



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.10.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2698 of 2018

Saravanan

... Appellant/Petitioner

Vs.

Mythili

...Respondent/Respondent

Civil Miscellaneous Appeal is filed under Section 47 of Guardian Wards Act to set aside the Judgment and decree dated 24.08.2018 in Guardian Wards Original Petition No.5 of 2016 on the file of the Additional District Court, Thiruvannamalai.

For Appellant : Mrs.Hema Sampath
Senior Counsel
for M/s.Karolin Geetha

For Respondent : No Appearance

J U D G M E N T

The appellant has filed this present Civil Miscellaneous Appeal seeking to set aside the Judgment and decree dated 24.08.2018 in Guardian Wards Original Petition no.5 of 2016 on the file of the Additional District Court, Thiruvannamalai.

2. The appellant and the respondent were husband and wife. The case of the appellant herein is that he got married to the respondent /wife, who is a none other than his sister's daughter, on 01.02.2004, as per Hindu Rites and Customs at Meenakshi marriage Hall in Tiruvannamalai Town. The appellant has studied M.C.A., M.Phil., Ph.D and the respondent had studied B.B.M., and they lived in Thiruvalluvar Nagar at Coimbatore. Out of the wedlock, one female child, namely, Preethika was born on 17.2.2005 in a hospital at Pondicherry and from the date of marriage, they were not happy. There was a dispute between both the parties and because of the compulsion of the parents and elders, the marriage between them has been taken place. As the rift was widened, the appellant and the respondent decided to



WEB COPY

dissolve the marriage and they filed a petition in H.M.O.P.No.114 of 2012 for dissolution of marriage that took place on 01.02.2004 by mutual consent before the Principal Subordinate Court, Tiruvannamalai. The said court has passed an order dissolving the marriage and the appellant and the respondent were living separately.

3. It is the further case of the appellant that with the consent of the respondent, the girl child was living with the appellant's parents in Soilnachipattu Village, Tiruvannamalai Taluk and at that point of time, the minor girl was studying her 5th standard at the Path Global Public School, Malappampadi Village. The appellant got a job in Majmaah University, Al-Majma, as Professor and the respondent / wife also remarried and started living with her 2nd husband. The appellant wanted to take his minor daughter along with him to Saudi Arabia and hence, he filed a Guardians and Wards Original Petition for appointing him as natural guardian. The respondent / wife did not appear and hence she was set exparte and the appellant was examined.

4. The trial court after examining the appellant has considered the issue that whether the appellant can have the custody of the child and the relevant paragraph Nos.8 and 9 are extracted hereunder:

'8. Ex.P.1 is the Photostat copy of petitioner's marriage invitation to prove that his marriage was performed with respondent Mythili on 01.02.2004 in Tiruvannamalai. Ex.P.2 is the Birth Certificate of ward Preethika, D/o, the petitioner / father and respondent / mother showing her date of birth as 17.02.2005 and place of birth St. Joseph Hospital, Pondicherry as given by Registrar of Births and Deaths, Puducherry Municipality. Ex.P.3 is the photostat copy of petition filed on behalf of the petitioners (Petitioner / husband and respondent / wife herein) in H.M.O.P.No.114 of 2012 on 02.04.2013, in which the petition was allowed and the marriage solemnized between the petitioners on 01.02.2004 in Tiruvannamalai was dissolved by decree of divorce by mutual consent. Ex.P.5 is the copy of Decreeal order passed in above mentioned H.M.O.P.No.114 of 2012 on 02.04.2013. Ex.P.6 is the copy of bonafide certificate issued to the ward Selvi. Preethika, D/o Mr.Saravanan, Admission No.750/2015 as studying in standard 6-A in Path Global Public School, Malappampadi, Tiruvannamalai by the Principal of the above school on 26.06.2015. Ex.P.7 is the certificate dated 21.06.2018 showing that the ward Preethika is a student of 9th during this academic year 2018-19 in Albernina



WEB COPY

Matriculation Higher School, Ramanathapuram, Coimbatore and her date of birth is 17.02.2005 and her admission no.18842.

9. After examining petitioner, whereas respondent being exparte on 23.07.2018, this Court has adjourned this matter for appearance of concerned child to 27.07.2018 and on that date, ward Preethika was examined personally and casually in the Chamber through which this Court has come to know following facts:

(i) On getting divorce by mutual consent, this petitioner/ husband had left his daughter with his divorced wife (respondent herein), whereas even before being granted divorce he had settled properties by way of gift in favour of his minor daughter [Ward herein] and his wife (respondent herein) separately.

(ii) Both the petitioner . father as well as the respondent / mother have got re-married with some other persons and living with their family.

(iii) Initially, that means, after her parents being granted divorce by mutual consent, this minor ward was with her mother in her maternal grand parents' house.

