



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26 .06.2015

CORAM:

THE HONOURABLE MS.JUSTICE V.M. VELUMANI

C.M.A.(MD) No.236 of 2015 and

M.P.(MD).No. 1 of 2015

A.S. Ahamed Meeran

... Appellant

Vs.

P. Safana Yasmin

.. Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 47 of Guardian and Wards Act, 1890 against the fair and decreetal order dated 27.01.2015 made in GWOP.No.34 of 2014 on the file of Principal District Court, Theni.

For Appellant : Mr. Ajmalkhan, Senior Counsel for

M/s Ajmal Associates

For Respondent : Mr. T. Antony Arulraj

J U D G M E N T

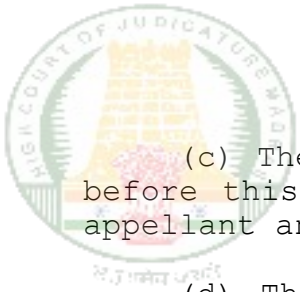
The Civil Miscellaneous Appeal is filed against the fair and decreetal order dated 27.01.2015 made in GWOP.No.34 of 2014, on the file of Principal District Court, Theni.

2. The appellant is the husband and the respondent is wife. The Respondent filed GWOP.No.34 of 2014, for appointing her as guardian of minor Moosa and to direct the appellant not to interfere with normal life of minor in the custody of respondent. By order dated 27.01.2015, the learned Principal District Judge, Theni, appointed the respondent as guardian of minor Moosa. Against the said order, the appellant has filed the present appeal.

3. The facts of the case are as follows:-

(a) The appellant and respondent got married according to Muslim Customs and Rites on 17.05.2002. A male child was born on 18.07.2003, in the wedlock and was named as Moosa. Due to mis-understanding between the petitioner and respondent, the marriage was dissolved as per Muslim Law by Muthavalli of Uthamapalaym Nainar Mohammed Pallivasal. An agreement of divorce was entered in to and reduced into writing. As per the said agreement, the custody of minor child will be with the appellant and respondent is given visiting rights.

(b) The minor child was studying in seventh standard in Laid Law School, KETTI, Ooty. On 18.10.2014, after school function the appellant brought the minor child to Uthamapalaym, at about 9.30 p.m. The respondent unlawfully and forcibly took the minor child. The appellant lodged a complaint before the Uthamapalaym Police Station. The respondent sent a notice on 20.10.2014 and the appellant sent a reply notice dated 23.10.2014.



(c) The appellant filed HCP.No.1286 of 2014. The respondent appeared before this Court along with the minor child. This Court, directed the appellant and respondent to work out their remedies in GWOP.

(d) The respondent filed GWOP.No.34 of 2014, for appointing her as guardian of minor child. In the O.P., the respondent alleged that the appellant is alcoholic, heavy smoker and short tempered. It will not be in the interest of minor, if he is brought up in that atmosphere.

(e). The appellant in the counter, denied all the allegations made by the respondent. According to the appellant, he is providing good education to minor, who is good in studies and extra curricular activities. As per divorce agreement, the respondent has only visiting rights. As per Mahomedan Law, the father is the Natural Guardian. The respondent has re-married one N. Kadar Mohaideen, who is already married and is having one and half years male child through the first wife. The respondent having remarried, is disqualified to be guardian of minor as per Mahomedan Law.

4. Before the learned Principal District Judge, Theni, no oral evidence was let in. The parties marked the documents as Exhibits. At the time of hearing the appellant was present. The respondent also was present along with the minor son.

5. The learned Principal District Judge considering the materials on record and the judgments relied on by the parties appointed respondent as guardian of minor child.

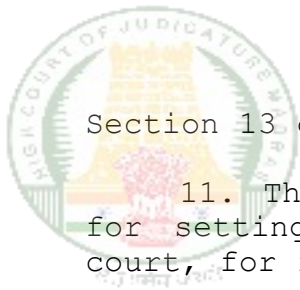
6. Against the said order, dated 27.01.2015, the appellant has preferred the present appeal.

7. The learned counsel for the appellant contended that, as per the Mahomedan Law the father of minor is the natural guardian. As per Section 352, Mulla's Mahomedan Law, mother can have custody of minor son till the age of seven years and custody of minor girl till she attains puberty. After that age, father only is entitled to custody of minor children.

