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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

CORAM:

Reserved on : 23.03.2017

Delivered on : 02.06.2017

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.M.A.(MD)No.111 of 2017
and CMP (MD) No.1126 of 2017**

1.Hema Priya
2.Vijayaraja

... Appellants/Respondents

Vs.

Ramesh

... Respondent/Petitioner

Prayer:- Civil Miscellaneous Appeal filed under Order 47 of GWOP Act against the fair and decreetal order dated 09.09.2016 made in GWOP No.1 of 2014 on the file of the Additional District Judge, Virudhunagar.

For Appellant : Mr.G.R.Swaminathan
for Mr.T.Antony Arul Raj

For Respondent : Mr.J.Sureshkumar
for Mr.S.Jawahar

J U D G M E N T

This Civil Miscellaneous Appeal is filed against the fair and decreetal order dated 09.09.2016 made in GWOP No.1 of 2014 on the file of the Additional District Judge, Virudhunagar.

2. The appellants are the respondents and the respondent is the petitioner in GWOP No.1 of 2014 on the file of Additional District Judge, Virudhunagar at Srivilliputtur. The respondent and the first appellant are husband and wife. The second appellant is the mother of the first appellant. The respondent filed GWOP No.1 of 2014 under Sections 7, 9 and 10 of the Guardian and Wards Act, on the file of Additional District Judge, Virudhunagar at Srivilliputtur, seeking for a direction to the appellants to restore the custody of minor Sivathmika Rubini Ramesh to the respondent who is the father of minor daughter.

3. The marriage between the first appellant and the respondent was conducted at Rajapalayam on 06.09.1999 as per Hindu Customs and Rites. From the date of marriage, the first appellant was behaving in a manner which clearly exposed that she is immatured. The second appellant and her husband (father of the first



appellant) convinced the respondent that the first appellant was brought up in USA and she was not familiar with Indian culture. The respondent did not get visa to go to USA immediately. The first appellant, during first week of October 1999 went to USA. The marriage conducted on 06.09.1999 was registered only on 28.02.2001 when the first appellant came to India. After marriage, when the first appellant came back to India, the respondent and first appellant were living together for five months. The respondent came to know that even though the first appellant was aged 27 years, her mental maturity was only that of 5 years old. When the respondent made a complaint to the parents of the first appellant, they gave evasive reply. They offered the respondent a decent job in USA and the respondent went to USA and he was gainfully employed in USA from 2002.

4. In spite of the co-habitation, the first appellant did not conceive and medical examination revealed that she could not give birth to a child. She underwent medical treatment and by artificial insemination, the minor daughter was born. The mental condition of the first appellant was deteriorating day-by-day that she could not take care of herself and also the child. The respondent and the first appellant returned to India. The custody of the minor daughter was with the respondent and his parents took care of the child. In spite of medical treatment, the mental illness of the first appellant did not improve. By end of December 2010, the second appellant came to India and took away the minor daughter and the first appellant from the house of the respondent at Rajapalayam. The first appellant is mentally ill and she cannot take care of herself as well as the minor daughter. The first appellant has no independent income. The second appellant is 60 years old and she has no regular income of her own. The father of the first appellant and the second appellant (parents of the first appellant) filed insolvency petition and were declared as bankrupt and subsequently they were discharged. They do not have any independent income but they are living by the financial assistance given by the US Government. The first appellant also is living only on the financial assistance through Social Security Disability Benefits offered by the US Government on the ground of her mental condition. In the circumstances, it will not be in the interest of minor daughter, if custody is with the first appellant. The respondent is decently employed and is in sound financial position to bring up the minor daughter and give her good education and it will be the best interest of the minor daughter if custody is given to the respondent.

