

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 17.07.2019	Delivered on 24.07.2019
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CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

O.P.No.906 of 2018

Tmt.Gigin @ Karpagavalli

... Petitioner

Vs.

Chris Jaffer Guru Alias Gururajan

... Respondent

Prayer: Original Petition filed under Sections 3, 7 to 10 and 26 of the Guardians and Wards Act, VIII of 1890 and Order XXI Rule 2 and 3 of the Original Side Rules, praying that to

(a) Appoint the petitioner as guardian of the person of the above named minor female child by name Deekshali.G @ Adhiraah;

(b) Permit the petitioner to apply visa for the minor child DEEKSHALI.G @ Adhiraah, without the consent of the respondent, as the mother/guardian and custodian of the minor child and to take the minor child along with the petitioner to abroad.

For Petitioner : Mr.Ravichandran Sundaresan

For Respondent : Set *ex parte*

ORDER

The petitioner, who is the mother of minor child Deekshali G @ Adhiraah, has come forward with this Original Petition seeking to appoint her as the guardian as a person of the minor child and to permit her to apply visa for the minor child, without consent of the respondent, as the mother/guardian and custodian of the minor child and to take the minor child abroad along with her.

2. The petitioner had married the respondent on 28.10.2012. Out of wed lock the minor child was born on 29.12.2014. Due to the misunderstanding between them, the marriage came to be dissolved by mutual consent and the decree of divorce was passed on 06.11.2017 by the Principal Judge, Family Court, Chennai, in OP No.1055 of 2017. As per the order, the petitioner has given up the claim for maintenance for herself and the minor child. Subsequently, a Original Petition came to be filed in this Court, as regards the custody of the minor child, a memorandum of compromise was entered into between the parties on 20.03.2017, in and by which, the respondent husband/father of the child was given a right to visit the child, on any two Saturdays, for one hour between 5.00 pm to 6.00 pm, at the designated place.

3. The father of the minor child had filed OP No.879 of 2016 seeking permanent custody of the minor child. The said Original Petition came to be disposed of by this Court based upon the memorandum of compromise entered into between the parties on 20.03.2017. The visitation rights were confirmed. The memorandum of compromise was also formed part of the order. It is in this background, the petitioner has come forward with this Original Petition, seeking her as the guardian of the person of the minor child and permit her to apply for visa for the minor child, without consent of the father, to take the minor child with her to abroad.

4. Notice of this petition was served on the respondent on 10.12.2018, since he did not enter appearance, he was set *ex parte* and the matter was posted for evidence, before the learned Master, on 17.12.2018. Pursuant to the said order, evidence was recorded by the learned Master.

5. The petitioner has examined herself as P.W.1. She has filed a proof affidavit reiterating the averments contained in the petition, wherein, it is stated that she is an Engineering Graduate in Computer Science and she has also completed Master of Business Administration in Engineering

Management in the United Kingdom. She has also stated that she was employed in Family Bargains at Banbury from 2011 to 2012.

6. According to her, in view of the fact that she possess a degree in Master of Business Administration from a University in United Kingdom and the work experience she had, she would be able to secure a job in United Kingdom and she is also taking efforts to secure a job. According to her, she believes that she will secure a job very shortly. She would also claim that the child will be immensely benefited by being taken to London along with her, since she would have the best Education of International standards and it will be in the best interest of the child. She would also state that she is not claiming any maintenance for herself or the child from the respondent.

7. The petitioner has also produced her Degree Certificate and her MBA Certificate as Exs.P1 and P2. The orders passed in the Original Petition in OP No.1055 of 2017 by the Principal Judge, Family Court, Chennai has been filed as Ex.P4. The Memorandum of Compromise dated 20.03.2017 has been filed as Ex.P5.

8. In the above circumstances, the petitioner would seek to appoint herself as the guardian of the minor and to permit her to apply for

visa to the minor child, without consent of the father/respondent, in order to enable her to take the minor child to London. She also stated in the proof affidavit that she would make available with the child for visitation by the father, whenever she visits India.

9. The learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***Vikram Vir Vohra v. Shalini Bhalla, made in Civil Appeal No.2704 of 2010***, wherein, the Hon'ble Supreme Court has held that the welfare of the child is of paramount importance and Courts are not powerless to modify the conditions relating to custody and visitation of the child depending upon the welfare of the child. While considering, as to whether, the Court has a power to alter the terms of the compromise arrived at between the parties with reference to the custody of the child, the Hon'ble Supreme Court had observed as follows:

"14..... The welfare of the child is of paramount importance in matters relating to child custody and this Court had held that welfare of the child may have a primacy even over statutory provisions [Mausami Moitra Ganguli vs. Jayant Ganguli – (2008) 7 SCC 673, para 19, page 678]. We have considered this matter in all its

aspects.”

10. The Hon'ble Supreme Court had also rejected the contentions of the father of the child, to the effect that the order of the custody of the child and the visitation rights cannot be changed, as an hyper-technical objection. In the said context, the Hon'ble Supreme Court also observed as follows:

“16. In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.”

11. The conclusions of the Hon'ble Supreme Court in **Gaurav Nagpal v. Sumedha Nagpal**, reported in **(2009) 1 SCC 42**, which read as follows:

“42. Section 26 of the Hindu Marriage Act,

1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for the time being in force.”

were also quoted with approval by the Hon’ble Supreme Court in **Vikram Vir Vohra v. Shalini Bhalla**.

