

**O.P.No.586 of 2011**

**SENTHILKUMAR RAMAMOORTHY, J**

This Petition is filed under Section 25 of the Guardians and Wards Act read with Order XXI, Rules 2 and 3 of the Madras High Court Original Side Rules 1956 read with Clause XVII of the Letters of Patent. The Petition is filed by the maternal grand mother of the minor girls, E.Priyanka and E.Priyadharshini, for permanent custody over the said minor children.

2. The undisputed facts are, inter alia, as follows. The daughter of the Petitioner, namely, the late Gunavathya married the Respondent on 21.02.2003 at Kundrathur, Chennai and she resided with the Respondent at Kozhumanivakkam Village, Mangadu, Chennai. She underwent treatment for infertility. Upon receiving such treatment, Gunavathya conceived in the year 2010. She was admitted on 04.04.2011 at Apollo First Med Hospital at Nungambakkam, Chennai. Upon performance of an emergency caesarean operation, twin baby girls were delivered on 08.04.2011. Immediately after child birth, Gunavathya became seriously ill and was treated in the ICU for three days where she passed away on 11.04.2011.

3. The disputed facts, inter alia, are as follows. According to the Petitioner, the Respondent/husband did not turn up when the wife was critical and under intensive care. After the death of the Petitioner's daughter, the Respondent did not take care of the new born babies and they were taken care of by the Petitioner and her daughter. The hospital expenses of about Rs.15 lakhs were paid by the Petitioner. These contentions are denied by the Respondent who states that he was present in the hospital while his wife was in intensive care and that he paid the hospital expenses in part. Similarly, the Petitioner alleges that the Respondent is not employed and is dependent on his father for his day-to-day expenses whereas the Petitioner is running a travel business and she is in a position to take care of the two female children. On the other hand, the Respondent states that he is an agriculturist and earns a reasonable income. The present Petition is filed in these facts and circumstances.

4. Upon completion of pleadings, the Petitioner examined herself as P.W.1 and was cross-examined by the learned counsel for the Respondent. The Respondent examined himself as R.W.1. He was also cross examined by the learned counsel for the Petitioner. In addition, the Petitioner's son was examined as R.W.2 and he was cross-examined by the learned counsel for the Petitioner.

5. I heard the learned counsel for the Petitioner and the learned counsel for the Respondent.

6. The learned counsel for the Petitioner provided a brief summary of the facts and circumstances leading to the filing of the Petition. Thereafter, she pointed out that the Respondent obtained orders for visitation but did not meet the children as per the visitation orders. He also did not make any monthly contribution for the maintenance of the children. With regard to the evidence that was adduced, she pointed out that the order in O.A.No.5336 of 2011 dated 22.11.2011 was marked as Ex.P6 through P.W.1. As per the said order, the Court directed the Respondent to deposit a reasonable amount in the name of the minors to establish that he was genuinely concerned about them. In spite of the said order, the Respondent failed to deposit the money. Therefore, this Court, by order dated 22.11.2011, dismissed O.A. No.5336 of 2011. Subsequently, by order dated 27.11.2013 in O.A. No.4797 of 2011, which is marked as Ex.P7, this Court permitted the Respondent to visit the minors on alternate Sundays from 10.00 a.m. to 1.00 p.m. However, the Respondent visited the minors only on a few occasions and he has not visited them for a considerable period of time. She also pointed out that the last such meeting was in August 2019 at the Child Care Centre in the Court complex. She also pointed out that the Respondent adduced evidence

through the Petitioner's son, who was examined as R.W.2, and supported the case of the Respondent because there was discord between him and the other members of the family. In support of her submissions, the learned counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in **Nil Ratan Kundu and others v. Abhijit Kundu (Nil Ratan Kundu) Manu/SC/7935/2008**, wherein, at paragraphs 57 to 60, the Hon'ble Supreme Court held that the Court should apply the positive test as to whether the grant of custody to a particular person would be in the welfare of the minor. In other words, the Court should not ask itself whether the person requesting for guardianship is unfit or disqualified but the approach should be child-centric and not guided by the rights of the parents.

7. In response, the learned counsel for the Respondent made the following submissions. The Petitioner stated in paragraph 9 of the Petition that the minor female children were looked after by the Petitioner, her husband, Govindaraj, her elder daughter, Mekhala, and her sons, G.Jayachandran and G.Anand. It is also stated therein that the Respondent collected cash from the Petitioner's son, Jayachandran, and paid the hospital bills, wherein his name is reflected. In spite of stating that the cash was collected from Jayachandran in order to pay the hospital bills, the said Jayachandran

was not examined. In the counter affidavit of the Respondent, it is stated that he lives in a joint family with his parents and five brothers, he was affectionate to his wife during her life time and that there were no complaints from her to the effect that he ill-treated her. As the husband, he signed the consent form for the surgery. Therefore, it is false to state that he did not turn up during his wife's critical illness. With regard to the hospital expenses, the learned counsel pointed out that the Respondent stated truthfully in paragraph 10 of the counter that the hospital expenses for the treatment of his wife and children were shared by him and the Petitioner. He also pointed out as to how the Respondent stated that he has no intention to get re-married. With regard to his income, he pointed out that the Respondent stated that he is an agriculturist along with his father and brother and doing agriculture on more than 7-1/2 acres of land. He also pointed out that the Respondent stated that the Petitioner requires physical help to carry on her day-to-day activities. By referring to the cross examination of P.W.1, he pointed out that she admitted that she is staying with the daughter, Mekhala, at Porur, which is outside the jurisdiction of this Court.