5. The first appellant filed counter statement and it was adopted by the second appellant denying the various averments mentioned in the petition filed by the respondent and submitted

<https://hcservices.courts.gov.in/hcservices/>

of marriage, the respondent was not having good job in India and it was agreed that respondent would come to USA where he could get good job. The respondent agreed to marry the



first appellant for secured life in USA where the first appellant's parents are permanent citizens. The appellants denied that the first appellant is having mental illness and maturity of 5 years old child. The first appellant did not conceive due to any defect in her but she could not conceive due to impotency suffered by the respondent. In view of the same, by artificial insemination injecting, a third person's semen into the uterus of the first appellant, she conceived. In view of the same, the respondent is not the father of the minor daughter. From the date of birth of the minor daughter, only the appellants are looking after and taking care of her. They are in sound financial position to maintain the minor and give her proper education and to take care of her. The respondent's sister namely Rajeswari has no child and it is the intention of the respondent to give the minor child to her. The respondent filed HMOP No.56 of 2011 against the first appellant for divorce with false averments and on false grounds. The minor daughter is an US citizen and it will be beneficial if she resides in USA. The respondent is not entitled to custody of minor daughter who is about to attain puberty and it will not be safe to give custody of the minor to the respondent.

6. The respondent filed reply statement and furnished the details of Bankruptcy filed by the second appellant and her husband (father of the first appellant) and Assets & Liabilities declared by them. The first appellant filed additional counter statement and submitted that I.A.No.201 of 2011 filed by the respondent seeking appointment of the second appellant as guardian of the first appellant on the ground that the first appellant was in unsound mind was dismissed after enquiry and the said order has become final. In view of the same, the second appellant is not a necessary party. The respondent is earning a meagre salary from a private company and he has to maintain himself and his parents. The respondent is not the natural guardian of the minor daughter and is not a fit person to be appointed as guardian.

7. Before the Additional District Judge, Virudhunagar, the respondent was examined as P.W.1. and 15 documents were marked as exhibits P1 to P15. The appellants did not let in any oral and documentary evidence. The learned Additional District Judge, after considering the pleadings, oral and documentary evidence let in and the various judgments relied on by the learned counsel for the respondent, held that the respondent is the father and natural guardian of the minor child and it will not be in the interest of the minor, if custody is given to the first appellant and allowed the GWOP filed by the respondent. However, the learned Additional District Judge granted visitation right to the first appellant.

<https://hcservices.courts.gov.in/hcservices/> the said order dated 09.09.2016 made in GWOP No.1 of 2014, the appellants have preferred the present appeal.

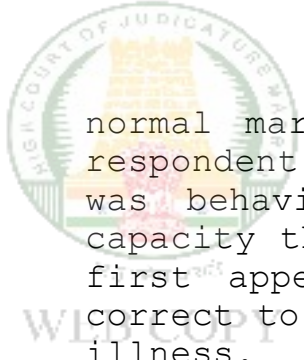


9. The learned counsel for the appellants submitted that the respondent is not the biological father of minor viz. Sivathmika Rubini Ramesh and in the case of custody of minor child, the welfare of the child is paramount consideration for the courts. The respondent, from the birth of the minor did not show any love and affection and from the date of birth of the minor, the first appellant alone is taking care of the child with utmost love and affection. The first appellant has sufficient and financial means to bring up the minor child. The minor child was born in USA and she is a US citizen. The courts in India have no jurisdiction to entertain the GWOP. The contention of the respondent that the first appellant is mentally ill was rejected by the Court by dismissing I.A. No.201 of 2011 filed by the respondent for appointment of second appellant as guardian of the first appellant. The respondent harassed the first appellant in matrimonial home and the first appellant has filed complaint against the respondent and his family members. The said complaints were registered as Crime No.4 of 2011 under Section 498A & 406 of IPC and the said complaint was taken on file as C.C.No.51 of 2011 on the file of Judicial Magistrate No.2, Srivilliputtur and by judgment dated 08.10.2012, the respondent was convicted for the offences under Section 498A of IPC. Subsequently, the said judgment of conviction was set aside by the Additional Sessions Judge, Virudhunagar in Crl.A.No.6 of 2014. Mere acquittal of the respondent will not be a ground for rejecting the plea of the first appellant.

