

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 26.04.2018

JUDGMENT PRONOUNCED ON : 10.07.2018

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

O.S.A.NO.95/2018 & & CMP.NO.6085/2018
AND
O.S.A.NO.113/2018 & CMP.NO.7166/2018

OSA.95 OF 2018:-

1. Naim Tabriz Khan
2. A.Gulnar
3. M.Fazlulla Khan

... Appellants/Respondents
in O.P.719 of 2014

Vs.

Sofia Nishath

... Respondent/Petitioner
in O.P.719 of 2014

OSA.113 of 2018:-
Naim Tabriz Khan

... Appellant/Petitioner
in O.P.778 of 2014

vs

Sofia Nishath Shajahan

... Respondent/Petitioner
in O.P.778 of 2014

Prayer in O.S.A.No.95 of 2018:

Original Side Appeal is filed under Order XXXVI Rule 1 of Original Side Rules r/w clause 15 of Letters Patent to set aside the Order and decree passed in O.P.No.719 of 2014 on the file of this court dated 07.03.2018.

Prayer in O.S.A.No.113 of 2018:

Original Side Appeal is filed under Order XXXVI Rule 1 of Original Side Rules r/w clause 15 of Letters Patent to set aside the Order and decree passed in O.P.No.778 of 2014 on the file of the Hon'ble Court dated 07.03.2018.

For Appellants : Mrs. Sheela Jayaprakash
in both the Appeals for M/s.M.J.Jaseem Mohamed

For Respondent : Mrs.Geetha Ramaseshan
in both the Appeals

JUDGMENT

(Judgment of the Court made by P. RAJAMANICKAM., J.)

OSA.No.95 of 2018 has been filed by the respondent in O.P.No.719 of 2014 against the order passed in O.P.No.719 of 2014 dated 07.03.2018 on the file of this court.

OSA.No.113 of 2018 has been filed by the petitioner in O.P.No.778 of 2014 on the file of this court against the order passed in O.P.No.778 of 2014 dated 07.03.2018.

2. The respondent herein has filed a petition under Sections 3,7 to 10 and 25 of the Guardian and Wards Act and under Order XXI Rules 2 and 3 of Original Side Rules of this court in O.P.No.719 of 2014 seeking permanent custody of two minor daughters viz., Yusra Mariam born on 13.03.2012 and Zaara Samreen born on 19.03.2014 and also to appoint her as guardian for the aforesaid minor children. The first appellant in S.A.No.95 of 2018 and appellant in OSA.No.113 of 2018 has filed O.P.No.778 of 2014 under Sections 3, 7, 10 and 25 of the Guardians and Wards Act and under Order XXI Rules 2 & 3 of Original Side Rules seeking permanent custody of the aforesaid children and also to appoint him as guardian for the said children. The learned Single Judge has allowed O.P.No.719 of 2014 and dismissed O.P.No.778 of 2014 by the common order dated 07.03.2018. Aggrieved by the same, the present Original Side appeals have been filed.

3. The averments made in the petition filed in O.P.No.719 of 2014 are, in brief, as follows:

a) On 10.09.2010, the petitioner had married Naim Tabriz Khan (first respondent) at Hotel Accord Metropolitan, T.Nagar, Chennai -17, as per the Muslim Law. Both the petitioner and the first respondent had been married earlier and that their first marriages had ended in divorce and that the first respondent was living in USA. After the marriage, the petitioner left for USA along with the first respondent on 08.10.2010. Out of wedlock, two female children viz., Yusra Mariam and Zaara Samreen were born on 13.03.2012 and 19.03.2014 respectively. The petitioner had gone through depression due to domestic violence faced by her in her first marriage and this was informed very early to the first respondent and his family members before

their marriage. When the petitioner became pregnant with the first child, the first respondent wanted his mother (his second respondent) and his sister to come for her delivery in USA, but the petitioner preferred her parents. This became an issue with him and when the petitioner was in the labour room, the first respondent prevented her mother from entering the room till his mother called from India and asked the first respondent to allow her inside. From that time onwards, the first respondent's behaviour towards the petitioner changed and stopped caring about her, picked up quarrels with her over trivial reasons and even went to the extent of not eating at home. The petitioner lived in constant tension and after the birth of the first child, she became lonely and went into postpartum depression. She needed to see a doctor immediately, but the first respondent refused to act immediately and kept postponing to take her to the doctor.

