



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 29.01.2018
(Reserved on 13.12.2017)

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P (PD) (MD) No.270 of 2017
and
C.M.P (MD) Nos.1272 and 7594 of 2017

Kalaivani ... Petitioner/Petitioner/Respondent

vs.

S.Sivaraman ... Respondent/Respondent/Petitioner

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order dated 22.12.2016 made in I.A.No.54 of 2016 in G.W.O.P.No.28 of 2016 on the file of the learned Principal District Court, Theni.

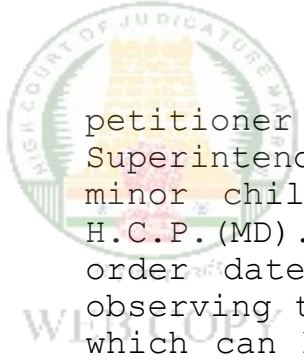
For Petitioner : Mr.T.Senthil Kumar
For Respondent : Mr.R.Venkateswaran

O R D E R

The Civil Revision Petition has been filed against the order passed by the learned Principal District Judge, Theni in I.A.No.54 of 2016 in G.W.O.P.No.28 of 2016, dated 22.12.2016.

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

The petitioner is the wife and the respondent is the husband. The marriage between the petitioner and the respondent took place on 01.12.2013 at Pechiamman Temple, Kulathur, Tuticorin District as per Hindu Rites and Customs and on 10.07.2014, they were blessed with female child Yazhisai. According to the respondent, due to some difference of opinion between them, in the year 2015, the petitioner deserted him and was living separately along with her minor child. On 08.09.2016, when the petitioner went to the school, the respondent along with his family members entered into the house of the petitioner and forcibly taken away the minor child Yazhisai. Hence, the petitioner lodged a complaint against the respondent and others before Kombai Police Station about the kidnap of minor child Yazhisai on the same day and the same was registered as C.S.R.No.181 of 2016. On 11.09.2016, the respondent/husband filed a petition in G.W.O.P.No.28 of 2016 before the Principal District Court, Theni, against the petitioner to declare him as natural guardian as well as custodian of minor child. Since the police officials attached to Kombai Police Station failed to secure the minor child, the



petitioner gave a representation on 14.09.2016, to the Superintendent of Police, Theni. Thereafter, in order to secure the minor child, the petitioner filed the Habeas Corpus Petition in H.C.P.(MD).No.1282 of 2016 before this Court. This Court, by an order dated 21.09.2016, disposed the H.C.P.(MD).No.1282 of 2016, observing that there is some dispute regarding custody of the child, which can be resolved by the petitioner before the District Court, Theni, where GWOP is pending. During the pendency of G.W.O.P.No.28 of 2016, the petitioner/wife filed an application in I.A.No.54 of 2016 before the Principal District Court, Theni, for the custody of the minor child. On 22.12.2016, the Principal District Court, Theni has dismissed the I.A.No.54 of 2016, against which, the petitioner/wife has filed the present Civil Revision Petition before this Court.

3.Learned counsel for the petitioner would further submit that the divorce petition filed by the respondent is pending before the Sub Court, Theni, in O.P.No.188/16 and the petition for restitution of conjugal rights is pending in O.P.No.55/17. Learned counsel for the petitioner would further submit that collective reading of Section 4(2) of the Guardians and Wards Act, 1890, Section 4 of the Hindu Minority and Guardianship Act, 1956 and Section 6 of the Hindu Minority and Guardianship Act, 1956 clearly shows that mother should be the natural guardian of the child, if the child is below the age of 5 years and in the instant case, the minor child was aged about 2 years and 2 months when the respondent has forcibly taken away the child from the lawful custody of the petitioner/mother.

4.It is further submitted that under Section 25 of the Guardians and Wards Act, 1890, the petitioner filed interlocutory application seeking restoration of custody of the child where respondent/husband had forcibly taken away the child from the lawful custody of the petitioner. Hence, filing of the petition under Section 25 of the Act is only to find out whether the child was removed from the lawful custody of the guardian and the Trial Court without even going into the merits of the case ought to have restored the child to the custody of the mother, but, unfortunately dismissed the application. Therefore, he has filed the present revision petition for restoration of the child. In support of his contention, learned counsel relied on the following judgments:-

- 1)V.Vinod Kumar vs. V.Arunadevi reported in 2016 (1) MLJ (Cr1) 1.
- 2)Vadivel vs. Umamaheswari reported in 2014 (1) MLJ 150.

5.In the counter, the respondent would submit that the petition is not maintainable as the child under the custody of the father and therefore, the petitioner ought to have filed application where the child ordinarily resides and the learned counsel for the respondent would submit that the welfare of the child is paramount and the circumstances in which the child was living is hazardous and injurious to the health of the child and has affected the breathing system which if not treated properly, it would endanger the life of the child and therefore, he would contend that the mother has left



the child under the custody of her mother and had gone to school and he would state that the child is more attached to father and the petitioner filed complaints against the respondent.

6. Heard the learned counsel for the petitioner as well as respondent.

7. Before going into the merits of the case, this Court tried to mediate the issue between the petitioner as well as the respondent and it is found that though the petitioner was willing to live with the respondent, the respondent was not willing to live with the petitioner and therefore, this Court has no other option except to proceed with the case legally.