10. The learned counsel for the appellants contended that filing of Bankruptcy petition and being declared as bankrupt and subsequently being discharged is not a stigma on the citizen of USA and in fact it is a fashion prevailing in USA among the citizens. In the debate during previous election in USA, it was mentioned that Donald Trump filed four bankruptcy petition and subsequently he was discharged and Hillari Bill Clinton filed six bankruptcy petition and subsequently she was discharged. Therefore, the learned counsel for the appellants submitted that bankruptcy proceedings are only an official restructure and the insurance companies are taking care of the parties.

11. The learned counsel for the appellants contended that minor daughter is being brought up in USA from December 2010 and if custody is given to the respondent and she is brought up in India, her mental condition will be very much affected and in this tender age, she will not be in a position to adjust in the change in culture and change in condition of living which are totally different from each other.

12. The learned counsel for the appellants further submitted <https://hcservices.ecm.gov.in/hcservices/> between the first appellant and the respondent was conducted after consent being given by both the parties. The respondent has admitted in the petition filed by him that they had



normal married life. In view of the same, it is not for the respondent to contend that from the beginning, the first appellant was behaving in a immaturred manner and she is having mental capacity that of 5 years old child. It is the contention of the first appellant that her memory power is less and it is not correct to state that the first appellant is suffering from mental illness. The learned counsel for the appellant submitted that the learned Additional District Judge, Virudhunagar at Srivilliputtur has no jurisdiction to entertain the petition. The contention of the respondent that minor daughter was stealthily removed from the custody of the respondent and therefore the learned District Court has jurisdiction is not correct. The first appellant took the minor daughter as she is her mother and she has every right to take the child to USA from where the child was brought to India and where she lived for a short period.

13. The learned counsel for the appellants relied upon the judgment of the Hon'ble Supreme Court reported in **2015 (5) SCC 450 [Surya Vadanam v. State of Tamil Nadu & Others]** wherein it has been held as follows -

45.3. Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

14. The learned counsel for the appellants also submitted that when a minor of tender age lived for many years with the grandparents or near relatives who has been looking after, still that circumstances should be taken into account in deciding the welfare and the custody of the minor.

15. The learned counsel for the appellants also relied on the judgment of the Hon'ble Supreme Court dated 17.04.2009 in Civil Appeal No.2628 of 2009 wherein it is held as follows -

12) In Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Anr. (AIR 1987 SC 3), this Court has observed that whenever a question arises before Court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

13) At this stage, it may be useful to refer to the decision of Madras High Court, to which

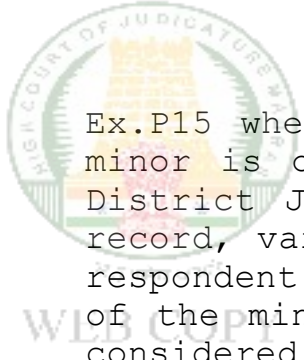


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reference is made by the High Court in the case of Muthuswami Moopanar (AIR 1935 Madras 195), wherein the Court has observed, that, if a minor has for many years from a tender age lived with grand parents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bonafide of the petition by the father for their custody.

18) Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of this case. In the present case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost only daughter in a tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child.

16. The respondent filed counter and denied the various contentions raised in the grounds of appeal and submitted that the in I.A.No.53A of 2011, learned Subordinate Judge, Srivilliputtur directed the first appellant to appear before the court to get first hand information about her. The first appellant took number of adjournments and did not appear before the Court. Hence, the learned Subordinate Judge, Srivilliputtur allowed the application and the said order is under challenge in CRP No.2622 of 2015, which is pending before this Court. The respondent filed medical certificate issued by Doctors in USA certifying about the medical condition of the first appellant and it was marked as Ex.P14. From the certificate, it is clear that the first appellant is mentally ill and she has a history of moderate mental retardation and functional ability of a 5 year old child and has by history, very severe visual motor perceptual integration difficulties. This condition is long standing and not likely to improve. The respondent also marked copy of the order dated 13.12.2013 of Juvenile & Domestic Relations District Court, Fairfax County as



