

## Archana Desaradhi Vs V. Sivakumar

**Court:** Andhra Pradesh High Court

**Date of Decision:** April 29, 1994

**Acts Referred:** Guardians and Wards Act, 1890 & Section 25

Hindu Minority and Guardianship Act, 1956 & Section 6

**Citation:** (1994) 3 ALT 450 : (1995) 1 APLJ 50 : (1995) 1 DMC 142

**Hon'ble Judges:** P.L.N. Sarma, J; Motilal B. Naik, J

**Bench:** Division Bench

**Advocate:** T. Veerabhadrayya, for the Appellant; Vilas V. Afzal Purkar, for the Respondent

**Final Decision:** Allowed

### Judgement

P.L.N. Sarma, J.

This appeal has been filed by the mother challenging the order of the Additional Chief Judge-cum-Principal Special

Judge for SPE & ACB cases, Hyderabad, allowing the application filed by the father u/s 25 of the Guardian and Wards Act read with Section 6 of

the Hindu Minority and guardianship Act for the custody of the minor, Master Manasa Rama.

2. For convenience take the parties would be referred to as the father and mother in this judgment. The father, respondent herein, filed an

application for the custody of the minor. Manasa Rama, aged about 4 years at the time of filing of the application (now about 6 years) alleging that

the father and the mother of the ward were married on 2-10-1987 according to Hindu rites and custom and the ward was born on 10-7-1988.

However, due to certain differences between them, an application u/s 13-B of the Hindu Marriage Act was filed by both of them seeking

dissolution of the marriage by a decree of divorce by mutual consent. The same was ultimately granted on 7-2-1991 by the Court. At the time of

granting of the decree for divorce, as the minor boy was an infant in arms requiring maternal love and affection, it is the allegation of the father, he

consented for the mother to continue to have the custody of the minor boy. He stated that he is a chartered accountant running institution for

coaching professional courses at Madras and set apart a sum of Rs. 25,000/- in a fixed deposit in the name of the minor boy and he used to come

to Hyderabad to see the minor boy after duly intimating the mother of the boy. On 1-5-1992 he requested the mother through a letter to make the

minor boy available so that he can spend some time with him but there was no reply and on 14-3-1992 when he contacted the mother, appellant

herein, by phone she expressed her inability to arrange a meeting between the minor boy and the father due to certain personal inconvenience.

Latter the father came to Hyderabad on 2-6-1992 and a meeting was arranged at the Abids shopping centre through the good offices of the

advocate who appeared for the mother. At the meeting he found that the minor boy was looking pale and addressed him as uncle instead of father.

He apprehends that there is a systematic brain washing of the minor child as against him. He also came to know that in the school records the

minor"s father"s name was noted as Dasarathi and not his name. The mother married a second time after divorce and has step-children to look

after and she is also a working woman and therefore she may not in a position to look after the minor boy. He stated that he is in affluent condition

and that he has got sufficient means by way of landed property also and he is in a position to look after the minor. Therefore, on the basis of the

allegations contained in the application, the father claims custody of the minor boy, Manasa Rama.

3. The application was resisted by the mother by filing a counter denying the allegations contained in the petition regarding the attempts made by

the father or the events that had happened on 1-5-1992 or the response over telephone on 14-5-1992. She denied all those allegations. She also

denied the allegations made that her younger and elder sisters along with their husbands and one Mr. Ravi abused the father in foul language, etc.

She also stated that the father contracted a third marriage and that she is not a working woman and she has no step-children to look after, that the

welfare of the minor boy serves much better if the minor boy is left in her care and custody and that it is not in the interest of the minor boy to

remove him from the custody of the natural mother and give the same to the father.

4. Evidence has been let in by both the parties in support of their respective cases. The father examined himself as P. W. 1, while the mother

examined herself as R.W. 1. She also examined her sister as R. W. 2 and maternal aunt as R.W. 3. Exs. A-1 to A-6 were marked on the side of

the father and Exs. B-1 to B-4 were marked on the side of the mother.

5. On a consideration of the material placed before the learned Judge the application was allowed granting custody of the minor boy to the minor

boy to the father. Assailing the said judgment the present appeal has been preferred by the mother.

