

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.09.2018

Pronounced on : 10.10.2018

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.R.C.No.576 of 2013

and

M.P.No.1 and 2 of 2013

1. V.N. Girishkumar

2. M. Valsala

3. T.P.K. Menon ...Petitioners

Vs.

Hemamalini ...Respondent

Prayer: This Criminal Revision filed under Section 397 read with 401 of Code of Criminal Procedure to set aside the order of the learned Judicial Magistrate, Mettupalayam passed in Crl.M.P.No.6970 of 2011 in D.V.A.No.5 of 2011 by order dated 27.12.2012 and subsequently modified by the learned III Additional District Sessions Judge, Coimbatore in C.A.No.6 of 2013 by an order dated 28.02.2013.

For Petitioners : Mr. G. Karthikeyan

For Respondent: Mr.V.S.Rajasekar - No appearance

O R D E R

The Revision Case has been filed to set aside the order of the learned Judicial Magistrate, Mettupalayam passed in Crl.M.P.No.6970 of 2011 in D.V.A.No.5 of 2011 by order dated 27.12.2012 and subsequently modified by the learned III Additional District Sessions Judge, Coimbatore in C.A.No.6 of 2013 by an order dated 28.02.2013.

2. The brief facts of the revision petitioner in the revision petition are as follows :-

The first petitioner is the husband of the respondent. Both the first petitioner and the respondent are the divorcee and the present marriage is second marriage to both of them. The first petitioner has a daughter from his first marriage. From the second marriage with the respondent female child was born. The respondent filed a petition against the revision petitioners in D.V.A.No.5 of 2011 on the file of the learned Judicial Magistrate, Mettupalayam alleging Domestic Violence. According to the respondent, the petitioners ill-treated her and treated very cruelly. During the pendency of the D.V.A., the respondent herein filed Crl.M.P.No.6970 of 2011 praying for custody of the child. The learned Magistrate after hearing both sides and also enquiring the child directly and passed an interim order permitting the respondent to have the custody of the child during the last Saturday of Every month. Since the Child was refused to go with the respondent, the Court passed an order dated 27.12.2012, directing the petitioners to produce the child on Monday or Friday of every week before the Court and further permitted the respondent to sit with the child and talk to the child in the Court premises itself. Aggrieved by the said order, the petitioner filed an appeal before the

learned III Additional District and Sessions Judge, Coimbatore in C.A.No.6 of 2013. The learned Appellate Judge after hearing both sides and after enquiring the child directly, passed an order dated 28.02.2013 permitting the respondent to meet the child on first and third Saturday of every month between 10.00 A.M. to 5.00 P.M. in the house of the petitioners. Likewise, the petitioners were directed to leave the child at the house of the respondent at Mettupalayam between 10.00 A.M. to 5.00 P.M. during the second and fourth Saturday of every month. Aggrieved over the said order, the present revision has been filed.

3. The learned counsel for the petitioners would submit that the Courts below have miserably failed to understand and appreciate the statement made by the child. The child has categorically stated that she is not willing to go with the mother namely the respondent. The learned Judge's have even recorded the statement of the child, she did not even look at the face of the respondent. When that being so, the learned Judge should have appreciated the fact that the welfare of the child is paramount. The learned senior counsel further submit that only after enquiry made by the learned Judge to the minor child personally, the child refused to speak or to go with the respondent, the visitation right was given without representing the rights of the mother to take care of the child. The genuineness of this problem arose when the respondent objected to the presence of the first daughter of the first petitioner in the family. The first petitioner is taking good care of both the daughters, therefore, peace and enjoyment of the minor child is not disturbed.

