

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 01.08.2018	Delivered on: 19.09.2018
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CORAM

THE HONOURABLE Mrs.JUSTICE S.RAMATHILAGAM

C.M.A.No.3168 of 2013

M.Sudhakar

.. Appellant

Versus

Charumathi

.. Respondent

Civil Miscellaneous Appeal filed under Section 19(1) of the Family Courts Act, 1984 read with Section 47 of the Guardians and Wards Act, 1980, against the Order and Decree dated 10.06.2013 made in G.O.P.No.360 of 2010 on the file of the Family Court at Puducherry.

For Appellant : Mr.N.S.Siva Kumar

For Respondent : M/s.K.Sumathi

JUDGMENT

This appeal has been filed by the appellant/husband against the order dated 10.06.2013 passed by the Family Court, Puducherry, in G.O.P.No.360 of 2010, thereby, declining the custody of the minor children to him.

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

2.1 The appellant/husband married the respondent/wife on 11.04.1999 at Vellore as per the Hindu rites and customs. Out of the lawful wedlock, two children namely S.Kavin Sahana and S.Sudhir were born on 28.04.2001 and 15.09.2003 respectively. During the course of matrimony, a lot of indifference arose between the parties, due to which, the appellant/husband has received all sorts of troubles at the hands of the respondent/wife, which caused humiliation and harassment to him. However, he tolerated the same in the interest of maintaining the marital harmony and status and in the interest of minor children in particular. Whiles, without his knowledge and consent, the respondent/wife left the matrimonial home in January 2003. Further, she made an attempt to commit suicide by

burning herself, for which, the appellant/husband spent a huge sum for treatment. She also went to the extent of preferring a false complaint against him on 17.12.2008 to the All Women Police Station, Vellore, due to which, he was remanded to Judicial custody. Subsequently, the said case culminated in C.C.No.13 of 2009 on the file of the Judicial Magistrate III, Vellore and is pending. Thereafter, on one occasion, the respondent/ wife returned to the marital abode after mediation by elders, but, the respondent/wife finally left the matrimonial home in December, 2008 along with the minor children. According to the appellant/husband, he is in very good position by doing business and that he, being the natural guardian of the minor children, would look after them in very good manner. It is his apprehension that if the minor children are under the care and custody of the respondent/wife, their entire future and welfare will get affected very much. Hence, the appellant/husband filed G.O.P.No.360 of 2010 under Section 25 of the Guardians and Wards Act, 1980 praying to appoint him as the legal guardian of the minor children and to direct the respondent/wife to deliver the custody of them to him.

2.2 Resisting the averments made in the aforesaid petition, the respondent/wife filed a detailed counter, wherein, she admitted the marriage with the appellant/husband. She depicted the appellant/husband as inhumane in treating her and her children with utmost cruelty by way of torturing and beating them often, after consuming liquor with his friends during night time. Due to the atrocities committed by the appellant/husband, she was driven to the extent of committing suicide by way of self immolation, due to which, she suffered burn injuries heavily. Further, the appellant/husband deserted her and drove her from the matrimonial home on 13.12.2008 along with the minor children without any humanity. It is the further case of the respondent/wife that on one occasion, her right ear was torn by the appellant /husband by beating her, when she refused to bring Rs.6,00,000/- and a Benz Car from her parents and hence, she preferred a complaint before All Women Police station, which culminated in C.C.No.13 of 2009, after filing charge sheet. It is the grievance of the respondent/wife that the appellant/husband never cared about her welfare as well as her children. Further, he is a habitual drinker and is having illicit intimacy with several women. According to the respondent/wife, she is running a computer company and is earning Rs.20,000/- per month, besides earning a sum of Rs.25,000/- by working in a company, which is sufficient enough to educate her children and for their livelihood. Further, the appellant /husband is roaming round through out Tamil Nadu due to his business purpose and he never finds time to look after the children and hence, if the custody of the children is given to him, their future, moral psychology and education will be affected. The respondent/wife filed GOP.No.160/2009 under

Section 6 of the Hindu Minority and Guardianship Act, 1956, praying to permit her to act as the natural guardian of the person of the minor children.

3. The Family Court, after verifying the evidence and documents thoroughly, dismissed G.O.P.No.360 of 2010 filed by the appellant/husband, thereby, declining the custody of the minor children to him, however, granting visitation rights over them. While doing so, the Family Court found that only after registration of the criminal case against the appellant/husband, he was arrested by the Police and was enlarged on bail. At the time of arrest, the respondent/wife left at Vellore with her children to her parents' home at Pondicherry. The Family Court has also taken note of the fact that both the children were admitted in a convent school by name Study Lee Ecole International promoted by Dr. Cherian Educational Trust, Kalapet, Pondicherry and their educational expenses were also incurred by the respondent/wife. The said fact was also admitted by the appellant/husband in his evidence. The Family Court has further taken into account the statement made by the respondent/wife in her G.O.P.No.160 of 2009 that she can educate her children out of her earnings; though the appellant/husband is having three companies at Vellore and Chennai, he never cared for the welfare of her as well as the children; since the appellant/husband is an industrialist and running three companies, he cannot find time to take care of the children and till now, he is not taking care of them and not paying any amount towards maintenance of the children regularly; there was a dowry demand of Rs.6,00,000/- and Benz Car by the appellant/husband; and during her ten years marriage life with the appellant/husband, he used filthy languages against her and beaten her and children.