6. The father as P.W. 1 stated in the evidence that he is a chartered accountant running an educational institution called Srinivasa Coaching. Centre

conducting classes for C A. and I.A.S. students and that he is in an affluent condition. He is the natural guardian of the minor, Manasa Rama, and

entitled to the custody of the minor under the Provisions of the Hindu Minority and Guardianship Act. At the time when the decree of divorce by

mutual consent was granted, on the advice of the advocate for the respondent that the minor boy must be left with the mother for a period of five

years and during that period he has no interest to see the boy, he did not make any effort to have the custody of the minor boy. Whenever he came

to Hyderabad he used to see the minor and on 1-5-1992 when he wanted to see minor he wrote a letter to the mother but there was no reply from

her. There on telephoned on 14-5-1992 to the mother only to be told that she was going to Ooty and it is not possible to arrange a meeting

between the father and the minor and if he is interested it can be done on 2-6-1992 morning. Accordingly on 2-6-1992 he came to Hyderabad in

the morning and contacted the respondent on phone and as per the instructions he visited her residence at about 9-30 a.m. There one Mr. Ravi

and Mr. Aradhana viz., R.W. 2 threatened him not to come to Hyderabad any more to see the boy, failing which there will be physical danger to

him. When he met the neighbours they informed that the petitioner's father died recently and that the minor was staying with the grand-mother

while the petitioner-mother is residing with her husband elsewhere. Then through the good offices of Sri P. Ramachandra Rao, advocate for the

mother, a meeting was arranged at 6.00 p. m. at Abids shopping centre. The minor, mother and Sri Appa Rao came to Abids shopping centre and

it is stated that Appa Rao prevented him even to touch his son who was looking pale and disturbed. When the minor boy was asked by the mother

whether he is willing to go to Madras the minor boy started crying and nobody could pacify him. Therefore, he was left with no choice but to leave

the place. He further stated in the chief examination that he has not seen his son during the pendency of the petition before the lower Court. He

spoke to his income amounting to Rs. 1,20,000/- p. a. and stated that he has mother aged about 50 years and that himself, his mother and his wife

are all living together and they will be in a position. to look after the child in a proper manner. He stated that he married a third time and during the

said wedlock he has one daughter and that daughter is about one year by the time of giving of the evidence and her name is Kiranmai Gandhi.

7. R.W. 1, the mother, stated in her evidence that her husband, herself and her mother are living together and that herself and her mother are taking

care of the child and she stated that she has no children through Mr. Dasaradhi whom she married on 26-3-1991. She stated that the father,

respondent herein, visited her house on 2-6-1992. As her father's ceremony was being performed in the house on that day the meeting could not

be arranged between the father and the minor and she denied the allegations that the father was abused when he came to her house on 2-6-92 to

see the minor. She specifically mentioned in the chief-examination that if the father is allowed to see the minor in her absence he may take away the

child and that she has no objection to take the child anywhere in Hyderabad to enable the father to meet the minor in her presence. In the cross-

examination she stated that after she married a second time on 26-3-1991, her husband Mr. Dasaradhi, herself and the minor are living together

separately from others. She stated that Dasaradhi is an engineer in a private firm and that she is not employed anywhere and reiterated that she has

no children through Dasaradhi. She also denied the suggestion that her financial position or capacity is not sound to educate the boy in a manner

befitting his status and welfare and also denied the suggestion that the minor boy is not getting the required care and affection at home. She denied

the suggestion that she is trying to erase the memory of the father from the mind of the child. She also stated that in the school records Mr.

Dasaradhi's name was mentioned as foster father and Mr. Dasaradhi is getting a sum of Rs. 12,000/- p.m. as a computer engineer in a private

company, the headquarters of which is situated in U.S A. She also spoke to the fact that she was earlier employed working as manager in

Architects Engineers, Hyderabad but now she is not working.

8. R. W. 2 was examined only in respect of the allegations made by the father regarding the fact that he was abused when he went to the house of

the respondent on 2-6-1992. Likewise, R.W. 3 was examined for purposes which are not relevant for the disposal of the appeal.

