

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.06.2016

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

W.P. No.15628 of 2016  
& W.M.P.Nos.13581 & 13582 of 2016

A.Aniswar,  
Minor, Represented by his mother and  
Natural Guardian, Mrs.C.Shree Vidhya,  
2<sup>nd</sup> Floor, Old No.26, New No.18,  
9<sup>th</sup> Street, R.K.Salai, Mylapore,  
Chennai - 600 004. ... Petitioner

Versus

- 1.Union of India,  
Represented by its Secretary to Government,  
Ministry of Home Affairs,  
Foreigners Division, OCI Cell,  
NDCC - II Building,  
Jai Singh Road, Near Jantar Mantar,  
New Delhi - 110 001.
- 2.The Bureau of Immigration,  
FRRO, Chennai.  
No.26, Shashtri Bhawan Annexe Building,  
Haddows Road, Nungambakkam,  
Chennai - 600 006. .. Respondents

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, calling for records of 2<sup>nd</sup> respondent comprised in order dated 22.04.2016 bearing reference No FRRO Chennai Ref No.16840 quash the same as arbitrary, illegal, unconstitutional and consequently direct the 2<sup>nd</sup> respondent to register the petitioner as OCI and issue appropriate certificate without insisting upon custody order of guardianship in the hands of his mother from court of law.

For Petitioner : Mr.S.Ramesh  
For Respondents: Mr.V.Venkatesan  
SCGSC

## O R D E R

By consent, the Writ Petition is taken up for final disposal.

2.The deponent of the affidavit, is mother of the minor, namely, A.Aniswar. The deponent would state that she is an Indian Citizen holding an Indian Passport No.NN0276593. The marriage between the deponent and one Asok Kumar was solemnized as per the Hindu Rights and Customs on 28.08.1998 at Trichy and the husband of the deponent is a Malaysian Citizen, holding Malaysian Passport. After the marriage, for a brief period, the mother and father of the petitioner lived at Chennai and thereafter, shifted to Malaysia and there the petitioner was born on 10.02.2000. On account of difference of opinion between the mother and father of the petitioner, his mother filed a petition for divorce in F.C.O.P.No.2923 of 2006 on the file of the First Additional Family Court, Chennai under Section 13(1) (i-a) of the Hindu Marriage Act, 1955. The father of the petitioner, who was arrayed as respondent in the above cited proceedings, remained exparte and therefore, an exparte decree of divorce came to be passed on 22.02.2007. According to the petitioner, the respondent - father of the petitioner herein did not take steps to set aside the exparte decree and it has become final.

3.It is further stated in the affidavit filed in support of this petition that the petitioner was issued with "Person of Indian Origin Card" [PIO] bearing reference No.PO307767. The respondents herein vide notification dated 09.01.2015 in F.No.26011/01/2014-IC.I stated that from the date of the publication of the notification, all the persons holding the PIO Card, shall be deemed to be Overseas Citizen of India Card Holders. Therefore, it is insisted that all the existing PIO Card Holders will have to submit for registration as OCI Card Holders on or before 31.03.2016. Accordingly, the petitioner had submitted his application to the second respondent in FRRO Ref.No.16840 on 22.02.2016 along with all the necessary and relevant documents. However, the second respondent vide communication dated 22.04.2016 bearing reference No.FRRO Chennai Ref.No.16840, had returned the application stating that the petitioner will have to produce custody papers granting custody in favour of his mother - deponent of the affidavit and challenging the illegality of the order, came forward to file this Writ Petition.

4.The learned counsel appearing for the petitioner has drawn the attention of this Court that the word "natural guardianship" includes both the mother and the father. Even in

the judgment dated 15.11.2006 in F.C.O.P.No.2923 of 2006 on the file of the First Additional Family Court, Chennai, the fact of the custody of the petitioner with his mother, has been stated and the respondent - father of the petitioner in the said Original Petition did not take any steps to set aside the exparte decree for divorce and it has become final and therefore, it can be safely construed that the deponent of the affidavit, mother of the petitioner, is having his custody and prays for setting aside the impugned order with a further direction directing the second respondent for issuance of PIO Card. The learned counsel appearing for the petitioner, in support of his submissions, placed reliance upon the judgment in ABC VS. State [NCT OF Delhi] [(2015) 10 SCC 1 : 2015 7 Scale 480].

5.Per contra, Mr.V.Venkatesan, learned Senior Central Government Standing Counsel, who appears on behalf of the respondents has drawn attention of this Court to the counter affidavit of the second respondent and would contend that as per Clause No.5 of the brochure issued with regard to OCI Card Holders, "In case of minor child whose both parents are citizens of India or one of the parents in a citizen of India and (iii) If the parents are divorced, Court order of dissolution of marriage, which specifically mentions that the legal custody of the child is with the parent who is applying for the OCI Card." However, in the decree for divorce, it has not specifically stated anything about the custody and in the absence of such an order, the impugned order is sustainable and prays for dismissal of this Writ Petition.

