

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.4336 of 2015

Dr.Muthian Sivathanu PH.D(USA)

[Petitioner]

Vs

1 The Secretary to Government
School Education Department
Government of Tamilnadu
Fort St.George Chennai 600 009

2 The Director of School Education
Tamilnadu DPI Campus
College Road Chennai 600 006

3 The Principal
D.A.V.Matric Higher Sec.School
Block No.12
J.J.Nagar Mogappair East Chennai 600 037

4 Nalini Muthian

[Respondents]

Petition filed under Article 226 of the Constitution of India for issuance of a writ of mandamus directing the respondents one to three to take action on the final notice dt.10.1.2015 of the petitioner and to cancel the illegal surreptitious admission given by the third respondent school to child M.Subhalakshmi, Std III B, Admission No.3214 in conspiracy with the fourth respondent Kidnapper and mother of the child so as to enable the continuance of the childs education in the previous school viz.St. Johns Matric Hr.Sec.School Baba Nagar Chennai 49 in order to protect the interests and reasonable well-being of the child.

For Petitioner : Mr.M.Sivathanu

For Respondents : Mr.V.Jayaprakash Narayan, SGP

O R D E R

The petitioner, Dr.Muthian Sivathanu, who claims to hold Ph.D. degree from the United States of America, has filed this writ petition for issuing a writ of mandamus to direct the respondents 1 to 3 to take action on the final notice dated 10.1.2015 and cancel the illegal admission given by the 3rd respondent school to M.Subhalakshmi, in III Standard, in conspiracy with the 4th respondent, who happens to be the wife of the petitioner, to enable the continuance of the child's education in the previous school viz.St. Johns Matriculation Higher Secondary School, Baba Nagar, Chennai 49.

2. I have elaborately heard the learned counsel for the petitioner and carefully perused the materials placed on record.

3. The 1st issue to be considered is whether the relief sought for by the petitioner is maintainable before this Court and such direction as sought for could be granted.

4. Admittedly, there is a matrimonial dispute between the petitioner and the 4th respondent-wife and the proceedings are pending before the Family Court. Though the learned counsel for the petitioner made elaborate reference to the dates and events of the proceedings in the Family Court and made an allegation that proceedings are indefinitely delayed in the Family Court, this Court is of the view that those issues need not be gone into for the purpose of considering whether the petitioner is entitled to the relief sought for.

5. It is seen that the 4th respondent-wife had filed a petition under Section 25 of Guardianship and Wards Act, 1890 r/w Section 7 of the Family Court Act, 1984 r/w 151 of CPC in G.W.O.P.No.2177 of 2011, wherein, she claimed guardianship and custody of the minor child Subhlakshmi. The said petition was allowed by the I Additional Family Court, Chennai, by order dated 04.12.2011. It is seen that despite notice, the petitioner herein who was the only respondent in the said G.W.O.P., did not appear. The Court, considered the documents filed by the 4th respondent-wife and allowed the petition and declared that the 4th respondent is appointed as permanent guardian with permanent custody for the minor female child M.Subhalakshmi, born on 03.06.2007 and the 4th respondent was directed to take necessary steps in the welfare of the minor child.

6. It appears that the petitioner herein has filed an interlocutory application in I.A.No.3121 of 2012 to condone the delay in filing an application to set aside the ex-parte order along with an application to set aside the ex-parte order and another interlocutory application in I.A.No.1543 of 2014, praying for a direction upon the 4th respondent to continue the education of the child M.Subhalakshmi in the same school viz., St. Johns Matriculation Higher Secondary School, Babanagar, Chennai 49 and to advance the hearing of the Guardian O.P. Be that as it may, the interlocutory application filed by the petitioner in I.A.No.1543 of 2014 to continue the child in St.Johns Matriculation Higher Secondary School was allowed by order dated 20.08.2014, since the 4th respondent-wife did not appear and she was called absent and set ex parte. It has to be pointed out that the I Additional Family Court, Chennai, while allowing I.A.No.1543 of 2014, passed the following order:-

"I.A. 1543/14 in O.P.2177/11
20.08.2014

Petitioner husband present. Respondent
wife absent

No representation for respondent.

Respondent called absent set exparte.

Heard the petitioner.

Petition is allowed".

From the above referred order, it is seen that the Family Court did not assign any reason as to how the writ petitioner was entitled to such a relief, though the 4th respondent-wife remained ex parte.

7. The petitioner, thereafter, sent a contempt notice stating that the 4th respondent has disobeyed the orders passed by the Family Court dated 20.08.2014 and filed a contempt petition before this Court in Contempt Petition No.3336 of 2014 to punish the 4th respondent for wilful, deliberate disobedience of the order dated 20.08.2014 passed by the I Additional Family Court, Chennai in I.A.No.1543 of 2014 in G.W.O.P.No.2177 of 2011.

