

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 02.01.2019
Delivered on : 01.02.2019

CORAM:
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.1870 of 2018
and
CMP.No.14401 of 2018

M.Kamalakannan ...Appellant/Petitioner

Vs

R.Sutha ...Respondent/Respondent

Civil Miscellaneous Appeal filed under Order 43(1) of the Civil Procedure Code read with Section 47 of the Guardians and Wards Act, 1890 against the decree and judgment passed by the learned Principal District Judge, Perambalur made in G.W.O.P.No.6 of 2016 on 27.4.2018.

For Appellant : Mr.M.Sridhar

For Respondent : Mrs.Hema Sampath
Senior Counsel
for M/s.R.Meenal

JUDGMENT

The appellant/husband has filed this appeal assailing the decree and judgment passed by the learned Principal District Judge, Perambalur made in G.W.O.P.No.6 of 2016 on 27.4.2018.

2. The facts in a nutshell are as under: The petitioner/husband filed a petition under Sections 7 to 9 and 17 of the Guardians and Wards Act, 1890 seeking permanent custody of his minor son, namely, Harshan, who was three years at the time of filing of the petition and is around six years now.

3. The learned Principal District Judge, Perambalur, by decree and judgment dated 27.4.2018, rejected the petition filed by the appellant on the sole ground that the child was four years old and the respondent/mother is having sufficient means to take care of the interest of child. However, the appellant was permitted to see the child between 9 AM and 5 PM on Sundays.

4. Aggrieved by the said judgment and decree, the present appeal is filed.

5. It is the contention of the learned counsel appearing on behalf of the appellant that:

- (i) the Court below erred in not considering the yardsticks contemplated under Section 17 of the Guardian and Wards Act, 1890 while deciding the issue of custody of child;
- (ii) The Court below failed to give importance to the "welfare of the child" and rather was carried away by the rights of the parents;
- (iii) The Court below failed to take into account the wishes of the child and assess the psychological impact after obtaining the opinion of the Child Psychiatrist or a Welfare Worker.

6. Per contra, the learned Senior Counsel appearing on behalf of the respondent reiterated the reasons that weighed with the Court below in dismissing the petition filed by the appellant and prayed for dismissal of the appeal.

7. However, pending consideration of the appeal, upon persuasion by this Court, the appellant/husband and the respondent/wife have filed separate memorandums dated 19.12.2018 and 2.1.2019.

8. In the memorandum dated 19.12.2018, the appellant/husband made a plea that:

- (a) Whenever the child gets school holiday, he should be allowed to stay with the appellant either at Chennai or Perambalur;
- (b) The respondent (wife) should furnish details to the appellant that where the child is studying and where and with whom he is staying/living and her email id enabling the appellant to inform her in advance about his holidays details and arrival to his native place;
- (c) The child should be allowed to have talk with the appellant, his father and mother through phone and video calls;
- (d) Apart from School holidays, the child should be allowed to participate in family functions if any taken place in the appellant family; and
- (e) The appellant will have holidays on 2.2.2019 to 6.2.2019 (Saturday to Wednesday), 5.6.2019 to 9.6.2019 (Wednesday to Sunday - Ramzan holidays) and 10.8.2019 to 13.8.2019 (Saturday to Tuesday). In those days the child may allowed to stay with the appellant at Chennai or Perambalur.

9. The respondent/wife in the memo filed on 2.1.2019, inter alia, raised the following plea:

- (a) The passports of the respondent and her son, which are in the custody of the appellant, should be handed over to the respondent or to the custody of this Court, as the appellant may clandestinely take the minor child to Malaysia;
- (b) The respondent/wife is agreeable to bringing the child only during weekends, as she is employed in Kochi and cannot get leave frequently;
- (c) During the visits, the child should be allowed to stay with the appellant during night and travel tickets should be arranged by the appellant/husband; and
- (d) The gold ornaments and other items belonging to the respondent/wife, as annexed to the memorandum, which are in the custody of the appellant/husband, should be returned to her forthwith. The appellant/husband was also required to return Rs.1,10,000/- which was taken by him from the respondent/wife.

