



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.11.2016

CORAM :

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

CMA(MD)No.1149 of 2016

M.Panchavarnam

... Appellant

vs.

Arthi

... Respondent

Appeal filed under Section 47 of the Guardian and Wards Act, 1890, against the order and executable order dated 22.08.2016 passed in GWOP.No.12 of 2013 by the Principal District Court, Ramanathapuram.

For Appellant : Mr.J.Barathan for Mr.T.R.Jeyapalam

JUDGMENT

The present Civil Miscellaneous Appeal has been filed against the order dated 22.08.2016 passed in GWOP.No.12 of 2013 by the Principal District Court, Ramanathapuram.

2.The facts in nutshell as narrated by the counsel for the appellant are that the appellant is the father-in-law of the respondent and his only son namely, Palanikumar, married the respondent on 08.09.2011 and out of the wedlock, a male child was born on 11.07.2012. The only son of the appellant died in a road accident on 24.02.2013. After the death of his son, the respondent/daughter-in-law was in the house of the appellant for sometime and thereafter, went to her parents' home. The appellant filed GWOP.No.12 of 2013 before the Principal District Court, Ramanathapuram, seeking custody of the minor child now aged 4 years. The reason stated by the appellant is that his grand son was with him for about 10 days after the death of his son and thereafter, the respondent filed a complaint before the All Women Police Station and she had taken away the child by threatening the appellant. The appellant/paternal grand father filed the petition for custody of the child. The ground for custody stated by the appellant is that the respondent is studying 10th Standard and for that purpose, she is going out and therefore, she is unable to maintain the child properly.



3. The contention of the respondent is that after the death of her husband, the appellant/father-in-law ill-treated her and had gone to the extent of beating and used abusive languages against her. Further, the respondent contended that the appellant illegally detained the child and driven out her from the house. The respondent finally filed a police complaint before the Uchipuli Police Station and after the intervention of the police, the respondent was able to secure her minor child aged about one year at that point of time. Further, the respondent contended that the appellant and his family members are not returning the articles and the jewels of the respondent which are under the custody of the appellant's family. Due to all these issues, the appellant with a view to harass the respondent, filed a petition for custody of the minor child.

4. The learned Principal District Court, Ramanathapuram, considered the rival contentions of both the appellant and the respondent and made a categorical finding that there was a strained relationship between the appellant and the respondent after the death of the son of the appellant in the road accident. This apart, the dispute between the appellant and the respondent still exists, since the articles and jewels belonged to the respondent are not handed over by the appellant to her. A case is also pending with regard to partition of properties. Considering various disputes prevailing between the appellant and the respondent and in the interest of the minor child aged about 4 years, the learned Principal District Judge rightly considered that the appellant is not entitled for custody of the minor child.

5. Courts have emphasised that the minor child below 5 years of age should be always with the custody of the mother, unless it is proved beyond reasonable doubt that mother is not fit to have the custody of the child. In ordinary circumstances, it is always advisable and preferable to have the custody of the child only with the mother, more specifically, in respect of a child below 5 years of age. Therefore, this Court is of the view that the findings rendered by the learned Principal District Judge, are very much emphatic and there is no infirmity in the said findings.

6. The learned counsel appearing for the appellant relied on the following decisions:-

(i) In **Roxann Sharma vs. Arun Sharma**, reported in **(2015) 8 SCC 318**, the Hon'ble Supreme Court at paragraph 6, held as follows:-

'6. In terms of Black's Law Dictionary, Tenth Edition, 'Visitation' means a non-custodial parent's period of access to a child. Visitation right means a non-custodial parent's or grandparent's Court ordered privilege of spending time with a child or grandchild who is living with another person, usually the custodial



parent. A visitation order means an order establishing the visiting times for a non-custodial parent with his or her children. Although the non-custodial parent is responsible for the care of the child during visits, visitation differs from custody because non-custodial parent and child do not live together as a family unit. In our opinion, visitation rights have been ascribed this meaning - In a dissolution or custody suit, permission granted to a parent to visit children. In domestic relations matters, the right of one parent to visit children of the marriage under order of the court.'

(ii) In **Dinesh @ Syed Mohamed Sheik Sikkandar and others vs. S.Jareena Begum**, reported in **2011-1-L.W 897**, this Court at paragraph 33, held as follows:-

'33.Hence, the judgment and decree dated 31.12.2009 passed in G.W.O.P.No.27 of 2007 by the learned First Additional District Judge, Madurai is hereby set aside. However, it is made clear that the respondent is entitled to seek visitation rights. Since the respondent did not come with any application, I leave it to the respondent to make an appropriate application before the concerned Court seeking visitation right.'

(iii) In **R.Poonkothai vs. K.S.Karupaiah**, reported in **2012 (3) MWN (Civil) 851**, this Court at paragraphs 33 to 36, held as follows:-

'33.In the light of the above factual matrix and the legal precedents, this court is convinced that it is the best interest of the minor child Tharun is to be with the maternal grand parents subject to visitation right of the second respondent in O.P.No.686 of 2011 and the petitioner in O.P.No.682 of 2011. So far as the properties are concerned, since contradictory statements are made, it is not safe to rely upon the scanty materials produced and also there is no reason to totally disqualify the paternal grand mother from the property issue.

