



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON:11.09.2017
DELIVERED ON: 21.11.2017

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THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A (MD) No.469 of 2017
and
C.M.P. (MD) No.5040 of 2017

Ramu ... Appellant/Respondent

Vs

Muruganantham ... Respondent/Petitioner

PRAYER:- Civil Miscellaneous Appeal is filed under Section 47 of Guardian and Wards Act, 1890, to set aside the fair and decreetal order dated 20.04.2017 made in G.W.O.P.No.5 of 2014 on the file of the District Court, Sivagangai District, Sivagangai.

For Appellant : Mr.S.Palanivelayutham
For Respondent
/Caveator :Mr.V.Nagendran

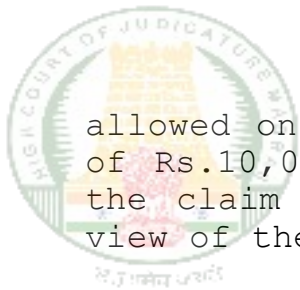
J U D G M E N T

The appellant has filed this Civil Miscellaneous Appeal against the fair and decreetal order dated 20.04.2017 made in G.W.O.P.No.5 of 2014 on the file of the District Court, Sivagangai District, Sivagangai.

2. The brief facts of the case are as follows:

(i) The appellant would aver among other things that the appellant is the father of one Amutha who was given in marriage to the respondent herein. The marriage between the respondent and the said Amutha was solemnized on 06.12.1998. Out of the wedlock, they were blessed with one male child and one female child. While so, due to illness, the said Amutha died on 21.09.2009. After that, it is alleged that the respondent herein abandoned the two children and married one Mrs.Singaramuthumari in the year 2010. It is stated that since 2010 onwards, the two minor children are under the custody of the appellant herein.

(ii) It is further alleged that even after deserting the minor children, the respondent never bothered about the maintenance of the two children. Therefore, the appellant filed an application in M.C.No.29 of 2013 before the learned Judicial Magistrate, Devakottai, seeking maintenance. The said application was partly



allowed on 20.09.2016 and the respondent was directed to pay a sum of Rs.10,000/- per month as maintenance to the minor daughter and the claim petition was dismissed in respect of the minor son, in view of the continuous stay of the minor son with the respondent.

(iii) Aggrieved by the said order, the respondent filed CrI.R.C (MD) No.807 of 2016 and the same is still pending. While the matter stood thus, G.W.O.P.No.5 of 2014 was ordered in favour of the respondent and the appellant was directed to hand over the custody of the minor daughter to the respondent. Aggrieved by the said order, the appellant has filed this present Civil Miscellaneous Appeal.

3. The learned counsel appearing for the appellant submitted that the custody is different from guardianship. The natural guardian can act as a guardian, but he need not hold lawful custody as a matter of right. The paramount interest of the minor must be the basis for the grant of lawful custody by the Court. As per Section 17(3) of the Guardian and Wards Act, the Court has ample power to find out the truth and also to ascertain the wishes of the minor child. Here, the evidence of the minor female child, clearly deposes that she is willing to stay along with her grandparents only. As far as the financial position is concerned, the appellant is a retired Government Employee and he is receiving Rs.50,000/- per month, as pension. He further submitted in order to escape from the liability to pay maintenance to the minor child, the respondent filed the above G.W.O.P and got an order in his favour in respect of the male child and therefore, he prays for appropriate orders.

4. The learned counsel appearing for the respondent submitted that he is the biological father of the minor child and therefore, he is entitled to get the custody of his minor child. He further submitted that in order to get maintenance from the respondent only, the appellant is keeping his child under his custody and the appellant has not filed any proof to prove his financial status and therefore, this Civil Miscellaneous Appeal is liable to be dismissed.

5. Heard the learned counsel appearing for the respective parties and perused the materials available on record and considered the relevant judgments produced on both sides.

6. The short question to be decided in this civil miscellaneous appeal is whether the appellant, being the grandfather of the minor child, has a right to have a minor child, when her biological father is very much available?

7. In this connection, it is useful to refer Section 17 of the Hindu Minority and Guardianship Act, 1956 :-

<https://hcservices.ecourts.gov.in/hcservices/> (1) Section 17. Matters to be considered by the Court in appointing guardian.- (1) In appointing or



declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. (emphasis supplied)

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Sub-S.(4) omitted by Act 3 of 1951, S.3 and Sch.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

(emphasis supplied)"