b) To add insult to the injury, the first respondent snatched away her three months nursing baby from her and sent the said baby to Chennai along with his parents (Respondent Nos. 2 and 3). The respondents assured her that the minor child would be brought back to be with her in the USA after some time. She believed the first respondent and continued to live with him. In June, 2013, she got pregnant once again. In October 2013, the first respondent brought her to India on the pretext of renewing her USA Visa that was due for expiry on 29.10.2013 and both of them stayed at the first respondent's parents' house at Mogappair, Chennai. During the said stay, the first respondent and his family members treated her indifferently and within four days of her arrival, she was thrown out of the matrimonial home. At that time, she was in her fifth month of pregnancy. The minor child Yusra Mariyam was detained by his first respondent and his parents. The first respondent left for USA on 16.11.2013 without her knowledge. All her jewellery and articles were retained by the first respondent and his family members. The first respondent clandestinely cancelled the petitioner's USA Visa, indicating his cunning plan of abandoning the petitioner. She has sent several mails and tried to contact the first respondent over phone, but there was no reply and she was unable to contact him.

c) On 11.03.2014, the petitioner received an e-mail at 05.45 a.m., from the first respondent stating that he was divorcing her. At 12.17 p.m., on the very same day, she received another e-mail stating that it was the second divorce "Talaq" he was pronouncing on her. These were the days when she was in labour pains and her parents and she were busy rushing back and forth to the hospital for undergoing various tests and scans. The second child was born on 19.03.2014 and the petitioner returned home on 22.03.2014 from the hospital. He received another e-

mail on 30.03.2014 from the first respondent stating that he was pronouncing third and final Talaq. The so called purported Talaq is not valid in law and she filed O.S.No.140 of 2014 and the same is pending before the II Additional Family Court, Chennai to declare that the Talaq is null and void. She also filed M.C.No.238 of 2014 before the same court seeking maintenance for herself and for the second child and the same is also pending. The first respondent also filed O.S.No.181 of 2014 to declare the marriage with the petitioner as null and void and the same is also pending before the II Additional Family Court Chennai.

d) The petitioner has been deprived of her right as mother to nurture her first child from the age of four months. She was not even aware of the whereabouts of the first child as she is in USA or in Chennai at times, which is extremely traumatic for the child and the petitioner. During counselling, the first respondent told that he would re-marry for the third time. The petitioner does not want her elder daughter to live with a step mother; when she is alive. The first respondent has filed HCP.No.1888 of 2014 before this court seeking direction to produce the second child. The petitioner also filed HCP.No.1953 of 2014 seeking direction to produce the first child. The petitioner is extremely apprehensive that the respondents may take away the first child to the USA. The welfare of both the children is the paramount importance and it is only the petitioner who alone can bring up the children at this tender age. The first respondent is threatening her time and again that he will take away even the new born baby from the petitioner. The petitioner is the only person who can provide an environment congenial to the proper growth and development of the children. Hence, the petitioner has filed O.P.No.719 of 2014 seeking permanent custody of both the children and also to appoint her as guardian for both the children.

4. The averments made in the counter filed by the first respondent in O.P.No.719 of 2014 are, in brief, as follows:

a) The first respondent denied all the allegations made in the petition. His consent for the marriage with the petitioner was obtained by fraudulent means, by suppressing the real nature, intensity and true picture of the petitioner's mental illness. The petitioner and her parents have concealed the following informations to the first respondent and his family.

i) that the petitioner was a chronic psychotic patient with hospitalizations as early as at the age of 17;

ii) that it was a progressive disease requiring a life long psychiatric treatment;

iii) that at the time of their marriage, she was on high

dose of anti- psychotic drug called Aripiprazole 20 mg;

iv) that the children born out of this marriage are susceptible to serious genetic health hazards,

v) that her symptoms included auditory hallucinations.

vi) that when she hears voices, she loses control of herself and implicitly obeys the voice commands, however bizzare, abnormal and dangerous the commands may be. These were things that no normal person would do, like drinking her own urine and tasting feces; and

vii) that the petitioner was also suffering from hypothyroidism, which could also cause cretinism in the new children that would come out of this marriage.

