled to claim any of the reliefs as a counter-claim in the writ petition filed for issuance of writ of *Habeas Corpus* and no court fee is paid thereon i.e., on the counter-claim and dismissal of the writ petition as withdrawn will have no impact on the claims of this petitioner, if he is entitled to claim such reliefs by paying court fee. But, in the present case, the petitioner

did not pay any court fee and such relief cannot be granted in a petition filed under Article 226 of the Constitution of India, except in an application filed under the provisions of the Guardians and Wards Act. Therefore, the counter-claim of the petitioner in the writ petition is misconceived and it cannot be granted *prima facie* while exercising extraordinary jurisdiction of judicial review under Article 226 of the Constitution of India.

16. Merely because the petitioner set up counter-claim, there is no bar to dismiss the writ petition, when it was withdrawn, since the writ petitioner did not gain any advantage out of the interim order, more particularly when the child was returned to this petitioner at 5 PM on 16.9.2018. Therefore, setting up a counter-claim is not at all a ground to deny dismissal of the application as withdrawn when the 4th respondent herein disinterested to prosecute the proceedings.

17. The basis for claiming this relief in the present petition is to transpose him as petitioner in the main petition by exercising power under Order 1 Rule 10 C.P.C. But, the petitioner has already filed another Writ Petition No.47795 of 2018, which is pending for consideration before this Court seeking various reliefs, more particularly for issuance of writ of *Habeas Corpus* directing respondents 1 to 12 to produce the ward by name N.Jainarayan Sai before this Court and return the child to the custody of this petitioner etc., Thus, the petitioner virtually claimed relief of custody of the child in the writ petition on production of child before the court by issuing writ of *Habeas Corpus*. At the same time, the petitioner admitted that the petitioner filed proceedings before the competent civil court for appointment of this petitioner as guardian of the minor ward Jainarayan Sai and for other reliefs. Even if this petitioner is transposed of as petitioner in the W.P.No.30964 of 2018 and the 4th respondent as respondent in the

petition, such a relief can be obtained by this petitioner in the writ petition pending before this Court bearing W.P.No.47795 of 2018. Therefore, transposition of this petitioner and granting relief in the writ petition, which was not pressed by the 4th respondent, does not arise. The counsel, though relied on a judgment of the Apex Court in **Kiran Tandon's case** (supra), the same cannot be applied to the present facts of the case, since in that case a claim was pending before the competent authority in a land acquisition proceedings and references were made to the District Judge by three claimants. In one of the references finding recorded that claimant is entitled to entire amount of compensation. No appeal preferred against the said finding. However, in appeal preferred against award, decree made in another reference, it was always open to Authority or State Government to contend that claimant was not entitled to receive entire amount. In such circumstances, the Apex Court held that there is no such finding here which on account of it having attained finality may debar the High Court to examine the question regarding the right claimed by the claimant to receive the entire amount of compensation. But, this principle cannot be applied to the present case.

18. The other judgments, the party-in-person relied on, have no direct bearing on the issue and therefore they deserve no consideration in the interlocutory application.

19. On over all consideration of facts and circumstances of the case, we find no ground to restore the writ petition No.30964 of 2018, which was dismissed as withdrawn by order dated 15.11.2018, for the following reasons :

- (i) The relief claimed by way of counter-claim in the counter filed by this petitioner in the above writ petition cannot be granted in a petition filed under Article 226 of the Constitution of India, but such relief can be obtained in a regular competent civil court;

- (ii) no Court fee was paid on the counter-claim; and
- (iii) the child was not taken away by the 4th respondent in view of the interim order to gain advantage for herself;
- (iv) Writ Petition No.47795 of 2018 is already filed, which is identical to the relief in counter-claim the petitioner set up in the other writ petition sought to be restored; and
- (v) finally, the petition under Guardians and Wards Act is pending before the competent civil court as contended by the petitioner before this Court, where such relief claimed as a counter-claim in the writ petition can easily be obtained in accordance with law.

20. In view of the foregoing discussion, we find no ground to restore the Writ Petition No.30964 of 2018 to its file and transpose this petitioner as petitioner in the said case and consequently, I.A. is liable to be dismissed.

21. In the result, I.A. is dismissed. The observations made and findings recorded in the earlier paras will have no bearing on the pending disputes between the parties in any court. All those findings only have limited purpose of deciding the present issue.

Sd/ K.Murali
ASSISTANT REGISTRAR

//TRUE COPY//

For ASSISTANT REGISTRAR

To,

1. The Principal Secretary, Home Department, Secretariat Buildings State of Andhra Pradesh
2. The Director General of Police, Andhra Pradesh State, Andhra Pradesh
3. The Station House Officer, Chittoor Police Station, Chittoor, Andhra Pradesh.
4. Shri Pavan Kumar Namineni, S/o. Syamasundara Naidu Namineni, Presently residing at 19-14-11, Kesavayana Gunta, Raghavendranagar, Tirupati, Andhra Pradesh
5. One CC to SRI T S ANIRUDH REDDY Advocate [OPUC]
6. Two CC's to Advocate General, High Court of AP(OUT).
7. Two spare copies.

HIGH COURT

CPKJ & MSMJ

DATED: 12/04/2019

ORDER

IA No. 2 OF 2018

IN

WP.No.30964 of 2018

IA DISMISSED