Ex.P15 wherein it has been held that jurisdiction with regard to minor is only with the courts in India. The learned Additional District Judge, Virudhunagar has considered all the materials on record, various judgments relied on by the learned counsel for the respondent and has rightly allowed the petition granting custody of the minor daughter to the respondent. The learned Judge has considered the paramount interest of the minor and then only granted custody of the minor on the ground that minor daughter custody must be given to the respondent in the interest of minor.

17. The learned counsel for the respondent submitted that minor daughter was ordinarily residing at Rajapalayam, within the jurisdiction of District Court at Virudhunagar at Srivilliputtur and she was stealthily removed by the first appellant to USA. In view of the fact that the minor daughter was stealthily removed from the ordinary residence, District Court, Virudhunagar at Srivilliputtur has jurisdiction.

18. The learned counsel for the respondent relied upon the following judgments in support of his contention -

2011 (6) SCC 479 [Ruchi Majoo v. Sanjeev Majoo]
 2011 (2) MLJ 796 [Sandhiya v. D.Gunasekaran]
 130 (2006) DLT 524 [Mr.Paul Mohinder Gahun v.
 Selina Gahun]

The learned counsel for the respondent contended that the first appellant and her parents have no financial capacity to maintain and take care of the minor daughter to give good education and create surrounding in which the child will be in touch with education. The learned counsel also relied upon a judgment of this Court reported in **2007 (1) MLJ 56 [Sharli Sunitha v. D.Balson]** and submitted that the first appellant has no mental capacity to look after the minor child.

19. Heard the learned counsel for the appellants, respondent and the judgments relied on by both the parties.

20. The point to be decided in this case is whether it will be in the best interest of the minor if custody is given to the respondent/father or the first appellant/mother.

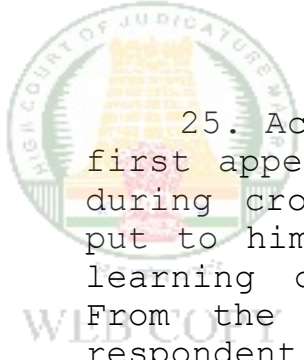
21. The learned counsel for the parties have mainly argued that their parties are in better financial position to take care of the minor child. This contention by the learned counsel for the parties cannot be a sole ground for granting custody of the minor child either to the first appellant or to the respondent. The paramount consideration of minor is the sole criteria for granting custody of minor to one of the parents. The financial condition may be one of the condition to entrust the custody

either to the father or to the mother of the child.

22. In the present case, the first appellant has taken a plea that the respondent is not the father of the minor daughter as the child was conceived by first appellant by artificial insemination through semen of third party. This issue was considered elaborately by the learned Additional District Judge, Virudhunagar in his order dated 09.09.2016 in GWOP No.1 of 2014 and relying on the judgment of this Court reported in **2013 (2) CTC 400 [K.Kalaiselvi v. Chennai Port Trust]** held that the respondent is the father of the minor daughter by rejecting the contention of the first appellant. The learned Judge has given valid and cogent reason for the said finding and the same does not warrant any interference by this Court.

23. As far as jurisdiction is concerned, from Ex.P15, order passed by the Juvenile & Domestic Relations District Court, Fairfax County, it is seen that District Court has jurisdiction to entertain GWOP as the child was taken from Rajapalayam in Srivilliputtur to USA by the first appellant. The jurisdiction of courts in India when the child is residing in any other country was considered by the Hon'ble Apex Court and this Court in number of judgments. In the judgments relied on by the learned counsel for the respondent reported in **2011 (6) SCC 479 [Ruchi Majoo v. Sanjeev Majoo]**, **2011 (2) MLJ 796 [Sandhiya v. D.Gunasekaran]** and **130 (2006) DLT 524 [Mr.Paul Mohinder Gahun v. Selina Gahun]**, it has been held that whether the minor daughter was ordinarily residing before being removed to any other country has jurisdiction to entertain the petition. In the present case, admittedly, the first appellant and the respondent were residing at Rajapalayam and the minor was taken to USA from there by the first appellant. The said fact coupled with the order dated 13.12.2013 of Juvenile & Domestic Relations District Court, Fairfax County contained in Ex.P15 clearly shows that the District Court, Srivilliputtur has jurisdiction to entertain the petition filed by the respondent.