6.This Court has considered the rival submissions and also perused the materials placed before it.

7.In Githa Hariharan (Ms) and another vs. Reserve Bank of India [(1999) 2 SCC 228], the facts of the case would disclose that the petitioner had agreed that the mother of the child, i.e., the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. However, the first respondent replied to the petitioners advising them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother and the said communication was put to challenge stating that it is in violation of Articles 14 and 15 of the Constitution and therefore, they prayed for striking down Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890. The Hon'ble Supreme Court of

India, after taking note of its judgment in Jijabai Vithalrao Gajre vs. Pathankhan [(1970) 2 SCC 717] and various decisions, has observed as follows;

"32.As regards the concept of guardianship, both the parents under the Hindu law were treated as natural guardians, of the persons and the separate property of their minor children, male or female except, however, that the husband is the natural guardian of his wife howsoever young she might be and the adopted father being the natural guardian of the adopted son. The law, however, provided that upon the death of the father and in the event of there being no testamentary guardian appointed by the father, the mother succeeds to the natural guardianship of the person and separate property of their minor children. Conceptually, this guardianship, however, is in the nature of a sacred trust and the guardian cannot, therefore, during his lifetime substitute another person to be the guardian in his place though, however, entrustment of the custody of the child for education or purposes allying may be effected temporarily with a power to revoke at the option of the guardian...

39.It is pertinent to note that sub-section (c) of Section 4 provides that a natural guardian means a guardian mentioned in Section 6. This definition section, however, obviously in accordance with the rule of interpretation of a statute, ought to be read subject to Section 6 being one of the basic provisions of the Act and it is this Section 6 which records that the natural guardian of a Hindu minor, in the case of a boy or an unmarried girl, is the father and after him, the mother. The statute, therefore, on a plain reading with literal meaning being ascribed to the words used depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of the death of the father, the mother obtains such a right to act as the natural guardian of a Hindu minor. It is this

interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision. It has been contended that the classification is based on marital status depriving a mother's guardianship of a child during the lifetime of the father which also cannot but be stated to be a prohibited marker under Article 15 of the Constitution.....

41. The contextual facts in the decision noticed above depict that since the father was not taking any interest in the minor and it was as good as if he was non-existing so far as the minor was concerned, the High Court allowed the mother to be the guardian but without the expression of any opinion as regards the true and correct interpretation of the word "after" or deciding the issue as to the constitutionality of the provision as contained in Section 6(a) of the Act of 1956 - it was decided upon the facts of the matter in issue. The High Court in fact recognised the mother to act as the natural guardian and the findings stand accepted and approved by this Court. Strictly speaking, therefore, this decision does not lend any assistance in the facts of the matter under consideration excepting, however, that the welfare concept had its due recognition.....

43. Turning attention on the principal contention as regards the constitutionality of the legislation, in particular Section 6 of the Act of 1956, it is to be noted that the validity of a legislation is to be presumed and efforts should always be there on the part of the law courts in the matter of retention of the legislation in the statute-book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law courts would be within their jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise and it is on this perspective that we may analyse the expressions used in Section 6 in a slightly more greater detail. The word "guardian" and the meaning

attributed to it by the legislature under Section 4(b) of the Act cannot be said to be restrictive in any way and thus the same would mean and include both the father and the mother and this is more so by reason of the meaning attributed to the words as "a person having the care of the person of a minor or his property or of both his person and property ...". It is an axiomatic truth that both the mother and the father of a minor child are duty-bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word "guardian", both the parents ought to be treated as guardians of the minor. As a matter of fact, the same was the situation as regards the law prior to the codification by the Act of 1956. The law, therefore, recognised that a minor has to be in the custody of the person who can subserve his welfare in the best possible way - the interest of the child being the paramount consideration."

8. The Hon'ble Supreme Court of India concluded that Section 6(a) of the Hindu Minority and Guardianship Act, 1956 itself recognises that both the mother and the father ought to be treated as natural guardians and the expression "after" therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature. It is further observed that the father by reason of a dominant personality, cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter, the word "after" shall have to be interpreted in terms of the constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used.

9. In the judgment in (2015) 10 SCC 1 (ABC vs. State [NCT OF Delhi]), the appellant adheres to the Christian faith and she gave birth to a son in the year 2010 and had subsequently raised him without any assistance from or involvement of his putative father and desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but was informed that she must either declare the name of the father or get a guardianship / adoption certificate from the Court. Accordingly, she filed an application under Section 7 of the Guardians and Wards Act, 1890 before the competent Court to declare her as the sole

guardianship. The appellant had also published a notice of the petition in a daily newspaper and had not named the father and therefore, the jurisdictional Court directed the appellant to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application on 19.04.2011 and challenge was made before the jurisdictional High Court that has ended in dismissal and therefore, she approached the Hon'ble Supreme Court by filing the appeal. The relevant portion is extracted below:

"An analysis of the law relating to custody and guardianship of children born outside wedlock in various jurisdictions indicates that the preponderant position is that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child. This analysis should assist us in a meaningful, dynamic and enduring interpretation of the law as it exists in India. The predominant legal thought in different civil and common law jurisdictions spanning the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother of a child born outside of wedlock. Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word "manta". Furthermore, recognising her maternity would obviate the necessity of determining paternity. In situations such as this, where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the well-being of the child (paras.17 and 18)"

Therefore, the Hon'ble Apex Court recognises the role played by the mother as the natural guardian of the minor.