Hence the first respondent has filed a suit in O.S.No.185 of 2014 to declare the marriage as null and void, which is pending before the II Additional Family Court, Chennai.

b) Apart from the tremendous shock that his wife was a psychotic patient, he realised that he had been pushed into an enormous responsibility of caring for his mental ill-wife, without a warning or an apology from her parents for having concealed the truth from him and his family. The parents of the petitioner, relieved of their burden, went about enjoying life and going on jolly tours. He took the petitioner, along with her parents to the renowned and experienced psychiatrist Dr.Zahida Tayyib on April 16, 2012, as soon as the petitioner's parents returned from their jolly tours of America. On examining the petitioner, the doctor found that the petitioner in need of medication at that time, but only recommended group counselling sessions which the petitioner attended. This was the case until 12.05.2012, when the petitioner's mother shouted at the first respondent, the petitioner began to hear voices and necessitated an emergency visit to the doctor. On 12.05.2012, after the petitioner's mother shouted at the first respondent, the first respondent took the petitioner to a restaurant, where he witnessed the petitioner shake and shiver under the effect of her auditory hallucinations with a two months old baby in hand. Thereafter on 15.05.2012, the petitioner's parents returned to India. On 28.05.2012, the petitioner got a greater relapse of her psychotic attack, during which episode she drank her own urine, tried to bite the first respondent and behaved like a person possessed. The first respondent had to call 911, the emergency paramedical services and admitted her in a psychiatric hospital. He also had the presence of mind to switch on his video camera, which he could later show to the psychiatrist, if required.

c) The first respondent denies the averments that he had no intention to bring back the baby to USA. It was the petitioner who was not prepared to bring back the baby to USA and take care

of it. He came across some writings of the petitioner where she has written "KILL YUSRA WITH HAMMER AND PISTOL". The petitioner seems to have heard this command through auditory hallucination. The allegation that the first respondent and his family treated the petitioner indifferently in his home in Chennai, is false. The petitioner's parents caused commotion and hence the respondents asked the petitioner's parents to take their daughter to their house to relax for a couple of days. Leaving the house of the respondents, the petitioner and her parents instantly set about turning the situation more hostile.

d) In order to resolve the problems, the first respondent made a representation to the Chief Khazi and both the parties were called for a mediation on October 26, 2013. There, the petitioner and her parents promised to provide a written admission, apology and withdrawal of false accusations. This promise was not kept and further they went about spreading even more accusations against the first respondent and his family. By this time, the first respondent learnt that the petitioner had written in her diary "Kill Yusra by Hammer and Pistol". So, it was important for the first respondent to mind his and his family's safety. No explanation came before his scheduled departure on November 16, 2013. So the first respondent had no option but to leave alone, back to the USA.

e) The petitioner's jewels, passport, certificates and testimonials have been handed over to her father with signed acknowledgment on 24.02.2014 through the mediator chosen by her and her parents. Only when all reconciliation attempts failed, the first respondent was pushed to send the Talaq notices. The petitioner is a chronic psychiatric patient and she is given to auditory hallucinations. She obeys dangerous commands. She needs constant supervision and monitoring. The baby is not safe with her. Her illness has been diagnosed as schizophrenia, bipolar, bipolar mixed and major depression. In her diary, she had noted that her own father had sex with her. She had written these words even before her marriage. The petitioner tried to kidnap the first child. His children cannot be granted to the custody of the petitioner or her parents. Hence, the first respondent prayed to dismiss the above petition.

5. In O.P.No.778 of 2014, the petitioner therein/first respondent in O.P.No.719 of 2014 has made averments similar to that of the counter filed by him in O P.No.719 of 2014. Similarly, the respondent/petitioner has made similar averments in the counter as stated by her in O.P.No.719 of 2014.

6. During trial, both the petitions were taken up for joint trial and evidence was recorded in O.P.No.778 of 2014. The petitioner in O.P.No.778 of 2014 viz., Niam Tabriz Khan

examined herself as PW1 and marked Ex.P1 to Ex.P100 as exhibits. On the side of the respondent, the respondent in O.P.No.778 of 2014 examined herself as RW1 and also examined one Dr.Rangarajan as RW2. She has marked Ex.R1 to R44 as exhibits.

7. Learned Judge after hearing both sides and considering the materials placed before him found that even according to the petitioner, the respondent is suffering from psychological illness and that being so, the writings made by her during such illness cannot be used against her and the said writings are not admissible in evidence. He further found that there is no evidence that the respondent is suffering continuously from psychological attacks. According to the learned Judge that for the welfare of the two children, they must stay together and they should not be separated. The learned Judge also found that during pendency of the proceedings, the petitioner had contacted third marriage and under the said circumstances, it would not be proper to entrust the custody of the children with the petitioner. Accordingly, by the common order dated 07.03.2018, learned Judge has allowed O.P.No.719 of 2014 and dismissed the OP.No.778 of 2014. He also directed the registry to post the matter on 12.03.2018 to pass orders with respect to visitations rights. He also directed the parties to file necessary affidavits putting forth their views in respect of visitation rights of the two children. Aggrieved by the said order, these Original Side Appeals have been filed by the petitioner in O.P.No.778 of 2014 and respondents in OP.No.719 of 2014.