(iv) After some years, somewhere around 2015, this petitioner / father has taken this ward with him and admitted her in school in Coimbatore and keeping this ward's care and custody till today.

(v) This ward finds some markable difference in her mother's approach in taking responsibility and due care about this ward only after respondent getting re-marriage.

(vi) This petitioner / father had already taken his minor daughter along with his second wife and son for some foreign tour.

(vii) This minor girl is very happy and comfortable in residing with her father though he got re-married. Further more, this minor girl has admitted that she is comfortable even in the company of her brother Aathiran Vasanth, that is the son of 2nd wife of the petitioner.

(viii) This minor girl, namely, Preethika, who is running 14 years at present is curious about appointing her father as her guardian so as to be with him as he intended to go abroad for his job.'

5. Even though the trial court has observed the above facts, it proceeded to state that since the appellant is working as a Associate Professor in Majmaah University, Saudi arabia, he alone has to take care of the child and wants to take the child to Saudi Arabia for ensuring her well education, marriage, life etc., and hence he has filed the Original Petition to be



declared him as natural guardian for his minor daughter, Preethika. The appellant has also stated that he wants to get settle in Saudi Arabia and that there will not be any loss or damage to the respondent, if he is appointed as natural guardian for her daughter, as the respondent has also got married to another person.

6. Before the trial court, the appellant has also admitted that he re-married one Anuradha on 17.06.2010 even before getting divorce from the respondent and a son namely, Aadhiran Vasanth was born to them and that he is aged 6 years, studying II standard. After examining the appellant, the trial court has observed that he has settled the house property situated at No.5-A, Iyyer Street, Kilnachipattu in Tiruvannamalai, which is worth more than Rs.50,00,000/- to the minor girl and the property was handed over to his mother after making her as guardian for the minor girl, Preethika. Since the paternal parents were aged, they were not examined and till the year 2020, he has work permit in Saudi Arabia and later, it could be renewed, if it is necessary.

7. The trial court has verified the exhibits filed on behalf of the appellant and found that in the deed of settlement, the appellant has appointed his mother, namely, Vasantha alone as guardian to his minor daughter, Preethika with recital so as to give his daughter the said property, on attaining the age of majority and for the respondent, only on condition not to raise any objection later for getting divorce by mutual consent.

8. Further, the trial court has erred in stating that the appellant has not frankly admitted before the trial court that he has already remarried, whereas, he had specifically stated that the respondent was not able to take care of the child, as she got re-married with somebody else and living him. The appellant was forced to marry the respondent, who had no interest.

9. With regard to the simple correction made in H.M.O.P., ie., in the place of 'two years', 'seven years', no proper explanation has been given and the trial court proceeded to state that the appellant has not approached with clean hands whereas, he has admitted that on 17.06.2010, he performed re-marriage with one Anuradha, before getting divorce by mutual consent, which was granted only on 02.04.2013.

10. The trial court also proceeded to state that the appellant has not disclosed from whose custody and on which date, he took his minor daughter's custody, not only in the



petition, but also during his examination. The trial court has also stated that the appellant has re-married at the time when the marriage with the respondent was in existence, the same would prove that he has performed the same illegally and hence, the trial court holds that the petitioner is found to be unfit to be appointed as natural guardian for his minor daughter for having suppressed the material points.

11. When the trial court has stated that the appellant is a non-functioning natural guardian, as he was not able to say when he got custody of the child and left his minor daughter to the custody of the respondent and took the child only in the year 2015 and after the respondent had performed re-marriage, which clearly shows that only after the girl child was taken care by the appellant, the respondent has remarried. Eventhough the respondent has not appeared before the Court to deny or accept the averments, the court has presumed that the appellant has not disclosed from whose custody and what date, he took his minor daughter into custody and held against the appellant, which is erroneous.

12. It is seen from the trial court's order that the said minor girl Preethika, who is living with the appellant, was studying in IX standard. The finding that while the minor girl was studying in VI standard at Tiruvannamalai district, the appellant has left his daughter, cannot be held against him, as the appellant has clearly stated that he wanted to take his minor daughter to Saudi Arabia, as appellant was working in Majmaah University, Saudi Arabia, only if he was appointed as natural guardian, he would be permitted to take his child permanently.

13. Even though the trial court has observed that the appellant's remarriage is no disqualification for him to grant the custody of the child, as the child's discretion and wishes is also to be consulted, wherein specifically the child, who is around 14 years, seems to be intelligent enough to take her own decisions, the trial court felt painful to allow the petition on the following points insisted as guidelines in disposing these sort of petitions :

'AIR 1974 ALL 95 - Where an application for guardianship is made with an intention to taking the minor out of India, the application cannot be granted.

AIR 1924 Pat 755 - Section 33 District Judge as Protector and guardian of infants: The District Judge under the Guardians and Wards Act exercises this function of the State and becomes the protector and guardian of the infants.