12. While considering the question on variation of the visitation rights, in the light of the fact that the child was being taken abroad, the Hon’ble Supreme Court had found that the autonomy of the mother on her person, cannot be curtailed by the Court on the ground of prior order of the custody of the child. While doing so, the Hon’ble Supreme Court has observed as follows:

“23.Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be asked to choose between her child 12 and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.”

13. Turning to the facts of the case on hand, though an order relating to custody of the minor has been passed by this Court, based on the compromise between the parties, in and by which, the father had been given certain visitation rights, in view of the subsequent events that had

emerged and the mother having got an opportunity to go abroad, I find that the child should also be allowed to go abroad along with the mother, since it will be in the welfare of the minor. She will be provided best education and better quality of life, if she is allowed to go to London along with her mother. The husband/father though served has not chosen to appear and resist the petition.

14. In view of the above, I am of the opinion that the welfare of the minor child will be sub served by appointing the mother as a guardian and permitting her to apply for visa, without consent of the father, to take the child abroad. This will however, be subject to the mother making available with the child for visitation by the father, whenever she comes to India.

15. For the foregoing reasons, the Original Petition is allowed, the petitioner is appointed as the guardian of the minor child and permitted to apply visa for the minor child, without consent of the respondent and to take the minor child to abroad. No costs.

24.07.2019

jv

Index: Yes/No

Internet: Yes/No

Speaking order/Non speaking order

Note: Issue order copy on 26.07.2019

List of Witnesses examined on the side of the Petitioner:

PW1 - Tmt.Gigin @ Karpagavalli

List of Witnesses examined on the side of the Respondent: Nil

List of Exhibits marked on the side of the Petitioner:

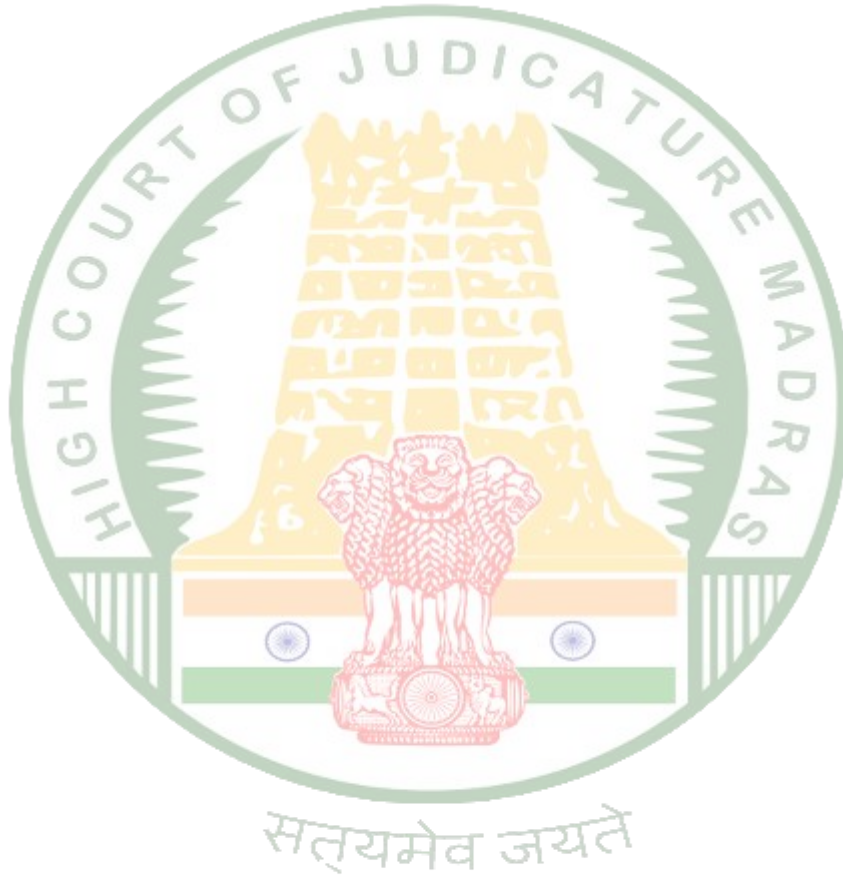
Sl. No.	Exhibits	Description of Documents
1	Ex.P1	The Photocopy of the B.E. Degree Certificate
2	Ex.P2	The Photocopy of the M.B.A. Certificate from Conventry University
3	Ex.P3	The Birth Certificate of minor Aadhiraah
4	Ex.P4	The photocopy of order dated 06.11.2017 passed in OP No.1055 of 2017 by the Principal Family Court, Chennai
5	Ex.P5	The Photocopy of Memo of Compromise dated 20.03.2017
6	Ex.P6	The photocopy of the Government Gazette regarding the name change of minor name Aadhiraah as G.Deekshali
7	Ex.P7	The photocopy of the petitioner Passport
8	Ex.P8	The Photocopy of passport of minor daughter Deekshali
9	Ex.P9	The

petitioner declaration of willingness

List of Exhibits marked on the side of the Respondents: Nil

jv

24.07.2019



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R.SUBRAMANIAN.J.,

jv



Pre delivery order in
O.P.No.906 of 2018

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24.07.2019