8. The petitioner contended that the child has been kidnapped and shifted to another school and the child would be prejudiced as she would lose her friends in the old school and the action of the 4th respondent is in deliberate violation of the order dated 20.08.2014 passed in I.A.No.1543 of 2014 by the Family Court. The

4th respondent herein, who was the respondent in the contempt petitioner filed a counter affidavit stating that the allegation attributed is untenable because the girl child has already been shifted from St. Johns Matriculation Higher Secondary School, Babanagar, Chennai 49 to D.A.V. Matriculation Higher Secondary School, J.J.Nagar, Mogappair East, Chennai and hence the question of proceeding for contempt does not arise. Before the Court, the 4th respondent placed reliance on the school records including receipt for paying fees in D.A.V. Matriculation Higher Secondary School, J.J.Nagar, Mogappair East, Chennai and the student profile apart from other documents. The petitioner herein, while contesting the contempt petition submitted that the order passed by the Family Court allowing the Guardian O.P. itself is null and void. The Hon'ble Division Bench of this Court considered the submissions made by the petitioner as well as the 4th respondent as well as the pleadings and taking note of the entire facts, closed the contempt petition vide order dated 23.12.2014.

9. At this stage, it will be worthwhile to extract the order dated 23.12.2014 passed in Contempt Petition No.3336 of 2014 below:-

"This Contempt Petition has been filed for the alleged disobedience of the order dated 20.08.2014 made by the I Additional Judge, Family Court, Chennai, in I.A.No.1543 of 2014 in GWOP No.2177 of 2011, directing the respondent not to shift the girl child M.Subhalakshmi, born on 03.06.2007, from St. Johns Matriculation Higher Secondary School, Babanagar, Chennai 49.

2. The above said order came to be passed in the following circumstances:-

GWOP No.2177 of 2011 came to be filed by the respondent herein (wife of the petitioner), seeking an order appointing her as guardian of the said girl child. Since the petitioner herein who was the respondent in the GWOP did not appear, the said GWOP came to be disposed of by an ex-parte order dated 04.12.2011, granting the relief as prayed for by the respondent herein. Thereafter, the petitioner in the contempt petition, chose to file an interlocutory application in I.A.No.3121 of 2012 to condone the delay in filing an application to set aside the ex-parte order along with an application to set aside the ex-parte order. Pending disposal of the said application, he had prayed for an order of interim injunction not to shift the girl child M.Subhalakshmi from St. Johns Matriculation Higher Secondary School, Babanagar, Chennai 49, in which she was studying,

to any other school, by filing I.A.No.1543 of 2014, in the above said GWOP. In the said I.A.No.1543 of 2014, an ex-parte order came to be passed by the learned I Additional Judge, Family Court, Chennai, on 20.08.2014, granting an ad interim injunction as prayed for in the said application. Before ever the said order could be obtained by the petitioner herein, the girl child M.Subhalakshmi had been admitted in another school viz., D.A.V. Matriculation Higher Secondary School, J.J.Nagar, Mogappair East, Chennai 600 037. The fees for such admission in the said school came to be remitted on 18.06.2014 itself by the respondent herein. Thereafter, the petitioner chose to file a Habeas Corpus Petition before this Court in H.C.P.No.3175 of 2014 for the production of the said Girl Child M.Subalakshmi before this Court, alleging that the girl child had been kidnapped by her mother. A Division Bench of this Court, after hearing both sides, passed an order, dismissing the said H.C.P.No.3175 of 2014 on 14.11.2014. After suffering the dismissal of the said H.C.P., the petitioner has chosen to file the present contempt petition on 01.12.2014, alleging that the order passed by the learned I Additional Judge, Family Court, Chennai, has been violated by the respondent herein.

3. It is the contention of the learned counsel appearing for the respondent, who has put in a counter, that the order which is allegedly violated itself is unworkable because the girl child M.Subhalakshmi had already been shifted from St. Johns Matriculation Higher Secondary School, Babanagar, Chennai 49 to another school viz., D.A.V. Matriculation Higher Secondary School, J.J.Nagar, Mogappair East, Chennai 600 037 and hence there shall be no question of proceeding against the respondent for contempt.

4. Copies of the relevant school records including the receipt for the payment of fees in the D.A.V. Matriculation Higher Secondary School and the student's profile have also been produced. Upon perusing the said documents, we are convinced that the girl child M.Subhalakshmi, born on 03.06.2007, had been admitted in Class III, Section B of the D.A.V. School much earlier than the order passed by the I Additional Judge, Family Court, Chennai, which is said to be violated.

5. However, the learned counsel appearing for the petitioner would contend that the original order passed by the Family Court allowing the GWOP itself is null and void. Such a contention is quite irrelevant as the only question involved in this contempt petition is whether there was any violation of the order of the I Additional Judge, Family Court, Chennai dated 20.08.2014 made in I.A.No.1543 of 2014 in G.W.O.P.No.2177 of 2011.