8. According to the said provision, the welfare of the minor should be considered as paramount consideration for entrusting the custody of the minor child to anyone. The said provision makes it clear that while deciding the question as to which parent, the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. In the case on hand, the female child is with her grandparents since the date of the death of her mother. No doubt the respondent is the biological father of the minor child. The only disturbing feature in this case is why he kept mum for four years in seeking the custody of the minor child, after the death of his first wife died thereby allowing the minor child to be brought up by the grandparents. On this aspect, No reason flows from the side of the respondent nor averred in the affidavit or pleaded. In the present scenario of the world, once wife dies, the man goes for remarriage. Most of the times, the second marriage is a bane for the children of the first wife rather than be a boon to the said child. Why I am saying this, is till 2014, the respondent has not claimed any custody of the minor child from this appellant. Immediately on the death of his first wife, he remarried within a span of six months. Thus, one thing is clear that the respondent herein had never bothered or claimed custody of the minor child at the earliest point of time. After filing maintenance petition before the Judicial Magistrate's Court, Devakottai, in the year 2013 and after receiving notice, the respondent has come forward with a petition claiming the custody of the minor child. The attitude of the respondent is nothing but to defeat the maintenance petition filed by the appellant. Apart from that, the minor child has given clear evidence before the Court below and expressed her willingness to be with her grandparents. Further, according to the appellant, he would aver that he gets Rs.32,573/-



as pension per month and he has got his own house in his name and has sufficient means to run life with his wife and minor Divyadharshini. Added further, the evidence of R.W.2 clearly indicates that she has more interest to stay along with their grandparents. The minor child made further allegation that she was compelled to give a compliant as against her grandparents by her father to the police station and later, it was abruptly denied by her.

9. Therefore, this Court is of the considered view that in order to defeat the claim of maintenance allowance to be payable to her daughter, the respondent wants to wriggle out from his dutiful responsibilities. This Court are not so serious about the photographs produced before us and on that basis also this Court does not conclude, but, one thing, it wants to record that in the index to typed set of papers filed on the side of the respondent, few photographs are annexed to show that the minor child is quite happy with the biological father and step mother. However, in the photograph, it appears that the child wears trinket. Whereas, the child of the biological father and stepmother wears a gold chain which is apparently seen from the photographs produced by them. These differences later will definitely spoil the peace of the child and reduce her confidence, which was also to be taken into consideration in deciding the case on hand.

10. On the subject matter of the issue, I also gain support from the judgment of the Honourable Supreme Court cited by the learned counsel for the respondent, reported in CDJ 2008 SC 1566 in between Nil Ratan Kundu & Another Vs. Abhijit Kundu, it has been laid down as follows:-

"47. We observed:

"The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child are predominant consideration. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the cases are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the



parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

20. It is also further submitted by the learned counsel for the respondent in respect of wishes of the minor, quoted in a Judgment of Delhi High Court, reported in 25 (1984) DLT 186 in between Prabhati Mitra Vs. D.K.Mitra, which would go to show that if the minor is of an age fit enough to express an opinion, the Court has the duty to consider the application on merits before it combining with the likes of the minor and the welfare of the minor has to be considered in order to promote the welfare of the child."

11. Apart from the above, the respondent in his deposition available at page No.12 of typed set of papers has categorically admitted that the father of the deceased spent a sum of Rs.4,00,000/- (Rupees Four Lakhs Only) towards the medical expenses of her daughter. He also admitted that he has not paid the principal amount as well as the interest amount for the medical expenses meted out by the appellant. The respondent also admitted that the amount of Rs.10,000/- granted towards maintenance in M.C.No.20 of 2013 by the learned Judicial Magistrate, Devakottai against the respondent is on the higher side. All would go to show that the character and attitude of the respondent herein. Back to the conclusion that the welfare of the child is paramount importance and in other words, in the interest of the minor child, this is the fittest case where the minor child can be granted to the grandparents. This Court is also conscious of the fact that each and every case has to be decided on its own factual aspect of the matter. Such situation is absolutely warranted in the present case and therefore, custody is granted to the appellant herein.

12. In the light of the factual foundation of the case coupled with the judgment cited supra, I have no hesitation to set aside the order of the Court below made against the fair and decreetal order dated 20.04.2017 made in G.W.O.P.No.5 of 2014 passed by the learned District Judge, Sivagangai. Accordingly, this Civil Revision Petition is allowed. Consequently, the award of maintenance granted by this Court is confirmed and such maintenance amount is directed to be granted to the appellant from the date of petition along with interest at the rate of 9%. In the matter of maintenance case, this Court often come across that the litigation prolongs indefinitely, due to various reasons, because of which, the genuine litigant suffers a lot. Keeping in mind the interest of the litigant in the matter of maintenance case, this Court deems it fit to award interest so that frivolous litigations can be avoided in future.



13. Before parting with this judgment, there is no embargo on the part of the respondent to see the minor child and pay more amount than the amount awarded by the Court below to show his love and affection for the welfare of the child. The said arrangement is being made to nurture the relationship between the father and the daughter. No costs.

Sd/-

Assistant Registrar(Crl side)

/True Copy/

Sub Assistant Registrar

To,

1.The District Judge,
Sivagangai District,
Sivagangai.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+2cc to M/S.V.Nagendran, Advocate SR.No. 88303

+1cc to M/S.S.Palanivelayutham, Advocate SR.No. 88756

order made in
C.M.A(MD) No.469 of 2017
21.11.2017

ssm

JM/SKN RSK/SAR 2/22.11.2017/6P/6C