8. It is an admitted fact that the child was forcibly taken away from the custody of the mother of the petitioner when the petitioner has gone to the school. At this juncture, it is relevant to extract below Section 4(2) of the Guardians and Wards Act, 1890 and Section 6 of the Hindu Minority and Guardianship Act, 1956:-

'Section 4(2) of the Guardians and Wards Act, 1890:-

"guardian" means a person having the care of the person of a minor or of his property or of both his person and property.

Section 6 of the Hindu Minority and Guardianship Act, 1956:-

6. Natural guardians of a Hindu minor.- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are

(a) in the case of a boy or an unmarried girl, the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl, the mother, after her, the father;

(c) in the case of a married girl, the husband; provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation.- In this section, the expressions 'father' and 'mother' do not include a stepfather and stepmother."

9. A conjoint reading of the above provisions shows that for the child below the age of 5 years, the natural guardian should be only the mother and perusal of the records shows that the petition filed for restoration of the custody of the child stating that the child was forcibly taken away by the husband and therefore, the Court has

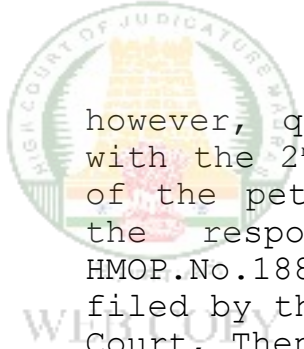
to only decide whether the child has been forcibly taken or not.

10. Here is a case, where the husband had kidnapped the minor child on 08.09.2016 and rightly the petitioner had gone to the police and lodged a complaint and she has also filed HCP(MD) No.1282/16 and the respondent has filed GWOP within two days of kidnapping and this Court in HCP(MD) No.1282/16 directed the parties to seek their remedy before the appropriate Court where GWOP is pending and what ought to have transpired in the mind of the Judge was since the petition is pending, the Court thought that even custody can be got before the concerned Court where the GWOP is pending. It is unfortunate that since the dismissal of HCP on 04.10.2016, the respondent also filed a divorce petition against the petitioner. After the respondent has forcibly kidnapped the minor child from the lawful custody of the mother, he has filed a petition to appoint him as natural guardian which in my considered opinion is a clear abuse of process of the Court. The power to remove guardianship from one person to another lies only with the Court and not on any individual person who has forcibly removed the child from a woman who has been deserted by him.

11. As rightly contended by the learned counsel for the petitioner, no man can take advantage of his own wrong 'Nullus commodum capere potest de injuria sua propria'. It is to be noted that the respondent/husband was earlier married to one Krishnaveni through her, he has got a child by name, Ilakkiya and during the pendency of divorce proceedings, he filed GWOP.No.11 of 2004 dated 05.08.2010 and in the maintenance case filed by the first wife, the learned Judicial Magistrate, Rajapalayam, directed him to pay Rs.4,000/- towards maintenance for his wife and daughter. Challenging the same, he has filed Crl.R.C.No.9 of 2014, wherein, he has filed an affidavit stating that after divorce, he married one Kalaivani and a female child namely, Yazhisai was born on 10.07.2014 and he has also stated that he is working in a jewellery shop and have a meagre income and since he has to maintain the second wife and child born through her, sought for reduction of maintenance.

12. In my considered opinion, the issue to be decided before this Court is whether the child has been removed from the custody of the mother. The reasons given by the respondent for removal of the custody of the child cannot be sustained in the eye of law and the judgments produced by the respondent also not applicable to the present facts and circumstances of the case. It is an unfortunate case for nearly one year the poor woman was made to run from pillar to post and the learned Judge has dismissed the interlocutory application seeking custody of the child. It is also very unfortunate that the complaint of kidnapping given by the petitioner was also closed.

13. It is also borne by records that the petitioner has filed Crl.R.C.No.9/2014 seeking reduction of maintenance amount stating that he has to maintain the second wife/petitioner and the child,



however, quite contrary to the same, he has got misunderstanding with the 2nd wife and has taken the child forcibly from the custody of the petitioner/mother. Further, the divorce petition filed by the respondent against the present petitioner(2nd wife) in HMOP.No.188/ 16 and the petition for restitution of conjugal rights filed by the petitioner in HMOP.No.355/17 are pending before the Sub Court, Theni.

14.The attitude of the respondent in my considered opinion has to be viewed seriously. Since the child was at the age of 2½ years and she was removed from the custody of the mother forcibly by the respondent, the respondent is directed to hand over the custody of the child Yazhisai, within ten days from the date of receipt of a copy of this order, failing which, the Superintendent of Police, Theni, is directed to ensure that the custody of the child is handed over to the petitioner/mother.

15.Accordingly, the impugned order passed by the learned Principal District Judge, Theni, in I.A.No.54 of 2016 in GWOP.No.28 of 2016 is set aside and the Civil Revision Petition is disposed of with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar

To

1. The Principal District Judge,
Theni.
2. The Superintendent of Police,
Theni.
3. The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+ 1 CC TO Mr.T.SENTHILKUMAR, ADVOCATE IN SR No. 44448
+ 1 CC TO Mr.R.VENKATESWARAN, ADVOCATE IN SR No. 44480

BALA
TE/SV-MMS/SAR-4 : 06/02/2018 : 5P/7C

C.R.P (MD) No.270 of 2017
29.01.2018