AIR 1927 All 581 - an order appointing a guardian who is already by law a guardian is an order without jurisdiction.



1975 (2) Mad LJ 95 (DB) - After a protracted litigation between the mother and the father the Supreme Court in Rosy Jacob V. Jacob a Chakramakkal, ordered custody of eldest minor to the father and of the other two to their mother. The father notwithstanding this decision, moved the court under Sections 7,8,10,17,19 and 25 of this Act for (a) being declared guardian of the minors and (b) for custody.'

14. At this stage, the learned counsel for the appellant has submitted that when the appellant intended to take his minor child out of India, he was denied on the above said reasons and now, the appellant has left the job abroad and he has come to India and presently working in SNS College at Coimbatore and the child is living with the appellant for the past four years. Therefore, the learned senior counsel pleaded to grant custody of the minor girl to the appellant. In support of her contentions, she had relied upon the following Judgments:

(I) AIR 1971 Mysore 211, [Kamamma V. Laxminarayana Raj]

(II) Civil Appeal No.10771 of 2018 [Dr.Amit Kumar V. Dr.Sonila and others]

(III) AIR 1969 Madras 365 [Reginald Danieal V. Sarojam and Another]

From the above, it is clear that the appellant / father has got every right to be guardian of the minor when it comes to the welfare of the child. It is also seen that at the time of filing of this Petition, the appellant was working in Saudi Arabia, but now, he is settled down at Coimbatore.

15. The minor girl, viz., Preethika aged 14 years was present before this Court. When this Court interacted with her, it is found that the said girl is studying in X standard in a reputed school at Coimbatore, who appears to be relaxed and expressed her willingness to reside with the appellant/father. Further, the minor girl submitted that she lived with the respondent for some time and when the respondent / mother performed remarriage and got two children, the respondent started ignoring the said child and due to which, the affection to be given to the minor girl was denied and she wanted to join her father the said love and affection is now given by the appellant's 2nd wife, who is taking care of the said minor girl very well. The minor girl also stated that the son born to the appellant and 2nd wife is also very friendly with her and the step mother is taking care of her and her brother equally. The step mother also helps her in clearing her doubts in the studies and cooks very well and whatever she does, she performs the same with a smiling face and makes it ready immediately and gives it to her. She also conveyed that her father is kind and takes care of her with affection.



16. Apart from the above, this Court also interacted with the appellant's second wife, viz., Anuradha, who was present before this Court holding a Ph.D, degree stated that she is taking care of the studies of the minor daughter and now, she is getting good grades, viz., A & B and she has no hesitation to take care of her step daughter and it is found that both of them are very friendly.

17. The respondent has not chosen to appear before this Court, inspite of notice being served on her through Court on 23.09.2019 and privately on 23.07.2019 and her name being printed in the cause list.

18. It is also seen from the Trial court's order that at the time of getting divorce, the appellant left the minor daughter with the respondent and later, he filed an application for custody of the child, viz., after three years, from the year of dissolution of marriage. Further, it is to be seen that the respondent was taking care of the minor daughter and when divorce was granted, the respondent got re-married and thereafter the respondent has not chosen to take care of the minor daughter. Now, the child is also having no intention to stay with the respondent. Also, at the time of travelling abroad, as a tourist, the appellant need not have custody of the child and when he wanted the minor child to reside with him permanently in an abroad country, definitely, he should be a legal guardian and therefore, the appellant had approached the Court seeking permission. Now, the appellant is working in SNS college, Coimbatore and taking care of the child. Hence, there is no question of suspecting the intention of the appellant, viz., trying to take the child to Saudi Arabia.

19. As it could be seen that both the appellant and the respondent are relatives and there would not be any problem for the child being with the appellant. After divorce was granted, the respondent has also remarried and settled, the appellant is now taking care of the child and considering the welfare and interest of the child, it would be better for the daughter/minor child to stay with the appellant / father and this Court finds no reason for rejecting the case of the appellant, as the child's welfare and interest is the paramount point to be considered.

20. It is not in dispute that both the parties have remarried and the minor child was taken care very well by the appellant and his 2nd wife, in the interest of minor and taking note of the fact that the appellant, who is a natural guardian, would take care of the child very well, this Court is inclined to allow this appeal.



21. In view of the above, the present Civil Miscellaneous Appeal is allowed and Judgment and Decree dated 24.08.2018 in G.W.O.P.No.5 of 2016 on the file of Addl. District Court, Thiruvannamalai is set aside and the appellant is hereby appointed as natural guardian to the Minor Girl, viz., Preethika. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssd

To

1.The Additional District Court,
Thiruvannamalai.

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

+lcc to Mrs.Karolin Geetha, Advocate SR.89784

C.M.A.No.2698 of 2018

RSI (CO)
CB(06/01/2020)