

(2013) 09 AP CK 0041

Andhra Pradesh High Court

Case No: F.C.A. No. 45 of 2012

Md. Fayaz and Smt. Amthullah
Bee

APPELLANT

Vs

Smt. R. Sabiha Begum

RESPONDENT

Date of Decision: Sept. 4, 2013

Citation: (2014) 1 ALD 474 : (2014) 3 ALT 615

Hon'ble Judges: S.V. Bhatt, J; L. Narasimha Reddy, J

Bench: Division Bench

Advocate: Md. Saleem, for the Appellant; K. Soma Konda Reddy, for the Respondent

Final Decision: Disposed Off

Judgement

L. Narasimha Reddy, J.

The respondents in F.C.O.P. No. 117 of 2010 on the file of Family Court, Kurnool filed this appeal u/s 19 of the Family Courts Act, 1984 feeling aggrieved by the order dated 17-01-2012 passed therein. The 2nd appellant is the mother of the 1st appellant. The 1st appellant was married to Smt. R. Shahnaz Begum, the sister of the respondent, on 13.05.2007. The couple was blessed with a female child viz., Anshra Falaq, in the next year. On 04.04.2010, the wife of the 1st appellant died. A complaint was submitted to the III Town Police Station, Kurnool, alleging that the 1st appellant, his parents and brother murdered Smt. R. Shahnaz Begum. Crime No. 76 of 2010 was registered, and thereafter, a case is being tried as S.C. No. 159 of 2011 in the Court of IV Additional District and Sessions Judge, Kurnool. The 1st appellant, his parents and brother are accused of the offences punishable u/s 304B read with Section 34 of the Indian Penal Code, and other relevant provisions.

2. The respondent filed F.C.O.P. No. 117 of 2010 under Sections 7 and 17 of the Guardians and Wards Act, 1890 and under Sections 7 and 8 of the Family Courts Act, 1984 for custody of the minor child. She has also invoked the relevant customary law of the Islam. She pleaded that, not only the 1st appellant, but all his family members are facing trial for the offence of murder of Smt. R. Shahnaz Begum and

that it is no longer safe for the minor child to be in their custody.

3. The appellants filed counter opposing the O.P. The 1st appellant pleaded that being the natural father, he is entitled for custody of the minor child and the respondent has no right whatsoever. He also pleaded that the allegations made against him are totally incorrect and that the death of his wife occurred on account of electric shock.

4. Through the order under appeal, the trial Court allowed the F.C.O.P.

5. Sri Md. Saleem, learned counsel for the appellants, submits that the allegation made against the 1st appellant is yet to be proved and as of now, he deserves to be treated as innocent. He contends that being the natural father of the minor child, the 1st appellant is entitled for the custody and at the most the respondent can seek the relief of visiting the minor child occasionally. He submits that the trial Court has misapplied the relevant provisions of law and that the decree passed by it cannot be sustained.

6. Sri K. Somakonda Reddy, learned counsel for the respondent, on the other hand submits that once the 1st appellant is accused of causing the death of his wife, it is difficult to expect any safety to the minor child. He contends that whether one goes by the provisions of Guardians and Wards Act or the Customary Law of Islam, the respondent, being the sister of the deceased Smt. R. Shahnaz Begum, is entitled for custody. He contends that the trial Court has taken correct view of the matter and no interference is warranted.

7. The trial Court framed only one point for consideration viz., "whether the respondent is entitled to claim for the custody of the minor girl?"

8. On behalf of the respondent, PWs. 1 and 2 were examined and Exs.A-1 to A-4 comprising the certified copy of the F.I.R., birth certificate of the minor girl, photographs of Shahnaz Begum, who is the wife of the 1st appellant, are filed. On behalf of the appellants, R.Ws. 1 and 2 were examined and no documentary evidence was adduced.

9. The points that arise for consideration before us are:

(1) Whether the respondent is entitled to seek the custody of the child and, if so, the nature thereof?

(2) Whether the order passed by the trial Court warrants any interference?

POINT No. 1:

10. It is a matter of record that the 1st appellant was married to the sister of the respondent and a minor child was born to them in the year 2008. The wife of the 1st appellant, however, met with an untimely death. There is serious dispute as to the cause of the death. While according to the 1st appellant, the death occurred on

account of electrocution, the respondent complained that the 1st appellant, his parents and brother caused the death of Shahnaz Begum. As of now, the 1st appellant is facing the trial in S.C. No. 159 of 2011.

11. We find that there is no codified Muslim Law governing the subject. It is mostly in the form of commentaries of the Jurists. Whether one goes by the general codified law or by customary law, the father, no doubt, is natural guardian of the child, particularly, when the mother is no more. However, there are exceptions to this. If the father is facing the allegation of causing the death of his wife i.e., mother of the minor child, it is not at all safe to keep the custody of such child with him, at least, till the cloud upon his involvement in the death of his wife is removed. That can take place only when the trial Court, which is trying the offence leading to the deceased woman, acquits him.

12. Being the maternal aunt of the minor child, the respondent is very much entitled for the custody. However, we add a caveat here. The custody cannot be un-conditional or permanent. That would be only be till the prosecution launched against the 1st appellant reaches finality. In case, he is acquitted in the case, he would be entitled to get back the custody of the child. If, on the other hand, he is convicted, the respondent would continue to act as guardian of the child, till she attains the age of majority. Even in such case, the 1st appellant shall be entitled to have the right of visiting the child, depending upon the nature of sentence, which he may be required to serve. Point No. 1 is answered accordingly.

POINT No. 2:

13. In the light of our answer to point No. 1, we find it necessary to modify the order of the trial Court even while sustaining some of its findings. Therefore, the appeal is partly allowed modifying the order passed by the trial Court to the effect that:

(a) the respondent shall be entitled to the custody of the minor child viz., Anshra Falaq with immediate effect and the 1st appellant is under the obligation to handover her to the respondent.

(b) the custody so given to the respondent shall be subject to the outcome of S.C. No. 159 of 2011 pending on the file of IV Additional District and Sessions Judge, Kurnool. If the 1st appellant is acquitted in that case, he shall be entitled to get back the custody of the minor child. If, on the other hand, he is convicted, the respondent shall continue to be guardian of the minor child till she attains the age of majority.

(c) The 1st appellant shall be entitled to have the rights of visitation on the first and third Sunday of every month between 10-00 a.m. and 01-00 p.m.

(d) The respondent shall be under the obligation to continue the minor child in the same school and to bear the expenditure for education and maintenance.

The Miscellaneous Petitions filed in this appeal shall stand disposed of. There shall be no order as to costs.