6. In view of the fact that the girl child M.Subhalakshmi had already been moved to another School earlier than the date of the passing of the order in I.A.No.1543 of 2014 in GWOP No.2177 of 2011, we are of the considered view that no act of contempt has been committed after the date of passing of the above said order.

7. In the light of the foregoing facts and circumstances, we deem it appropriate to close the contempt petition, as no case for proceeding against the respondent for contempt has been made out. However, the learned I Additional Judge, Family Court, Chennai is directed to dispose of the I.A.No.1859 of 2014, which was filed to set aside the ex-parte order dated 04.12.2011, within a period of four weeks from the date of receipt of a copy of this order".

10. From the above order, it is seen that while closing the contempt petition and holding that there is no case for proceeding against the 4th respondent for contempt, a direction was issued to the I Additional Family Court, Chennai to dispose of the I.A.No.1859 of 2014, which has been filed to set aside the ex-parte order dated 04.12.2011, within a time frame. It is not in dispute that no further action has been taken by the petitioner against the order passed by the Division Bench in the said contempt petition and it has attained finality.

11. In the meantime, the petitioner has filed a Habeas Corpus Petition before this Court in H.C.P.No.3175 of 2014. The said petition was dismissed by the Hon'ble Division Bench, by order dated 14.11.2014. The Hon'ble Division Bench pointed out that since the order has been passed by the Family Court in G.W.O.P.No.2177 of 2011, question of entertaining the HCP does not arise. The petitioner however contended that the Habeas Corpus Petition was maintainable and relied upon the decisions of the Hon'ble Supreme Court. The Hon'ble Division Bench, took note of all the submissions and held

that they are not applicable to the facts of the case since the girl child aged about 7 is in the custody of her mother, which cannot be construed as an illegal custody. Then, the Hon'ble Division Bench proceeded to consider the scope of Habeas Corpus petition filed under Article 226 of the Constitution of India and the object behind the grant of such power and ultimately the Hon'ble Division Bench in its order dated 14.11.2014 held that the petitioner, who is the father of the minor girl is not entitled to seek the remedy of the custody of the child by way of Habeas Corpus Petition filed under Article 226 of the Constitution of India, by raising a plea of illegal detention of the child by the mother, since the child is in the custody of the mother.

12. It is not in dispute that as against the order passed by the Division Bench in H.C.P.No.3175 of 2014 dated 14.11.2014, the petitioner has not preferred any appeal. Thereafter, the petitioner has sent representations and a notice on 10.01.2015 to the respondents herein to treat it as a final notice before the petitioner files the writ petition for a mandamus, and to cancel the admission granted to his daughter and to advise the 4th respondent, the mother of the child to continue the education of the child in St. Johns Matriculation Higher Secondary School, Chennai 49. Thereafter, the petitioner appears to have sent similar representations and E Mail and has now filed this writ petition.

13. The learned counsel for the petitioner reiterated the entire facts as set out above and submitted that fraud has been played by the 4th respondent and therefore, this Court should interfere in the matter. In support of the above contention, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of A.V.Papayya Sastry and Ors. vs. Government of A.P. and Ors. reported in AIR 2007 Supreme Court 1546. The learned counsel further submitted that the child was in St. Johns Higher Secondary School and had a small group of friends in the school and it is illegal to remove the student from the said environment. In this regard reliance was also made to the observations made by the Hon'ble Supreme Court in the case of Mausami Moitra Ganguli vs. Jayant Ganguli in Civil Appeal No.3500 of 2008 dated 12.05.2008. Reliance was also placed on the decision of the Kerala High Court in the case of Dawlu @ Dawlath vs Ahammed Tarish in OP(FC) No.349 of 2014 (R) dated 24.07.2014. By referring to the said decision, it is submitted that when fool play has been resorted to in obtaining transfer certificate, a direction was issued by the Hon'ble Division Bench of the Kerala High Court to restore the child back to the old school. The learned counsel for the petitioner has also referred to the guidelines relating to the child access and custody guidelines which has been approved by the Hon'ble Bombay Hgh Court and by referring to clause 24 therein, it is stated that custodial parent shall not be entitled to admit, change the school or the daycare centre of the child without written consent and/or agreement between the parties

and if the issue has not been resolved, then admission, change of school/daycare centre of the child shall be as per the order of the Court.