24. The next question is whether the first appellant is mentally ill to such an extent that she is not a fit person to have the custody of the minor daughter. It is no doubt true that the respondent has produced Ex.P14, medical certificate issued by US Doctors wherein it has been stated that the first appellant is having some mental illness but it has to be taken into consideration that minor child is in the custody of the first appellant, admittedly from December 2010 and she is looked after and maintained by her. The respondent himself has admitted that even though the first appellant has no independent income, she is getting financial assistance from Social Security Disability Benefits offered by the US Government.



25. According to the respondent, the benefits are given to the first appellant due to her mental condition. On the other hand, during cross examination of respondent as P.W.1, suggestion was put to him that the first appellant is given 750 US\$ due to her learning disability but the respondent denied the suggestion. From the admission of respondent and suggestion put to the respondent on behalf of the appellant, it is clear that the first appellant is getting benefits of Social Security Disability Benefits offered by the US Government and she is capable of maintaining herself as well as the minor daughter. The minor daughter is a female child born on 19.10.2007 and from the date of birth, the first appellant and the child were in custody of the respondent till 2010. From December 2010 till date, admittedly the child is in the custody of the first appellant and is residing in USA. For such a long time, the minor child has been brought up in USA and she definitely is used to the culture and condition prevailing in USA and it will be very difficult for the child of tender age to adjust to the condition prevailing in India in the place where the respondent is living, i.e. Rajapalayam at Srivilliputtur District in India. Further, the minor is a female child and it will be in the best interest of the child if she is in the custody of the mother, first appellant herein. The first appellant was also brought up in USA. It is not the case of the respondent that the minor daughter is not properly looked after or brought up by the first appellant or her parents. The claim of the respondent is that the first appellant has no mental capacity to look after the minor child and the first appellant and her parents do not have financial capacity to maintain the child. This contention will not entitle the respondent to have the custody of the minor daughter. The respondent has not contended that he is contributing to the maintenance of minor daughter even though he is alleging that appellants do not have financial capacity to maintain the minor daughter. This does not advance the case of respondent that it will be in the best interest of minor if custody is given to him.

26. Considering the fact that the minor child is living in USA from December 2010 with the first appellant and no allegation is made that the minor child is not looked after properly by the first appellant, on the whole, it will be in the best interest of the minor child if the custody is detained by the first appellant and she is brought up in USA. The judgment of the Hon'ble Apex Court dated 17.04.2009 in Civil Appeal No.2628 of 2009 in Anjali Kapoor v. Rajiv Balaji is squarely applicable to the facts of the present case. Further, in the judgment reported in **2007 (1) MLJ 56, cited supra**, relied on by the learned counsel for the respondent, infact supports the case of the appellants.

27. Considering all the above facts, this Court is of the opinion that the learned Additional District Judge, Virudhunagar



has erred in allowing the GWOP No.1 of 2014 filed by the respondent.

28. In the result, this Civil Miscellaneous Appeal is allowed setting aside the order dated 09.09.2016 passed in GWOP No.1 of 2014 by the learned Additional District Judge, Virudhunagar. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

The Additional District Judge,
Virudhunagar.

+1cc to M/s. T.ANTONY ARUL RAJ Advocate in SR. No.58455
RGR
JS/SV.MMS/SAR.2/21.6.2017/10P-3C

Pre-delivery Order in
C.M.A. (MD) No.111 of 2017
02.06.2017