8. Heard Mrs.Sheela Jayaprakash for M/s.M.J.Jaseem Mohamed, learned counsel for the petitioner and Mrs.Geetha Ramaseshan, learned counsel for the respondent.

9. The points for consideration in these appeals are as follows:

- 1) Whether the learned Judge was right in holding that the respondent is entitled to have custody of two minor children?
- 2) Whether these appeals have to be allowed?

10. Point No:1:-

The learned counsel for the appellants contended that the learned Judge has erred in holding that the first appellant/father has no interest in his second daughter just from the statement that the couple took precautionary birth control measures. She further contended that the learned Judge has erred in holding that Ex.P26 to P.31, Ex.P.61, the diary writings of the respondent as well as Ex.P.78 - the viber chat between the first appellant and the respondent are inadmissible even after recognizing that they have been admitted by the respondent herself, during the cross examination, as having been written and made by her. She further contended that the

learned Judge has erred in holding that the production of these notes is an invasion of the respondent's privacy. She further contended that the learned Judge has failed to see that the first appellant has produced these writings as evidence only to bring out the truth and not to defame her. She further contended that the learned Judge has failed to see that the case of the first appellant was that because of her mental illness, the respondent did not possess capacity to bring up the children. She further contended that the learned Judge erred in not taking note of the doctor's statement that the respondent has had multiple relapse of her psychiatric illness; that she requires life long treatment and that stopping medicines will make her condition worse and that prolonged medication produces side effects. She further contended that the learned Judge has erred in holding that the subsequent marriage of the first appellant after a divorce from the respondent would deprive him of his right to the custody of his daughters. She further contended that the learned Judge has erred in not taking into account that the best interest and welfare of the two minor daughters will be served, if they reside with the first appellant. She further contended that the learned Judge has erred in holding that the appellant has not complied with the procedure of producing the required certificates u/s. 65(B) of the Indian Evidence Act. She further contended that the learned Judge erred in not taking into account the evidence relating to the parents of the respondent and therefore she prayed to allow these appeals and set aside the order passed by the learned Judge and appoint the first appellant/father as guardian for the minor children and direct the respondent to handover the second child to the first appellant. In support of her contentions, she relied upon the decision in Poolakkal Ayishakutty Vs. Parat Abdul Samad in LAWS (KER) - 2004 -11 - 64

11. The learned counsel for the respondent/mother, on the contrary, contended that the evidence of the RW2 (doctor) would clearly establish that the respondent is suffering from recurring depressive disorder with psychotic features and she has responded very well to the medication and has shown complete remission from her symptoms and her response is compatible with normal family life. She further submitted that the evidence of RW2 would show that the scribblings of the respondent have no basis in reality and they are expressions of a psychotic process where people can talk and behave in an irrelevant and incoherent manner. She further contended that the evidence of RW2 would show that the respondent would be capable of handling both the children and that the writings and chats have no relevance to her real life experience. She further contended that there is no justification on the part of the first appellant to abandon the respondent and to say 'Talaq'. She further contended that while appointing the guardian for

minor children, welfare of minor children is paramount consideration. She further contended that in this case, admittedly the second child is with the mother and while removing minor child from mother's custody, the court has to look into the welfare of the child. She further contended that in this case during pendency of the proceedings before this court, the appellant had married another lady and got a child and the said fact was totally suppressed before the court with a view to get custody of the minor children. She further contended that taking into consideration of all the aforesaid facts, the learned Judge has rightly ordered to appoint the respondent as guardian for both the children and directed the first appellant to handover the first child to the respondent.

12. In support of her contentions she relied upon the following decisions:-

- 1) Rosy Jacob Vs. Jacob A.Chakramakkal, AIR 1973 SC 2090
- 2) Kollam Chandrasekar Vs. Kollam Padamalatha (2014) 1 SCC 225