9. From the evidence it is apparent that the minor was born on 10-7-1988. At the time when the decree for divorce by mutual consent was passed

on 7-2-1991 no arrangement was made for the custody of the minor boy. It is also fairly clear from the evidence on record that the father did not

make any attempt to see the child except the one that is mentioned on 2-6-1992. He stated in the chief-examination itself that since the minor was

infant in arms needing maternal love and affection he consented for the minor to remain with the mother. He stated in the chief-examination that

during his frequent visits of Hyderabad to see the minor, Master Manasa Rama, he used to inform the mother by letter beforehand and used to fix

up an appointment for the visit. But there is absolutely no cogent and convincing evidence on record, forthcoming, to establish the fact that he was

frequently visiting and meeting the minor child. The result being that the minor, right from his birth on 10-7-1988 till date, is living with and being

looked after by the mother. He is also being educated having been admitted to Rishi Public School at Hyderabad and it is stated that he is in

second standard. The father, no doubt, has a mother aged about 56 years but he contracted another marriage and through the present wife he has

a girl aged about one year at the time of giving of the evidence. Therefore, in his house apart from him, he has his mother and wife and they are

having a minor female child. The evidence of P.W. 1 is that he will be able to provide a stable home life for the minor, Manasa Rama, with the

support of his mother and his wife, having regard to the financial status and position he enjoys. It is significant to note that neither the mother nor the

present wife having been examined in the case. No doubt, affidavits have been filed here in this Court. We are not inclined to accept these

affidavits. It is necessary to note, in this connection that the father states in his evidence that he is running an educational institution called Srinivasa

Coaching Centre and enjoys good reputation and is coaching students for C.A. I.A.S. and therefore, earning about Rs. 1,20,000/- p.a. These

allegations, which are made, indicate that the father seems to be a busy man and the minor is of tender age of six years" and it may not be possible

for the father to look after the minor boy. He will have to necessarily depend upon the support of his mother aged 56 years and the wife. His wife

is already having a female child aged about one year at the time of deposition and as a stepmother, she may not be in a position to devote much

time and attention for the welfare of the minor. The only other person left in the house is his mother. Nothing is brought on record to establish

whether she is in a position to look after the minor and has bonds of affection for the minor, etc. We have already stated earlier that the minor child

has been in the care and custody of the mother at Hyderabad in a particular environment. Now when we look to the other side of the picture, the

mother no doubt is married but she has no children as on today through Mr. Dasaradhi whom she married on 26-3-1991. She is not working now

and she has a mother also and the minor boy, herself and Mr. Dasaradhi are living together separately and the minor has been with her throughout.

10. We have interviewed the parties as well as the minor child, Manasa Rama. We found him to be getting good education, well-behaved, well-

mannered and being looked after well. When we suggested that he can go to Madras and enjoy the company of his father, he expressed his

disinclination to go to his father at Madras. May be, his attitude is due to the fact that he is accustomed to the present environment at Hyderabad.

Whatever it may be, we have to see the welfare of the minor and no other consideration can outweigh this requirement. Even in the evidence of

P.W. 1 he fairly stated that at the meeting at Abids shopping centre on 2-6-1992 when the mother asked the minor boy whether he is willing to go

to Madras with the father the boy started crying and nobody could pacify him and therefore he had to leave having no other choice. This is true

even now. Therefore, if we remove him and take him away from the present environment and put him in a totally new environment among

strangers, except the father, it may not be congenial and in the best interests of the minor. At any rate, it may not serve the interests of the minor at

present.

11. It is well-settled by a catena of decisions that the provisions of Hindu Minority and Guardianship Act are in addition to and not in derogation of

Guardians and Wards Act, 1890. The relevant Sections of the Hindu Minority and Guardianship Act are subject to Section 13 of the Hindu

Minority and Guardianship Act which specifically says that in the appointment or declaration of any person as a guardian of a Hindu minor by a

Court, the welfare of the minor should be the paramount consideration. The principles governing the appointment of guardian of a minor have been

laid down in several cases and the gist of the same has been extracted in the judgment of a Division Bench of this Court in C.M.A. No. 1573 of

1989, dated 29-8-1990. The relevant portion of it reads thus:

All the decisions cited on either side establish one important factor i.e., that the Court will exercise its jurisdiction with reference to the custody of

the minor child only for the promotion and the welfare of the child. The parental rights, however, remain qualified and not absolute in this regard.

The welfare of the ward is the paramount consideration for considering the question for appointment of a guardian or for giving the custody of the

child to the guardian from whose custody the minor was removed. The fitness of the father to the custody of his minor child has also to be

considered in the context of the welfare of the minor and not with reference to the personal character of the father. All the provisions of the

Guardians and Wards Act, viz., Sections 17 and 25 clearly stated in specific terms that the jurisdiction will have to be exercised only for the

welfare of the minor child.

