

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.07.2019

CORAM

THE HON'BLE MR.JUSTICE T.RAJA

C.M.A.NO.516 OF 2015 & C.M.A.NO.793 OF 2015

AND

M.P.NOS.1 AND 1 OF 2015

Udhaya @ Udhayakumar

.... Appellant in CMA 516/2015
& Respondent in CMA 793/2015

Vs

Usha

.... Respondent in CMA 516/2015
& Appellant in CMA 793/2015

Prayer : Civil Miscellaneous Appeals under Section 47 of the Guardian and Wards Act, 1890 against the fair and decreetal order dated 20.02.2015, in G.O.P.No.152 of 2013 on the file of the II Additional District Judge, Salem.

CMA.No.516 of 2015

For Appellant : Mr.R.Selvakumar
For Respondent : Mr.T.M.Hariharan

CMA.No.793 of 2015

For Appellant : Mr.T.M.Hariharan
For Respondent : Mr.R.Selvakumar

J U D G M E N T

The first Civil Miscellaneous Appeal in CMA No.516 of 2015 has been filed by one Udhaya, husband/father of the child and the second Civil Miscellaneous Appeal in CMA No.793 of 2015, has been filed by Usha, wife/mother of the child. Both the appeals are taken together and were jointly heard.

2. Learned counsel for the appellant in CMA.No.516 of 2015/father of the child submitted that he and the respondent Usha got married on 03.09.2000 at Subramaniya Thirukovil,

Tharamangalam and the marriage was registered at the Office of the Registrar of Marriages at Tharamangalam on 8.9.2000. They were blessed with a girl child on 03.12.2005 at Salem Poly Clinic. The respondent Ms.Usha is a MCA graduate, whereas the appellant Udhaya is a Police Officer. After some time, the mother/respondent Usha got a job in an IT Company viz., GODB Tech Private Limited at Chennai. The appellant Udhaya, who was serving at Salem, got transferred to Chennai. The minor child was also admitted in Pre-KG in a school at Chennai and she continued her studies till February 2009. Due to disparity of opinion between the husband and wife, a complaint was lodged in All Women Police Station, Mylapore, Chennai against the husband Udhaya. In the meanwhile, the respondent Usha became pregnant for the second time. As the paternity of the child was disowned by Udhaya, at one point of time, when Usha was working, she was forced to stay in a hostel in Adyar. On 16.07.2010, her husband Udhaya trespassed into the office of Usha and questioned the Managing Director of the company, in which Usha was working, as to what he was doing with his wife Usha and slapped Usha in front of the Managing Director.

3. In view of the physical cruelty caused, the respondent Usha filed a divorce petition in F.C.O.P.No.467 of 2010, and though the appellant Udhaya filed a Vakalat, he did not contest the petition. Finally, exparte decree for divorce was granted on 29.11.2012. Subsequently, it was not challenged and was allowed to become final. Thereafter, the child was under the care and custody of the father/appellant Udhaya. Subsequently, the mother of the child Usha filed G.O.P.No.152 of 2013 under Section 7(i), 8 and 10 of the Guardians and Wards Act, 1890, seeking direction to hand over the custody of the minor child. P.W.1 and P.W.2 were examined and Exhibits P1 to P26 were marked on the side of the wife Usha and on the side of the husband Udhaya, himself was examined as R.W.1 and Exhibits R1 to R33 were marked. The learned trial Court, came to the conclusion that since Usha, the mother of the child went abroad in connection with her job, disbelieved the photos taken by Usha with her Managing Director in the airport, that the same will not ipso facto sufficient to prove that she is having illicit intimacy with the said Rajaram, the Managing Director, inasmuch as nowadays women are working on par with men and she has gone with her Managing Director, since both of them were deputed to work in the foreign country, allowed the application, appointing Usha, the mother of the child as guardian of the minor child Amirtha. At the same time, the trial Court gave visitation rights to the father of the child Udhaya. During the pendency of G.O.P.No.152 of 2013, the child was in the custody of the father. Aggrieved by the order of the trial Court appointing the mother of the child as the guardian, the husband Udhaya filed the present Civil Miscellaneous Appeal No.516 of 2015 and the wife Usha filed the

present Civil Miscellaneous Appeal No.793 of 2015, aggrieved by the direction of the trial Court, granting visitation rights to the husband/father of the child during the vacation and on the weekends of the month.

4. During the pendency of these appeals, this Court appointed Ms.Ramya V.Rao as Advocate Commissioner. After visiting the child, the Advocate Commissioner filed a detailed report dated 25.07.2015, giving complete picture of the mind of the child and also the behaviour of the child towards her mother. It is stated in the report that when the Advocate Commissioner produced the child before the mother Usha in a public place viz., Jeeva Park, the child was initially nervous and afraid, and started running towards the exit of the park. Thereafter, the advocate commissioner coaxed the child for a while and she finally agreed to talk to her mother, but refused to look at her face. She sat at the opposite side and the respondent mother could not control her emotions and was in tears, she begged her daughter to look at her. The child was not willing to move with her mother and started crying.

5. In view of the psychological effect seen in the child towards her mother, this Court is unable to disregard the Advocate Commissioner's report for sending the child with the mother. Now the child has been living in the custody of her father. In view of the long separation ie., from 16.07.2010, the date on which both of them separated, till now, the mother has not seen the child at all and vice versa.

6. Learned counsel appearing for the father Udhaya, argued that even in the year 2015, when an attempt was made to bring the child with the mother Usha, the child was not willing to accept any such compromise. Now, she has grown up and she is aged about 14 years, and the mother is also not in India, she is continuing her job in Taiwan. Therefore, any order directing the father to hand over the child even for one or two days by way of visitation rights, would create havoc for the reason that being she might even take the child with her to the foreign country and it would be very difficult to secure the child back.

7. I find force in the argument of the learned counsel for the appellant. When the child has been living with the father and her step-mother, who is also having a son aged 14 years, and the respondent Usha/mother of the child, has been working in Taiwan, even visitation rights also will not be possible because, it will be difficult to secure the child if the child is taken to abroad by the mother. Therefore, C.M.A.No.516 of

2015 filed by Udhayakumar/father of the child stands allowed and C.M.A.No.793 of 2015, filed by Usha/mother of the child stands dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar(Writ)

//True Copy//

Sub Assistant Registrar

KST

To

The II Additional District Judge,
Salem

+1cc to Mr.T.M.Hariharan, Advocate, S.R.No.63605
+1cc to Mr.R.Selvakumar, Advocate, S.R.No.63067

C.M.A.Nos.516 & 793 of 2015

BP(CO)
CS/08/07/2020