13. The undisputed facts are as follows :

a) The petitioner and the respondent are Muslims by religion. The petitioner and the respondent married on 10.09.2010 at Hotel Accord Metropolitan, T.Nagar Chennai - 17, according to Muslim law. This is the second marriage for them. Both of them were already married and their previous marriages ended in divorce. At the time of their marriage, the first respondent was living in USA and he was working there in a private Company. Before marriage the respondent was also working as an Assistant Professor in Sree Sastha College of Engineering, Chennai and she resigned her job on 31.08.2010. After their marriage, both of them left for USA on 08.10.2010 since the petitioner was working there. On 13.03.2012, the first daughter Yusra Mariam, was born at USA. When the first daughter was three months old, she was sent to Chennai with the petitioner's parents. Thereafter, the respondent in the month of June, 2013 got pregnant once again. In the month of October 2013, both of them came to Chennai and stayed in the petitioner's parents house at Mugappair Chennai for few days. Thereafter, the respondent went to her parents house and stayed there. On 16.11.2013, the petitioner alone left for USA. On 11.03.2014 at about 4.45 a.m., the respondent received an e-mail from the petitioner stating that he divorced her. At 12.07 p.m., on the very same day, she received another e-mail stating that it was the second divorce "Talaq" he was pronouncing on her. On 19.03.2014, the second daughter Zaara Zamreen born to the respondent.

b) On 30.03.2014, the petitioner sent an e-mail stating that he was pronouncing the third and final 'Talaq'. The respondent has filed a suit in O.S.No.140 of 2014 on the file

of II Additional Family Court, Chennai, to declare that the Talaq is null and void and also filed a case in M.C.No.238 of 2014 for seeking maintenance for herself and for the second child. The petitioner also has filed a suit in O.S.No.184 of 2014 to declare the marriage as null and void and the same is also pending before the II Additional Family Court, Chennai. The petitioner has filed HCP.No.1888 of 2014 before this court for production of the second child. The respondent herein also filed HCP.No.1953 of 2014 for the production of the first child. Thereafter, the respondent has filed an O.P.No.719 of 2014 to appoint her as guardian for both the minor children and to direct the petitioner to handover the custody of the first minor girl child Yusra Mariam to her. The petitioner herein also has filed O.P.No.778 of 2014 to appoint him as guardian for both the minor girl children and to direct the respondent to handover the second minor girl child Zaara Zamreen to him. The petitioner is presently working as Technical Support Director in Dell International Services India Private Limited, Chennai. The respondent is presently working as Assistant Professor in Sree Sastha College of Engineering, Chennai.

14. The respondent is taking treatment from a psychiatrist for her depression. According to her, due to domestic violence in her first marriage, she got depression and for the said illness, she is taking treatment continuously. According to the petitioner, there was a deliberate suppression of the fact that the respondent was taking treatment prior to and also subsequent to their marriage. But the respondent has stated in her evidence that even prior to the marriage, the fact that she is having mental depression was informed to the petitioner and his family members and only after due deliberation, the petitioner and his family members have come forward to marry her.

15. The petitioner has stated in his evidence that the respondent had shown to him a prescription dated 03.08.2010 issued by Dr.Rangarajan (RW2) containing details of Aripiprazole with the dose of 20 mg per day and the said prescription has been marked as Ex.P1. He also marked another prescription dated 25.10.2010 issued by the same doctor as Ex.P2. He also marked the certificate issued by the same doctor on 08.03.2011 as Ex.P3 wherein it is stated that the respondent was taking treatment from him from August 2008 for major depression. According to the petitioner, the said fact was suppressed by the respondent before the marriage.

16. At this juncture, it would be relevant to refer the cross examination of the PW1 wherein he has admitted that on 05.10.2010, he met Dr.Rangarajan (RW2) along with his sister who is also a Doctor. He also admitted that the said Dr.Rangarajan informed about the certain medical conditions of the respondent

and also to take precaution until the medicines were tapered. He also admitted that he only paid for the medicines as per Ex.P2. So, it is clear that within 25 days from the date of marriage, the respondent was taken to Dr.Rangarajan (RW2) for treatment of her mental illness. At that time, the petitioner and his Doctor sister also accompanied the respondent. Even assuming that prior to the marriage, the petitioner had no knowledge about the mental illness of the respondent, he would have had knowledge atleast from 05.10.2010. So, it has to be presumed that he would have enquired about the history of the respondent's mental illness from Dr.Rangarajan, on 05.10.2010 itself. If he felt that he was defrauded by the respondent and her family members by suppressing the mental illness of the respondent, he would have immediately taken steps to set aside their marriage. On the contrary, he led a marital life with the respondent and two children were born. According to the petitioner, on 28.05.2012, the respondent got more violent attack of psychosis and behaved like a person possessed and he had recorded the same in a video camera and the said video has been marked as Ex.P35. RW2 was cross examined by the learned counsel for the petitioner by showing the said Ex.P35 video, RW2 has answered that when somebody is in acute psychotic stage, they are not in control of the behaviour, so everybody needs to be careful when approaching such a person. Further it was asked while so, how the two months old baby will be careful. For that, he has answered that baby needs to be taken care of as baby will not know what to do. Further he has answered that the respondent requires life long treatment and follow up.