8. As per Section 354 Mulla's Mahomedan Law, if the mother remarries, outside the relatives, she is disqualified from being guardian of minor and his custody. The respondent has married one N. Kadar Mohaideen outside the family. Therefore, she is disqualified from being appointed as guardian of minor. The financial status of mother also must be taken into account while considering appointment of guardian of minor. The appellant is providing good education and extra curricular activities to the minor.

9. The learned Senior Counsel for the appellant also contended that the learned Principal District Judge failed to consider Sections 6 and 13 of Guardians and Wards Act, 1890. As per Section 6 of the Act, the learned Judge ought to have taken into consideration, the law applicable to the minor and parties, at the time of appointing guardian of minor.

The learned Senior Counsel for the appellant contended that the learned Principal District Judge, Theni, passed an order appointing guardian and custody of child without taking evidence as required under



Section 13 of Guardians and Wards Act, 1890.

11. Therefore, the learned Senior Counsel for the appellant prayed for setting aside the impugned order and remand the matter to trial court, for fresh consideration.

12. The learned counsel for the respondent, on the other hand contended that the order of the learned Principal District Judge, is as per law. The learned Judge has held that the welfare of the minor is paramount consideration and for that reason, has appointed the respondent as guardian of minor child.

13. The learned counsel for the respondent submitted that the respondent has no objection for the matter being remanded for fresh consideration.

14. Heard the learned counsels appearing for the parties.

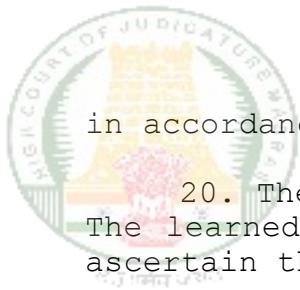
15. I have carefully perused the materials on record and heard the arguments of the learned counsel appearing on either side.

16. In case of appointment or declaration of guardian of minor, the welfare of the minor is paramount consideration. The learned Judge applied this principle, while passing the impugned order. At the time of hearing, before the learned Principal District Judge, Theni, the minor child was present along with the respondent. The learned Judge ought to have examined the minor to ascertain the wish of minor before passing orders. The minor was aged about 11 years at that time and was studying in seventh Standard in a convent residential school. The learned Judge presumed that the minor wants to be with the respondent, as he has come to the Court along with the respondent. By non-examination of minor, the learned Judge erred in committing irregularity.

17. The contentions of the learned Senior Counsel for the appellant that the learned Judge passed an order without taking evidence as required under Section 13 of Guardians and Wards Act, 1890. This contention is untenable. As per Section 13 of the Act, "Court shall hear such evidence as may be adduced in support of or in opposition to the application". In the present case, both the appellant and the respondent did not let in any oral evidence. They only marked documents. The learned Judge considered the documentary evidence and passed the order. It is not the case of the learned Senior Counsel for the appellant, that the appellant wanted to let in oral evidence and the learned Principal District Judge rejected the same and thereby, violated the provisions of Section 13 of Guardians and Wards Act, 1890. In the circumstances, the learned Principal District Judge, did not commit any irregularity in this aspect. He has followed the provision of Section 13 of Guardians and Wards Act, 1890, in letter and spirit.

18. Both the appellant and the respondent want to let in further evidence and have no objection for the matter, being remanded for fresh consideration.

19. The learned Principal District Judge, Theni, failed to examine the minor. For the above reasons, the order dated 27.01.2015, made in GWOP.34 of 2014, is set aside and remanded to the file of learned Principal District Judge, Theni, for fresh consideration, on merits and



in accordance with law, and for ascertaining the wish of minor.

20. The parties are at liberty to let in evidence, if they so desire. The learned Principal District Judge, Theni, shall examine the minor and ascertain the wish of minor before passing order.

21. The learned Senior Counsel for the appellant submitted that GWOP.34 of 2014 may be transferred to first Additional District Court, Periyakulam or Family Court, Theni, on the ground that the learned Principal District Judge, Theni, has already decided the issue. This submission is made on apprehension, which is not valid.

22. The learned Principal District Judge, Theni, is directed to consider the issue afresh on merits as per law, without taking into account the reasons given in the order, dated 27.01.2015, made in GWOP.No.34 of 2014.

23. with the above directions the Civil Miscellaneous Appeal is disposed of. No costs. Consequently connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(Per.Admn)

/True copy/

Sub Assistant Registrar(CS)

To

The Principal District Judge, Theni.

+1 CC to M/s Ajmal Associates, Advocate, Sr.No.34319

trp

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M.P.(MD).No. 1 of 2015
26.06.2015

TR/PRV : 01.08.2015 : 4p/3c