34.Therefore, this court directs the first petitioner Karupiah in O.P.No.686 of 2011 and R.Poonkothai, the petitioner in O.P.No.682 of 2011 to be joint custodian of the properties of the minor Tharun. They will take inventories of all properties and submit a report to this court within 60 days from the date of the receipt of the copy of this order. They will administer the property in the well-being of the minor. Thereafter, if they want to alienate or encumber the property, they will file an appropriate application before this court. Until such time, moneys received on behalf of the minor shall be kept in the joint account to be opened by the maternal grand father Karupiah and paternal grand mother Poonkothai. If there is any dispute, the matter can be



resolved by taking out applications in O.P.No.686 of 2011.

35. In view of the above, it is hereby ordered that O.P.No.686 of 2011 is allowed partly and the petitioners therein are appointed as guardians of the minor child Tharun. The first petitioner Karuppiah in O.P.No.686 of 2011 and R.Poonkothai the petitioner in O.P.No.682 of 2011 are appointed as a joint custodian of the properties of the minor with liberty to move an application in case of any difficulty or difference and to get orders. They should file the entire list of properties both movables and immovables within 60 days as directed above.

36. In the result, O.P.No.682 of 2011 will stand dismissed with liberty to the petitioner Poonkothai to have an interim custody of the minor child during three vacations, i.e., quarterly, half yearly and summer vacations for a period of one week each after due notice to the guardians appointed by this court and without causing any inconvenience to the child's academic study. Consequently connected applications will stand dismissed. However, the parties will bear their own costs.'

(iv) In **Meera Agarwalla (Bansal) vs. Shyam Sunder Agarwalla**, reported in **CDJ 2000 SC 373**, at paragraphs 5, 6, 7 and 9, the Hon'ble Apex Court held as follows:-

'5. It seems evident that none of the parties has any oblique motive. All of them have utmost love and affection for Ankur and we suppose that with that object in view, the custody is being sought by maternal grandfather on the one hand and paternal grandfather on the other. Another reason may be to have a male member in the family as both grandparents have only daughters, the only male member being father of Ankur having died.

6. Ankur had been studying at Maria Montessori School, Guwahati from 1995 till he shifted to Dergaon along with the appellant in April 1999. Dergaon is about 200 kilometers away from Guwahati. He has been admitted in a school which is 25 kilometers from Dergaon though he daily travels about 50 kilometers both ways in the personal car of the appellant. Both the parties seem to be quite affluent though by that itself cannot be the only criteria. We are informed that the Maria Montessori School is only about one kilometer from the place where paternal grandparents reside. None says that it is not a good school. Serious doubts that have been expressed about the validity of the adoption were sought to be explained by learned counsel for the appellant. We, however, refrain from commenting upon the validity of adoption in view of the pendency of the suit challenging it. The reasons given by the Family Court and High Court for directing custody of Ankur being given to the



respondent No. 1 cannot be faulted. In the custody proceedings, the case of the daughter of the appellant also was that as she has given Ankur in adoption of her father, he alone is the lawful guardian and thus her father-in-law does not deserve to be appointed a guardian and given custody of Ankur. We may also note that initially, she did not challenge the order of the High Court but during the pendency of the Special Leave Petition filed by her father, she has filed Special Leave Petition. In view of her stand about adoption, we cannot entertain her Special Leave Petition, also now contending that she may be appointed as the guardian of Ankur. This was not the claim before the Family Court or the High Court.

7. The orders relating to custody of children are by the very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child (*Rosy Jacob v. Jacob A. Chakramakkal*, 1973(1) SCC 840).

9. The High Court in the impugned judgment has agreed with the reasoning and final conclusion to which the learned Principle Judge, Family Court reached in favour of respondent No. 1. It has to be kept in view that respondent No. 1 is the paternal grandfather of child Ankur. He appears to have lot of attachment to him. In fact, it was the case of the maternal grandfather himself that during the time minor Ankur was with respondent No.1, he and his wife were over-fondling him. This shows their attachment to him. It has also to be noted that the evidence laid before the Principal Judge, Family Court shows that earlier respondent No.1 had executed Wills bequeathing his movable and immovable properties in favour of his daughters but he has cancelled the said Wills and by two Wills (Ex. 4 and 5) executed by his wife and himself respectively, they bequeathed their entire property in favour of minor Ankur on condition that he comes and live with them. It has also been noted by the Principal Judge, Family Court that during the time minor Ankur was in the custody of the appellant pursuant to the interim order in these proceedings, he spent most of his time with servants in the house of the appellant at Guwahati as he lived mostly in Dergan which is about 200 kms. from Guwahati. As all the daughters of appellant were living outside, there was no other person except the servants of appellant in his house to look after minor Ankur. All these circumstances well established on record clearly show that there is no infirmity in the decision rendered by the Family Court as confirmed by the High



Court directing custody of minor Ankur to be handed over to respondent No.1, his paternal grandfather.''