17. It is also to be pointed out that RW2 has stated in his evidence that he has been treating the respondent for recurring depressive disorder psychotic features. He further stated that the respondent has responded very well to the medication and has shown complete remission from her symptoms. He also stated that her response is compatible with normal family life and that the symptoms can be controlled with medication, but as for as cure is concerned, it is as in the case of diabetes where the symptoms can be controlled with medication and the stopping of medication would make the problem worse. He further stated that he has observed the respondent with her child and from what he has observed at the clinic and her behaviour with her child, he is of the opinion that she is very much capable of taking care of the child. He further stated that she would be capable of handling both the children. He also stated that in Ex.P.13, it is stated that the respondent is suffering from schizophrenia in Axis I, but the respondent is not having any negative symptoms and therefore she is fit to be a mother to child as per his current clinical examination. He further stated that the respondent is not in denial of her illness and is very responsible and conscientious in continuing her medicines and

treatment as of his current examination.

18. From the evidence of RW2, it is clear that the mental illness of the respondent cannot be cured as in the case of diabetes, but it can be controlled with medication. It is also clear that the respondent has been cooperative for treatment and she has been regularly taking medicines as per the advice of the doctors and she is capable of handling both the children. Only on one occasion ie., on 28.05.2012, when she was at USA, she became violent and for the said solitary incident, it cannot be said that she is unfit to lead a normal life.

19. Ex.R28 would show that the respondent passed B.E., (Computer Science) and Engineering in the first class with distinction and M.E., (Computer Science) and Engineering in the first class. Ex.R29 and Ex.30 would show that the respondent was working as lecturer in Vellammal Engineering College and SRM Deemed University. Ex.R31 to Ex.R.35 would show that the respondent has passed school examinations with good records. The respondent's evidence would show that presently she is working as an Assistant Professor in the Sree Sastha College of Engineering, Chennai from July 2016. There is no evidence that the respondent has behaved violently after the incident of 28.05.2012 either in the family or in the working place. Therefore, the contention of the petitioner that the respondent is unfit to act as guardian for the minor children cannot be accepted.

20. With regard to the question as to whether the petitioner is fit to act as guardian for the minor children, the learned Judge has found that the petitioner has suppressed the fact that during pendency of the proceedings, he has married another lady and a child was born through the said lady. It is an admitted fact that during pendency of the proceedings before this court, appellant got married to another lady and through her, he got a child. But he has not informed the said fact to the court when he was examined as witness. So, it appears that he tried to suppress the third marriage and the birth of the child through the third marriage. When he is having another wife with a child, we cannot expect that he would show the love and affection on the children born through the respondent. Further, the possibility of step motherly treatment by the third wife with the children born through the respondent herein cannot be ruled out. Under the said circumstances, it would not be proper to entrust the children with the petitioner.

21. In Poolakkal Ayishakutty Vs. Parat Abdul Samad (supra), the facts are totally different. In that case, mother of the child had committed suicide and after her death, the

child was brought up by the maternal parents. Father had filed an application for the custody of the child which was earlier allowed by the Family Court. But on appeal, the High Court of Kerala modified the order and father was only permitted to have visitation rights. Subsequently, maternal grandfather died. Father then preferred I.A.No.483 of 2004 for custody of the child citing change of circumstances. It was pointed out that on the death of the maternal grandfather, grand mother alone would not be able to look after the child and taking into consideration, the change of circumstances, the family court allowed the said petition. The High Court also confirmed the said order. But in the instant case, the mother is alive. Further, in the aforesaid decision itself Section 352 of Mohammedan Law was referred to which states as follows:

"Section 352. Right of mother to custody of infant children:- The mother is entitled to the custody (hizarat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father".

22. So, even as per the Mohamedan law, the mother is entitled for custody of the male child until he has completed the age of 7 years and of her female child until she has attained puberty. Therefore the aforesaid decision will not help the petitioner in this case.

23. In Rosy Jacob Vs. Jacob A.Chakramakkal, (supra) the Hon'ble Supreme Court has observed as follows:

" In our opinion, S. 25 of the Guradians and Wards Act contemplates not only actual physical custody, but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian, to properly look after the ward's health, maintenance and, education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. "

24. In Kollam Chandrasekar Vs. Kollam Padamalatha (supra) after referring to the decision of the Allahabad High Court, in Titli Vs. Alfred Robert Jones, AIR 1934 AII 273, the Hon'ble

Supreme Court in paragraph No.36, has observed that the inability to manage his or her affairs is an essential attribute of an "incurably unsound mind". For proper appreciation, the relevant portion of the said decision is extracted hereunder.