4. Though Notice has served on the respondents. But she is not chosen to appear either in person or through counsel.

5. Heard Mr.G.Karthikeyan, learned counsel for the petitioner and perused the materials available on record.

6. The learned counsel for the petitioner submits that after marriage with the respondent, the first child of the first petitioner stayed with her father. This was objected by the respondent and she started ill-treating the child. In the meanwhile, the first petitioner and the respondent had a daughter. The respondent denied the allegation of ill-treatment of the first daughter of the first petitioner and insisted that the child should be left in hostel. Due to this misunderstanding arose between the couple, the respondent walked out of the matrimonial home and came back to Mettupalayam. Thereafter, the respondent filed a complaint under Domestic Violence Act before the learned Judicial Magistrate, Mettupalayam. According to the learned Counsel, the learned Magistrate enquired the child and passed an interim order permitting the respondent to have the child during the last Saturday of every month. However, the child refuses to go with the respondent. Therefore, the learned Magistrate modified the order permitting the respondent to sit and talk with the child in the Court premises on Monday or Friday of every week.

7. Challenging the said order, the petitioner preferred the appeal before the learned III Additional District and Sessions Judge, Coimbatore. The learned Judge after hearing both sides and talked to the child personally. The learned Judge also clearly recorded that the child was not willing to go with the respondent. However, the fact that she is a female child, love and affection of the mother is important. The learned Appellate Judge modified the order permitting the respondent to meet the child on first and third Saturday of every month between 10.00 A.M. to 5.00 P.M. in the house of the petitioner and further directed the petitioners to leave the child to the respondent in Mettupalayam between 10.00 A.M. to 5.00 P.M. on second and fourth Saturday of every month.

8. Aggrieved against the said order, the revision petitioners preferred the present revision. As rightly pointed out by the learned senior counsel, safety, security and welfare of the child is very important. In this case, the child was born in the first marriage of the first petitioner and the female child was born in the second marriage are staying with his father namely the first petitioner. It is the

respondent who is walked out of the matrimonial home, the learned Magistrate and the learned Appellate Judge have clearly recorded that the child was not even willing to look at the face of her mother. The child was also not willing to go with her. Having recorded the same, both the Court have given visitation right to the respondent solely on the ground that the mother should not be denied of her love and affection. The fact that the child was not even willing to look and talk with the respondent. The Court should have considered the words comes from the mind set of the child, when she is forced to do something against her wish, then the future of the girl child will be in question. This is not a case where the child was willing to go with her mother. That being the case, the Court should not have forced her to do something against her wish. Now, the learned Magistrate has initially granted visitation right during the saturday's of every month. Since the child was not willing the said order was modified to the effect that permitting the respondent to sit and talk to the child in the Court premises. When the said order is being modified by the appellate Court should have considered the mind set of the child. The learned Appellate Judge has also had a talk with the child. The child refused to talk and see the respondent, when the respondent called the child, the child refused to go with her and expressed her willingness to go with the respondent. On the date of filing the petition in Domestic Violence Act, the child was aged about six years. We are now in 2018, seven years has been passed, now the child should be 11 years or 12 years. She should be school going child. If the child is taken to Mettupalayam during the second and fourth Saturday of every month, the journey to and fro Mettupalayam will have effect on her both physically and mentally. Education of the child will also be affected. Above everything else when the child herself not willingness to meet or go with her mother, the Courts cannot force her to do so. Therefore, this court has no hesitation to set aside the order passed by the Courts below.

9. Though notice has been served on the respondent. The respondent has not chosen to appear before this Court. This only shows that her intention is only to harass the revision petitioners, knowing fully well, the child is not willing to came with her. She has filed the petition seeking interim custody of the child. This Court finds that there is no merits in the CrI.M.P.No.6970 of 2011 dated 27.12.2012 passed by the learned Additional District and Sessions Judge No.III, Coimbaore.

10. In the result, the revision petition is allowed by setting aside the order made in Cr.M.P.No.6970 of 2011, dated 27.12.2012 passed by the learned Judicial Magistrate, Mettupalayam and the judgment of the learned III Additional District and Sessions Judge, Coimbatore made in C.A.No.6 of 2013, dated 28.02.2013. Consequently, connected miscellaneous petitions are closed.

10.10.2018

Index : Yes/No

Speaking Order/Non speaking order

rli

To

1.The Judicial Magistrate,
Mettupalayam.

2.The III Additional District
Sessions Judge, Coimbatore.

P.VELMURUGAN, J.,

rli

Pre-Delivery Order in
Crl.R.C.No.576 of 2013
and
M.P.No.1 and 2 of 2013

10.10.2018