(v) In **S. Balakrishnan vs. A. Malaimegu and another**, reported in **2014 (3) MWN (Civil) 513**, at paragraph 17, this Court held as follows:-

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'17. For the foregoing reasons, the impugned order passed by the Court below is liable to be set aside and accordingly, the same is hereby set aside. The Civil Miscellaneous Appeal is allowed. The appellant is declared as guardian of the minor child Ranjith Kumar and he is entitled to have the custody of the minor child. The respondents are directed to hand over the custody of the minor child to the appellant within a period of two weeks from the date of receipt of a copy of this order. The respondents are entitled to the visitation right and they may have the custody of the minor child for one day, once in two weeks, and also for a week in summer vacation of the school.''

7. The learned counsel for the appellant by citing the decision of the Hon'ble Apex Court in **Roxann Sharma vs. Arun Sharma**, reported in **(2015) 8 SCC 318**, argued that visitation right ought to have been given by the trial Court, while dismissing the petition filed by the appellant seeking custody of the minor child. In this regard, this Court finds that the appellant had not filed any petition seeking visitation right and therefore, there was no occasion for the trial Court to consider for the visitation right. Hence, the oral argument now advanced by the counsel for the appellant in the present appeal need not be considered, more specifically, in the absence of any specific petition by the appellant seeking visitation right.

8. The case reported in **Dinesh @ Syed Mohamed Sheik Sikkandar and others vs. S. Jareena Begum**, reported in **2011-1-L.W 897**, is also regarding visitation right and again, it is reiterated that no such petition was neither filed by the appellant nor pleaded before the trial Court. Hence, the same cannot be entertained more specifically in the appellate stage when there is a dispute between the appellant/father-in-law and the respondent/mother.

9. The other cases relied on by the learned counsel for the appellant are not similar to that of the present case on hand and considering the facts and circumstances of the present case, this Court is not inclined to consider the principles laid down in the abovesaid judgments in respect of the case on hand.

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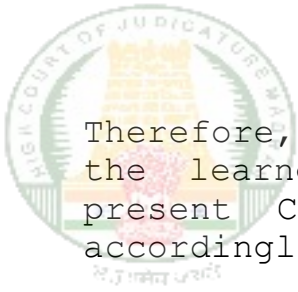
10. Further, due to the strained relationship between the



appellant and the respondent and regarding the pendency of cases before the Courts, it is not preferable to provide visitation right to the paternal grand father/appellant. The facts of the present case on hand clearly show that the appellant has not provided any reasonable care and affection to the respondent, who is none other than the daughter-in-law of the appellant. When the appellant is unable to provide a reasonable care to the daughter-in-law, he can conveniently be declared as an unfit person to have custody of the minor grand child or to have a visitation right. The facts and circumstances of the present case unambiguously portray that the appellant has not shown any affection towards the respondent and her child. Such being the situation, this Court is not inclined to consider the oral request of the learned counsel for the appellant to provide visitation right to the appellant. This apart, visitation right shall be provided either to the father or to the mother in the normal circumstances and in an extraordinary circumstances, where the natural guardians became unfit to have the custody of the child, then, the Courts shall consider the custody in favour of other persons, including visitation right. Hence, the request of the learned counsel for the appellant for visitation right shall not be considered.

11.The meaning of the word ''Love'' is defined in Webster's Dictionary as ''the feeling of strong or constant affection for a person, or strong affection for another arising out of a kinship or personal ties.'' Therefore, the father having a genuine love and affection towards his son, should consequently have an equal love and affection towards his daughter-in-law as well as grand children. A selective love of a father or father-in-law is to be always doubted. Therefore, the normal presumption is that a loving father will naturally show affection towards his daughter-in-law and the grand children. In the present case, the selective love and affection shown only to the deceased son by the appellant, can never be accepted as a natural love and hatredness shown to the respondent/daughter-in-law is to be considered against the appellant, while deciding the custody and for granting permission to have visitation right.

12.On reading of the facts and circumstances of this case, this Court is of the clear view that the interest of the minor child, especially at the age of 4 years is to be considered. It is the duty of the Courts to ensure that the minor child is protected in all respects and custody is given to the proper person. In the present case, the custody of the minor child is with the respondent/mother, who is the natural guardian and the father of the child died in the road accident. Such being the case, it is the natural course that the Court should see that the child especially, below 5 years is with the custody of the natural guardian and in the present case, the respondent/mother.



Therefore, there is no error or infirmity in the order passed by the learned Principal District Judge, Ramanathapuram and the present Civil Miscellaneous Appeal is devoid of merits and accordingly dismissed. No costs.

Sd/-

Assistant Registrar(CO)

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/True copy/

Sub Assistant Registrar

To

The Principal District Judge,
Ramanathapuram.

Nbi

CSL/SK-SKN/02.12.2016: 8P/2C

Pre-Delivery Order made in
CMA(MD) No.1149 of 2016
10.11.2016