"36. The Allahabad High Court, in Titli V Alfred Robert Jones has held that where it has come on record that the wife has improved her educational qualifications and has been looking after her children, the apprehension of the husband that there is danger to his life or to his children is not borne out is the finding recorded in the said case. Inability to manage his or her affairs is an essential attribute of an "incurably unsound mind". The facts pleaded and the evidence placed on record produced by the appellant in this case does not establish such inability as a ground on which dissolution of marriage was sought for by him before the trial court"

25. After observing so, the Hon'ble Supreme Court in the same Judgment in paragraph Nos.37 to 39 has observed as follows:

"37. The High Court has rightly set aside the said finding and allowed the appeal of the respondent after careful scrutiny of Ext.B-10. The correctness of the finding of the High Court in the impugned judgment is seriously challenged by the learned Senior Counsel on behalf of the appellant in this appeal. We have examined this contention, after careful perusal of the contents of Ext.B-10. In our considered view, the contents of the report as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1) (iii) of the Act. The report states that the respondent, although suffering from 'illness of schizophrenic type', does not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms are fairly under control with the medication which had been administered to her. It was further stated that if there is good compliance with treatment coupled with good social and family support, a schizophrenic patient can continue their marital relationship. In view of the aforesaid findings and reasons recorded, we have to hold that the patient is not suffering from the symptoms of schizophrenia as detailed above.

38. We are of the view that the High Court in exercise of its appellate jurisdiction has rightly come to a different conclusion that the respondent is not suffering from the ailment of schizophrenia or incurable unsoundness of mind. Further, the High Court has rightly rejected the finding of the trial court which is based on Ext.B-10 and other documentary and oral evidence by applying the ratio laid down by this Court in the case of Ram Narain Gupta vs. Rameshwari Gupta referred to supra. A pertinent point to be taken into consideration is that the respondent had not only completed MBBS but also did a post graduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to work in the said post. The appellant husband cannot simply abandon his wife because she is suffering from sickness. Therefore, the High Court allowed both the CMAs and dismissed O.P. No. 203 of 2000 filed by the appellant for divorce and allowed O.P. No.1 of 1999 filed by the respondent for restitution of conjugal rights wherein the High Court granted decree of restitution of conjugal rights in favour of the respondent.

39. It is thus clear that the respondent, even if she did suffer from schizophrenia, is in a much better health condition at present. Therefore, this Court cannot grant the dissolution of marriage on the basis of one spouse's illness. The appellant has not proved the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing positive and substantive evidence on record and on the other hand, it has been proved that the respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS, as deposed by PW 4 in his evidence before the trial court."

26. In this case also, the evidence of RW2 would show that the medication given to the respondent had good response. Further the respondent is a Post Graduate in Computer Science and Engineering and she is working as an Assistant Professor in an Engineering College and she has responded well to the treatment given to her. Under the said circumstances, the petitioner, instead of giving companionship and showing love and affection, he has abandoned her. In view of the aforesaid

decision of the Hon'ble Supreme Court, the husband cannot simply abandon his wife because she is suffering from sickness. In the aforesaid decision, the Hon'ble Supreme Court has not inclined to grant divorce on the ground that wife is suffering from the ailment of schizophrenia and that being so, the petitioner cannot seek custody of the children by saying that the respondent is suffering from schizophrenia.

27. Learned counsel for the petitioner relying upon the writings/scribbblings of the respondent's diary contended that she herself has stated that her father had sex with her and also stated that herself and the petitioner should be killed by medicines and the first child Yasura should be killed by hammer and pistol and that being so, it would not be proper to appoint her as guardian for the minor children. The RW2 as categorically stated in his evidence that those writings/scribbblings have no basis in reality and they are expressions of a psychotic process where people can talk and behave in an irrelevant manner. Therefore, much importance need not be given to the aforesaid writings/scribbblings. As per the evidence of RW2, the respondent is responding to the medications and she is now not having any negative symptoms. Further the respondent is now working as an Assistant Professor in the Engineering College and there is no complaint from the said college that she is acting violently. Under the said circumstances, the petitioner need not have any apprehension that his children will not have any safety in the hands of the respondent.