12. The Supreme Court in a decision Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, , stated as under :

Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision

cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As the matters ""are presented to us today, the

boy, from his own point of view, ought to be in the custody of the mother.

13. Keeping these principles in view we have to see where the welfare of the minor lay. The facts and circumstances which have been mentioned

earlier clearly establish that though the father as a natural guardian has statutory right to be appointed as guardian, the same is not absolute and the

welfare of the minor in question viz., Manasa Rama says in leaving him in the care and custody of the mother. A learned Judge of this Court in S.

Fatima v. A. Mohtuddin, 1968 (1) AWR 433 at 439, stated in similar circumstances as under :

He married another wife. She has not been produced in the witness box. It is difficult to say whether she will be kind to the children. Merely

because the petitioner's father and mother are also staying with him, it does not mean that the second wife will have no say in the household

matters. The step-mother in the household of the father has been taken as almost a factor against the welfare of the minor, an instance to the

contrary being taken only as an exception. It is only from that point of view that the second wife's evidence was material.

14. These observations are apposite to the present case. Here also the same circumstances arose. However, we hasten to add that we should not

be understood as laying down as a proposition of law that in the present case the step-mother is also put in the same category. On the facts and

circumstances, without going into the existence of a stepmother or not, we are of the opinion that"" the interests of the minor are well-served by

keeping him with the mother for the present.

15. However, the father undoubtedly has a right even in such cases to visit and the same cannot be denied by anybody. One of the suggestions

made on behalf of the father by the learned Counsel appearing for him is that the father may be permitted to take the minor boy to Madras once in

a month on Saturday and Sunday and return to the mother on Monday so as not to affect the schooling. We have given our anxious consideration

for this aspect. We are of the opinion that it may not be desirable straightaway to allow the father to take the minor child to Madras viz., totally

new surroundings. Having regard to all the suggestions made before us and on the facts and in the circumstances we would like to give the

following directions, which, we feel are reasonable and serve the interests and welfare of the minor.

1. The custody of the minor boy, Manasa Rama, shall continue to be with the mother.

2. The father is entitled to meet Manasa Rama once in a month on a Sunday after fixing the date in advance. On the said day at about 10'O clock

in the morning the minor child will be given to the father in the presence of either Sri T. Veerabhadrayya, Counsel appearing for the mother at his

house or in case of his non-availability in the presence of Sri Vilas Afzal Purkar. At his house and the father is also entitled to take the child out in

Hyderabad and hand-over the minor child back to the mother in the presence of Sri. T. Veerabhadrayya at his house or in his absence or

nonavailability in the presence of Sri Vilas Afzal Purkar at his house by 4"O clock in the evening. This arrangement will go on for the present to

enable the minor child to acquaint himself with the society of the father.

16. All the decisions are uniform in that, that these orders passed with reference to the custody of the minor are merely tentative and the Court is

entitled to vary these orders wherever such variations are considered to be in the interests of the minor, due to change in conditions and

circumstances and passage of time. Therefore, it would be open to either of the parties to these proceedings to apply to this Court for further

directions or orders as and when circumstances warrant such a course. As and when such application is filed the same will be disposed of on its

own merits and in accordance with law.

17. On behalf of the father, on instructions from him, Sri Vilas Afzal Purkar, the learned Counsel stated that the father is Willing to pay sufficient

amount, whatever is the amount fixed by this Court, towards education, maintenance, etc., of the minor child. Tentatively we direct the father to

make arrangement for a sum of Rs. 1,000/-p. m. Out of the said Rs. 1,000/-, the half amount of Rs. 500/- shall be kept in recurring deposit by the

father himself in the name of Manasa Rama for a period of 60 months. That deposit will be subject to any orders that may be passed by this Court

in future. The balance of Rs. 500/- shall be credited by the father to the account of the minor in the Indian Bank, Himayatnagar Branch,

Hyderabad. This shall be done every month on or before 10th of the said month. The payment of Rs. 1,000/-p.m. as aforesaid shall be with effect

from the month of September, 1994. For the month of September, 1994, the father can deposit or make arrangement for transfer within a period

of ten days from today.

For all the above said reasons and the directions given, the judgment under appeal is set aside and the appeal is allowed with the above said

directions. There will be no order as to costs.