

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 10-01-2018

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.3414 OF 2014

Chandra

...

Appellant

-vs-

Jayavelu

...

Respondent

Appeal against the judgment and decree, dated 22.07.2013, passed in G.W.O.P.No.226 of 2009, on the file of I Additional District Judge, Salem.

For appellant : Mr.R.Jayaprakash

For respondent : M/s.Sai, Bharath & Ilan

JUDGMENT

This appeal is directed against the order passed by I Additional District Judge, Salem, in a Guardian Original Petition.

2. According to the appellant, in the year 2009, her children were taken away by the respondent-father and they continued to be under his custody. Since the second child is the daughter and mentally retarded, she, being the mother, alone can give adequate attention and take care of her needs and father cannot attend to certain special requirements and, therefore, she wants to have custody of the daughter.

3. The Court below, considering the contention of the appellant, held that paramount importance is the welfare of the minor child and custody cannot be given on the basis of the rights of the parents. The trial Court has also held that the child was under the custody of the father from her early ages and he has taken care of the child well and that there is also no complaint about her concern. Further, after a period of ten years, the mother has suddenly come forward for taking custody of the child. Since the child was under continuous care of the father and considering the continuity of medical treatment, the Court below has granted visitation rights to the appellant-mother once in 15 days at the house of the respondent-father.

4. On the contrary, the respondent-husband would submit that the appellant-mother is living separately along with some other person and it is not conducive to leave the child under the custody of a third person. Also, admittedly, the child has no physical and mental maturity; he has been taking care of her and affording medical treatment to her and, therefore, the continuity should not be disturbed. Further, the girl has attained majority and, therefore, the Guardians and Wards Act, 1890, is not applicable to the present case and also, in view of the majority attained by the girl, this appeal is not maintainable.

5. Considering the personal and future relationship between the parties, this Court is inclined to conduct a mediation between the parties. Both the parties appeared in person before this Court, and this Court also negotiated with them, but, they are unable to arrive at a mutually agreeable settlement.

6. It is well settled by the Hon'ble Supreme Court in the case of Nil Ratan Kundu v. Abhijit Kundu, 2008 (9) Supreme Court Cases 413, that child is not the property or commodity, and the issues relating to custody of minor children should be handled with love, affection, sentiments and applying human touch to the problem. It is also held therein that paramount importance is the welfare of the minor and custody cannot be given on the basis of the rights of the parents. In paragraph 51 of the said judgment, the Supreme Court has observed as under :

"51. In Kamla Devi v. State of Himachal Pradesh, AIR 1987 HP 34, the Court observed :

"(T)he Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other".

7. This Court, after observing the response of the female child of the parties, finds that she will be comfortable at the present place and her health and general maintenance can go on without any disturbance thereat.

8. This Court, in O.P.No.62 of 2013, by its order, dated 16.04.2013, decided that once the child has attained majority, the Guardians and Wards Act will not apply and it will not also apply to the cases of mentally retarded persons. In such cases, the provisions of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, (Act 44 of 1999) will apply. It is also seen, that Mental Health Act, 2017, has application in respect of persons, suffering from mental disability.

9. Therefore, it is very clear that the prayer has become infructuous and the petition is not maintainable as such. Further considering the welfare of the child, the continuity of her treatment, mental peace, support of the grandmother and other family members, it is not conducive for her to dislocate in a new environment to accustom. The appellant can visit her daughter as permitted by the trial Court. In such circumstances, in this case, since the child has become major and she is very clear in her expression in continuing under the custody of her father, this Court finds no ground to grant custody of the child to the appellant. On the other aspects of the matter, this Court restrains itself from making any observation, considering the welfare of the child.

8. Civil Miscellaneous Appeal is dismissed accordingly. No costs. Consequently, the connected M.P.No.1 of 2014 is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

dixit

To
The I Additional District Judge,
Salem.

+1cc to Mr.R.Jayaprakash, Advocate Sr.No.2442
+1cc to Mr.Sai Bharath & Ilan, Advocate Sr.No.2013

NKK(CO)
sm:21.2.2018

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