14. After hearing the learned counsel for the petitioner and perusing the materials placed on record, it is evidently clear that the present writ petition is a clear abuse of process of law and Court. The petitioner claims to have secured Ph.D. degree from the United States of America and the cause title describes him as Dr.Muthian Sivathanu, Ph.D. (USA). From the facts narrated above, it is evident that the custody of the child with the 4th respondent is pursuant to the order passed by the Family Court in GWOP.No.2177 of 211 dated 04.12.2011. Therefore, the custody of the minor child with the 4th respondent is not illegal custody, but, it is pursuant to the Court decree. The said decree has not been annulled, set aside or modified till date. Therefore, the petitioner cannot seek to nullify the decree by resorting to the dubious method of filing this writ petition. In fact, so far as the order passed by the Family Court in I.A.No.1543 of 2014 dated 20.08.2014 is concerned, which has been referred to above, it is seen that the Family Court, while allowing the petition, did not assign any reason and the petition appears to have been allowed solely on the ground that the 4th respondent-wife was called absent and set ex parte.

15. Repeatedly, the Hon'ble Supreme Court has observed that even when the opponent is absent and he is set ex parte, still, there is a duty cast upon the Court to justify by assigning reasons as to how the petitioner is entitled to the relief sought for, even in the absence of the respondent. This cardinal principle pointed out by the Hon'ble Supreme Court has been ignored by the Family Court while passing the order dated 20.08.2014. Be that as it may, the petitioner filed a contempt petition before this Court, alleging disobedience of the order and the Division Bench has held that no case of contempt has been made out. Not stopping there, the petitioner moved the Division Bench of this Court by filing Habeas Corpus Petition alleging that the custody of the child with the 4th respondent is illegal custody and the child should be brought before the Court. The Hon'ble Division Bench rejected all the contentions raised by the petitioner and held that the custody of the child with the 4th respondent cannot be termed as illegal detention and dismissed the Habeas Corpus Petition. In such circumstances, question of entertaining a writ for issuance of a mandamus for the relief sought for does not arise.

16. The decision of the Hon'ble Supreme Court in the case of A.V.Papayya Sastry and Ors. vs. Government of A.P. and Ors. reported in AIR 2007 Supreme Court 1546, has absolutely no relevance to the case on hand. In fact the petitioner appears to have canvassed same contention before the Hon'ble Division Bench while arguing contempt petition also. Merely using the word "fraud" is not sufficient. If

the allegation of fraud is pleaded, it has to be proved in the manner known to law. This cannot be done in a writ petition, especially in the light of the successive proceedings initiated by the petitioner before this Court which all have ended against the petitioner. Therefore, the said decision of the Hon'ble Supreme Court is not applicable to the facts of this case.

17. Equally, the observations made by the Hon'ble Supreme Court in the case of Mausami Moitra Ganguli vs. Jayant Ganguli in Civil Appeal No.3500 of 2008 dated 12.05.2008 also is not applicable, since the 4th respondent is the mother who has got lawful custody pursuant to the order passed by the competent court. Therefore, the observations made by the Hon'ble Supreme Court in the said decision cannot be of any help to the petitioner.

18. So far as the decision of the Hon'ble Division Bench of the Kerala High Court in the case of Dawlu @ Dawlath vs Ahammed Tarish in OP(FC) No.349 of 2014 (R) dated 24.07.2014 is concerned, on facts, the Court found that there was foul play made by the husband for taking the child from the mother and therefore, the Court having been satisfied with the same, passed an order restoring the child back to the original school where the mother had admitted the child. It is not known as to how this decision would in any manner be of any assistance to the case of the petitioner. Therefore, the reliance placed on the decision of the Hon'ble Division Bench of the Kerala High Court is thoroughly misplaced and misconceived.

19. So far the Custody guidelines regarding Child Access and Custody, it has to be pointed out that the guidelines also states that if the issue is not resolved, then, it would be as per the order of the Court. As on date, there is an order passed by the Family Court recognizing the 4th respondent as the Guardian of the minor child and it has granted custody of the child. Therefore, the petitioner has to abide by the Court order and prosecute the matter before the Family Court since already certain directions have been issued by the Division Bench while closing the contempt petition No.3336 of 2014.

20. In the light of the above facts, this Court has no hesitation to hold that the present writ petition is a clear attempt to vindicate the grievances of the petitioner against his wife and it is highly regrettable to note that the petitioner is dragging the minor child in the legal battle between himself and his wife.

21. Hence for all the above reasons, the writ petitioner has not made out any case for issuing a writ of mandamus. Accordingly, the writ petition fails and the same is dismissed.

22. For the reasons assigned above, this Court would have been justified to impose heavy cost on the petitioner. However, taking note of the fact that the issue relates to a family dispute, this Court has not imposed any cost on the petitioner.

No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

- 1 The Secretary to Government
School Education Department
Government of Tamilnadu
Fort St.George Chennai 600 009
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Chennai 600 037

2 CCs to Mr.M.Sivathanu, Advocate SR.No. 9391

1 CC to the Government Pleader, SR.No. 9644

SKV (CO)
PSI (27.02.2015)

W.P.No.4336 of 2015