10. The respondent/wife, ultimately, agreed to bring the child only in weekends (Saturdays and Sundays), as stated hereunder:

- (i) 02.02.2019 and 03.02.2019;
- (ii) 08.06.2019 and 09.06.2019; and
- (iii) 10.08.2019 and 11.08.2019.

11. Section 6 of the Act, 1956 provides that the natural guardian of a Hindu minor, in respect of minor's person as well as in respect of minor's property, in case of a boy or an unmarried girl, shall be the father, and after him, the mother, provided that the custody of the minor who has not completed the age of five years shall ordinarily be with the mother. In the case on hand, the minor child was three years old at the time of filing the petition by the appellant/husband.

12. Section 17 of the Act provides as under:

"Section 17. Matters to be considered by the court in appointing guardian:

(1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of

the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference , the court may consider that preference.

(4) [* * *]

(5) The court shall not appoint or declare any person to be a guardian against his will.

13. Section 17 is divided into five sub-sections. Sub-section (4) is deleted. Sub-section (1) of Section 17 highlights that the Court shall, subject to provisions of the said section, be guided by the principle of welfare of the minor and while doing so, will be consistent with the law to which the minor is subject. It means, the Court shall take a view consistent with the personal law of the child under which the child is governed.

14. In sub-section(2) of Section 17, the legislature has given the list of the factors which are the determinant to decide guardianship. It is divided in two sets. In the first set, the Court has to consider factors related to age of the minor, to wit, whether minor is an infant, a kid, a child or a teenager. The Court has also to consider the sex, to wit, whether minor is a male or female. In the second set, the Court has to consider the character and capacity of the proposed guardian and the nearness of the kin to the minor. The Court has also to take into account, the wishes of the deceased parents and also existing and previous relations of the proposed guardian with the minor and his property.

15. Sub-section (3) of Section 17 states that the Court may consider the preference given by minor, to wit, the choice of minor if the minor is old enough to perform an intelligent preference. Thus, it is not only the mere preference but it should be sensible and proper preference.

16. Sub-section (5) is a negative guideline to the Court that no person should be appointed as a guardian against his will.

17. "Welfare of the child" is nevertheless the paramount consideration while handing over the custody or appointing the guardian. The term "welfare of the child" has many facets, unfolded layers and, therefore, it is left to the understanding and wisdom of the Court. The welfare of the child is a bundle of

facts, which the Court has to take into account; it would entail broadly, health, hygiene, nourishment, education, shelter, economic condition, love and affection etc. There may be some other circumstances, which are also to be taken into account while considering the welfare of the child. Thus, though the welfare of the child is a umbrella word, sometimes a particular circumstance becomes the decisive factor.

18. In the case on hand, the Trial Court exercising the power conferred under Section 17 of the Act considering the fact that the respondent mother is taking care of the minor child and she had sufficient means to pay the school fees etc., and therefore, it is appropriate to permit the custody of the minor child with the mother, granted visiting rights to the appellant/father. According to the appellant, in his absence, his father will take care of the minor child. But, according to the respondent/wife, after she leaves for work, her mother is taking care of the minor and will also look after the welfare of minor child in future till he becomes old enough to perform an intelligent preference, which includes sensible and proper preference, of determining the choice of parent he wants to stay with. This Court does not find any reason to interfere with such finding of the Court below.

19. Considering the overall conspectus of the matter, including the contentions advanced on either side and the memorandums filed by both side counsel, this Court is not inclined to interfere with the order passed by the Court below. Thus, while dismissing this appeal, giving paramount importance to the welfare of the child, this Court is inclined to pass the following order:

- (a) The appellant/husband is permitted to visit the minor child on the following days (i) 02.02.2019 and 03.02.2019; (ii) 08.06.2019 and 09.06.2019; and (iii) 10.08.2019 and 11.08.2019.
- (b) It is made clear that the passport of the minor child should be handed over to the respondent/wife, whenever the custody of the minor child is taken by the appellant/husband.

In the result, this Civil Miscellaneous Appeal is dismissed with the above directions. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vs

To

The Principal District Judge,
Perambalur.

+1cc to Mr.R.Meenal, Advocate, S.R.No.8560
+1cc to Mr.M.Sridhar, Advocate, S.R.No.8886

C.M.A.No.1870 of 2018 and
CMP.No.14401 of 2018

SR(CO)

rrs 01/02/2019



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