28. It is also to be pointed out that the learned Judge had an occasion to examine both the parties in his chambers and also to have a discussion with the two children and observed in paragraph No.65 of his judgment as follows:-

"65. This Court had an occasion to examine both the petitioner and the respondent in the Chambers and also to have a discussion with the two children. This court has to state that when the two children came to the chambers, they sat together in one chair. They were always together. They needed and enjoyed each other's companionship. I have no hesitation in holding that it would be in the best interest of the two children that they are together."

Again in paragraph No.74, the learned Judge has observed as follows:-

"74. This conviction is further strengthened by the further fact that the two children require each other's companionship. This cannot be denied. Their dependency on each other was evident when they were

in the chambers. As stated above, they both sat in one chair. They smiled together. They held hands together. They were so happy in seeing each other. They should not be separated. They have to be united. They have to be united with the only parent, who is now available namely the respondent. The petitioner has married again. His interests have diversified. He has another wife. He has another child. It would not be possible for the petitioner to bring up the two children in the same manner as he would have, had he continued his marital life with the respondent. Quite unfortunately, he had consciously chosen not to live with the respondent. He cannot be then permitted to live with the children of the respondent. It is also for these reasons that I hold that custody of the two children must be given to the respondent."

29. We are of the firm view that the opinion expressed by the learned Judge has to be upheld for the welfare of both the minor girl children. Looking from any angle, the respondent/mother is in a better position than the first appellant/father to act as guardian for the minor children. Accordingly, this point is answered against the first appellant/father and in favour of the respondent/mother.

30. Point No.2: In view of our findings to the point No.1, we hold that the learned Judge was right in holding that the respondent is entitled to have custody of two minor children and appointing the respondent/mother as guardian for the minor children and therefore, these appeals are liable to be dismissed. Accordingly, this point is answered against appellants and in favour of the respondent.

31. In the result, these appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gv

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

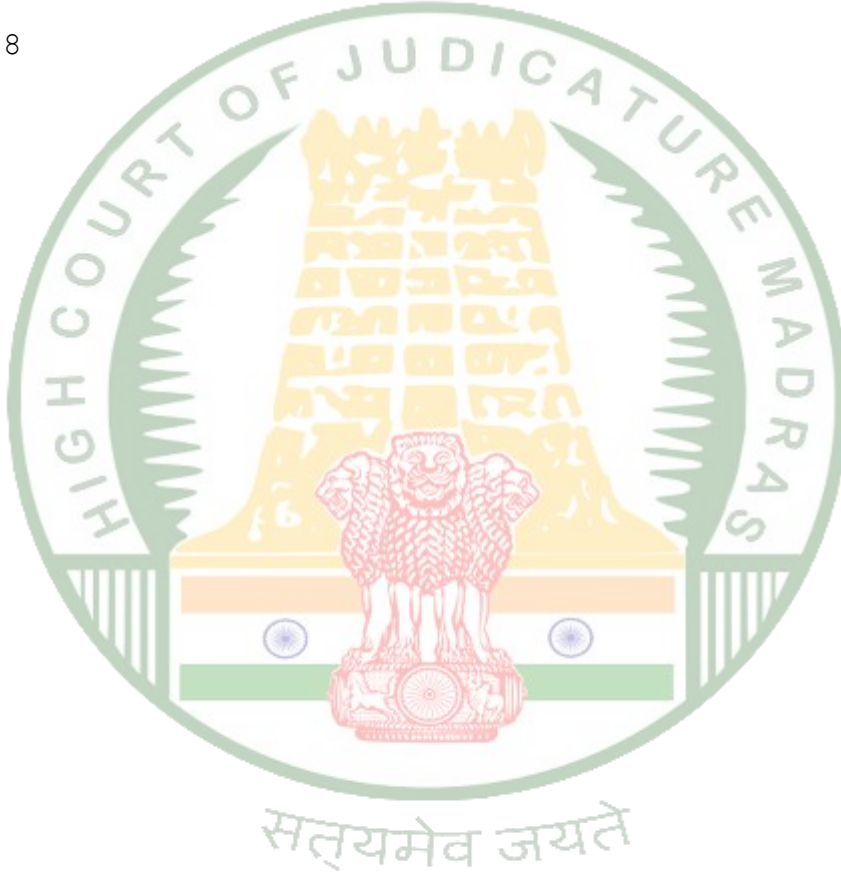
+2ccs to M/s.M.J.Jaseem Mohamed, Advocate, S.R.No.44876 & 44877
+6ccs to Mr.Bader Sayeed, Advocate, S.R.No.44796 & 44797

O.S.A.No.95/2018 & CMP.No.6085/2018

AND

O.S.A.No.113/2018 & CMP.No.7166/2018

VGI (CO)
CS/24/07/18



WEB COPY