10. In the case on hand, the facts placed before this Court would disclose that even in the exparte order passed on 22.02.2007 made in F.C.O.P.No.2923 of 2006, the fact that the petitioner had born to the deponent of the affidavit and her husband on 10.02.2000 and her return along with the petitioner to Trichy during August 2002 and her husband's continue stay at Malaysia, have been narrated. As already pointed out the respondent / husband of the deponent of the affidavit in the above said Original Petition, did not take steps to set aside the exparte order and therefore, it became final.

11. In the light of the above facts, it is not in serious dispute that the custody of the petitioner remains with the deponent of the affidavit, namely, Mrs.C.Shree Vidhya, D/o. Chellamuthu, residing at 2<sup>nd</sup> Floor, Old No.26, New No.18, 9<sup>th</sup> Street, R.K.Salai, Mylapore, Chennai - 600 004.

12. In the light of the above factual circumstances coupled with the above cited legal position, there cannot be any impediment on the part of the second respondent to consider the application submitted by the petitioner for getting OCI Card.

13. In the result, the Writ Petition is allowed and the impugned order of the second respondent bearing reference No.FRRO Chennai Ref No.16840 dated 22.04.2016 is set aside. The petitioner represented by her mother and Natural Guardian is at liberty to represent the application for getting the OCI Card as expeditiously as possible and on receipt of the same, the second respondent is directed to consider the said application in the light of the observations made in this order and process the application and pass orders, as expeditiously as possible and not later than two weeks from the date of submission of the application. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-  
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

sri

To

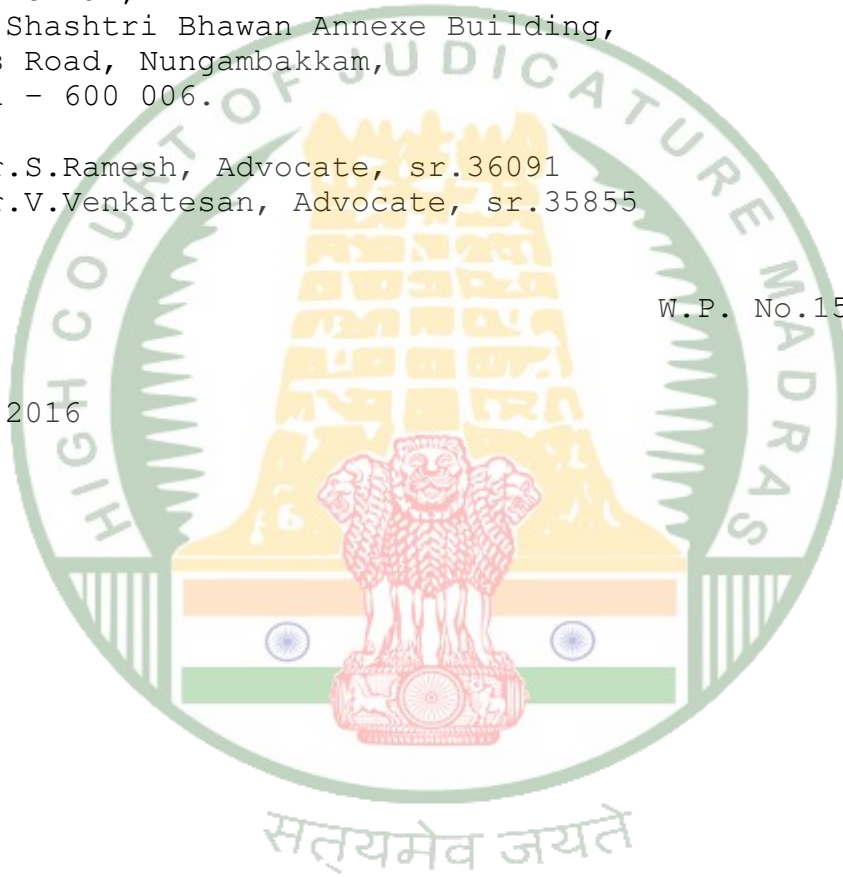
1.The Secretary to Government,Union of India,  
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2.The Bureau of Immigration,  
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No.26, Shashtri Bhawan Annexe Building,  
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1 cc to Mr.S.Ramesh, Advocate, sr.36091  
1 cc to Mr.V.Venkatesan, Advocate, sr.35855

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kra 28.06.2016



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