4. The Family Court has examined both the parties and their pleadings and also considered their mental status and their responsibilities to take care and custody of the children. As the interest and welfare of the children is paramount consideration, the Family Court has also examined the minor children in the Chamber, during the course of which, they expressed their willingness to live with their mother alone. The minor son Sudhir directly interacted with the appellant/husband and stated that he always preferred to live in the company of his mother i.e., the respondent/wife. The Family Court has observed that from the year 2008, the children were taken care and under the custody of their mother; the respondent/wife was also not stick on her view and left to the children for their own choice; the children, who are aged about 8 years and 6 years old, are willing to stay with their mother only; considering the facts that the respondent/wife is educating her children in a good school and the appellant/husband who is living at Vellore and doing business at Vellore and Chennai, may not in a position to take care of the children; the respondent/wife has stated that she brought them to

this level from their childhood with all care and affection, inspite of her sufferings; and due to the absence of the respondent/wife, the mental status will also be affected if they are under the custody of the appellant/husband alone. The Family Court further observed that though the appellant/husband is claiming custody of the children for providing them good education especially admitting her daughter in the Medical College and the son in a very good school, the minor daughter stubbornly expressed her view that she will get the medical seat on merits by herself by staying with her mother, which would show that they want only the respondent/wife to be their guardian, from whom and whose custody, they can get their education, love and affection and happy life. The Family Court has also observed that the appellant/husband is not paying the maintenance to the respondent/wife and the children. Challenging the

5. Heard both sides and perused the records.

6. On the side of the appellant, it is argued by quoting the case law in (1982) 2 Supreme Court Cases 544 [Thrity Hoshie Dolikuka /vs/ Hoshiam Shavaksha Dolikuka] that the minor children are not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. Further, it is argued by quoting the judgment of the Supreme Court in Criminal Appeal Nos.635-640 of 2018 Mrs.Kanika Goel /vs/ State of Delhi through S.H.O and another that the best interest of child" is wide in its connotation and cannot be limited only to love and care of the primary care giver i.e., the mother. It then adverted to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. In para 124 of the said judgment, it went on to observe thus:

" 124. Thus, all decisions regarding the child should be based on primary consideration that they are in the best interest of the child and to help the child to develop to full potential. When involvement of one of the parents is not shown to be detrimental to the interest of the child. It goes without saying that to develop full potential of the child"

7. On the other hand, the respondent/wife argued that now the daughter has got admission in B.D.S.Course and the mother, who was all along caring the children inspite of her mental agony, sufferings, by attending the Court proceedings, is able to provide maximum support to the children to get good education. It is also argued by filing the school records of the minor son Sudhir and by pointing out his efficiency in student's profile in scholastic areas that though the minor son is away from his father and in the absence of his care and only with the mother's care and love and affection and support, the boy expressed his goal that he wants to become an Air Force Kernel

and he is efficient in sports. The children who lost the care and support of their father i.e., appellant/husband and stayed with the care and custody of the mother i.e., respondent/wife, showed their efficiency in the field of education. It is also vehemently argued by the respondent/wife that with so much difficulties and sufferings of these years, she brought up the children and also magnanimously left the option to the children to choose their guardian on their own.

8. On the side of the respondent, it is also argued that while considering the welfare of the minor children, though the appellant/husband is financially sound and able to cater to all the needs of the children for their development, his financial support is very much opposed by the respondent/wife, even during the Court proceedings, as the appellant/husband did not pay the maintenance properly to the respondent/wife and the children. It is further argued by pointing out the observation of the Family Court that the children were all along under the care of the mother, who by herself was working in an establishment and also taking utmost care on the children, which is very much proved by the present educational status of the children; when the option regarding the custody was left to the children by the respondent/wife; this Court made an interview with the innocent children, who expressed their willingness, without anybody's torture, to stay only with the mother and their father's attitude, which would show his lack of affection towards them; and as the appellant/husband is always comparing his status with the respondent/wife, the children are very much comfortable and happy with the company of the mother only.

9. It is seen from the impugned order that the brought up of the children by the mother, without any financial support and comfort from the appellant/husband, would prove the less importance of the appellant/husband. Hence, in the absence of the children's wish, whose welfare and interest is paramount consideration, their custody could not be handed over to the appellant/husband, as it is well settled that it has become very much essential to consider the paramount interest of the welfare and intention of the children and not the rights of the parents. Thus, while deciding the custody of the children, the Family Court has observed that the children did not give him the status of the father and they were not lured by the words of their father that he has purchased a new car and he will get admission in a best school; and the minor son also directly expressed his willingness to stay with his mother only.

10. In view of the above discussions, this Court finds that if the children continue to be in the custody of the mother, they will be very happy; and the respondent/wife is in no way inferior in providing the minor children, the care, love and affection and proper education and leading them in the right

path, with dedication. Hence, this Court is of the view that the exclusive custody has to be given to the mother, however, granting visitation rights to the appellant/husband. Needless to state that it is open to the appellant/husband to provide whatever comforts, he could provide, to the children, inspite of his indifference with the respondent/wife.

11. In the result, the civil miscellaneous appeal is dismissed and the decree of the Family Court in G.O.P.No.360 of 2010 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

vv

To

1. The Family Court,
Puducherry .

2. The Section Officer, VR Section,
High Court, Madras.

+1 CC to Mr.N.S.Siva Kumar, Advocate sr 65201.

+1 CC to Mrs.K.Sumathi, Advocate sr 64812.

C.M.A.No.3168 of 2013

SP(01/04/2019)

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