8. He also pointed out the contradictions during the cross examination of P.W.1: on 14.06.2016, initially, she stated that her daughter did not get any treatment for infertility and, thereafter, admitted that she heard that her daughter received treatment for

infertility at a hospital in Poonamallee. From the cross examination on 23.11.2016, he pointed that she admitted that only the Respondent knew the details of her daughter's treatment and that the Respondent took his wife to the Hospital. He also pointed out as to how she admitted that she did not file any documents in support of her income status or that of the family. He also pointed out as to how she eventually admitted that both the Respondent and herself were in hospital and looked after her daughter. On the basis of the above evidence and the admitted position that the Petitioner is about 70 years old, the learned counsel for the Respondent contended that the Petitioner should not be given permanent custody. With regard to the judgment of the Hon'ble Supreme Court in **Nil Ratan Kundu** (supra), the learned counsel submitted that the fact situation in that case was that the father was facing criminal prosecution and, therefore, the said judgment is distinguishable.

9. The learned counsel for the Respondent referred to and relied upon the judgment in **Zarina Siddiqui vs. A.Ramalingam alias R.Amarnathan (2015) 1 SCC 705**, wherein, at paragraph 34, the Hon'ble Supreme Court held that if a party to a lis does not disclose all material facts truly and fairly but states them in a distorted manner and misleads the court, the court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of

process of law. He also relied upon the judgment of this Court in **J.Velan vs. G.Muthu and others 1990 (2) MLJ 417**, wherein this Court held that the father is the natural guardian under Section 6 of the Hindu Minority and Guardianship Act and that custody cannot be denied to the father on the ground that there is no lady in the house.

10. By way of rejoinder submissions, the learned counsel for the Petitioner contended that the custody of the minor children should not be disturbed and that the welfare of the children is the paramount consideration in such matters. She also pointed that there is nothing in the evidence to show that the children are not look after properly and that their social, educational, financial and emotional needs are not being satisfied. She also pointed out that the children are in the custody of the Petitioner for about 8-1/2 years. In response to a question as to how the Petitioner would continue to look after the minor children when she is already about 70 years old, she pointed out that the maternal aunt has been sharing the responsibility and that the children are very attached to her. In support of her submissions, the learned counsel referred to and relied upon the following judgments:

(i) **R.V. Srinath Prasad v. Nandamuri Jayakrishna and others (Srinath Prasad)**, MANU/SC/0158/2001 and, in particular,

paragraph 11 thereof, wherein it was held that custody orders by their nature can never be final but before a change is made it must be proved to be in the paramount interest of the children.

(ii) **Tarun Ranjan Majumdar and Others v. Siddhartha Datta MANU/WB/0015/1991**, wherein the Calcutta High Court held that a change in custody would only be justified if the court is satisfied that the welfare of the child warrants such a course.

(iii) **M.K.Hari Govindan v. A.R.Rajaram MANU/TN/0048/2003**, wherein the Division Bench of this Court held, at paragraph 6 & 9, that such cases should be decided with a human touch and that the custody should remain with the maternal grant father who had looked after the children from 1998.

(iv) **Sheila B.Das v. P.R.Sugasree MANU/SC/8030/2006**, wherein the Hon'ble Supreme Court held that the custody of the children should remain with the father especially because it was established that the children have a very good relationship with the paternal aunt.

(v) **Athar Hussain v. Syed Siraj Ahmed and Others MANU/SC/0014/2020**, wherein, at paragraphs 24 and 38, it was held that stability and consistency in the affairs and routines of children is also an important consideration in custody matters.

(vi) **L.Chandran v. Venkatalakshmi and others, MANU/AP/0049/1981**, wherein, at paragraph 20, the Division Bench of the

Andhra Pradesh High Court held that the custody of the child should not be disturbed because the Petitioner did not have female help and the parents were living far away.

(vii) **Gaurav Nagpal v. Sumedha Nagpal MANU/SC/8279/2008**, wherein, at paragraph 43 and 50, the Hon'ble Supreme Court held that the word 'welfare' used in Section 13 of the Hindu Minority and Guardianship Act should be construed liberally and must be taken in its widest sense and that the Court should take into consideration the moral and ethical welfare of the child in addition to the child's physical well being.

11. I considered the oral and written submissions of the learned counsel for the respective parties and examined the records.

12. The undisputed fact is that the minor children were born on 08.04.2011 and, therefore, are almost 9 years old. Secondly, it is undisputed that the mother of the minor children died immediately after child birth on 11.04.2011. Ever since, these children are in the custody of the maternal grand mother. The said maternal grand mother is about 70 years old now. Her husband is about 75 years old. The evidence on record indicates that the Respondent/husband was present in the hospital when his wife died and that he paid the hospital bills at least in part. However, as regards the children, the evidence

discloses that he did not contribute to the maintenance of the children and that he did not make the deposit pursuant to the order of this Court. There is also no evidence on record that the children are not being look after properly or that their social, educational, financial or emotional needs are not being fulfilled. In such circumstances, the question that arises is whether the custody is liable to be disturbed. In the judgments that were cited by the learned counsel for the Petitioner, the overarching principle is that the welfare of the minor child/children is the paramount consideration of the court in the exercise of *parens patriae* jurisdiction. It is also clear from the said judgments that the custody of the minor children should not be disturbed unless the facts and circumstances justify or warrant the dislocation of the children from their current environment. In this case, there is, undoubtedly, nothing in the evidence that warrants the dislocation of the children from the custody of the maternal grand mother. Therefore, I do not propose to disturb the custody of the maternal grandmother.

13. Nevertheless, it is a separate and distinct matter as to whether permanent custody of the children should be given to the maternal grand mother. As stated above, the maternal grand mother is about 70 years old and the maternal grand father is about 75 years old. Therefore, in the long term interest and welfare of the minor children, an order of permanent custody is clearly not warranted as it

could completely shut out the father from the lives of the children. There is no doubt that the Respondent/father has not taken concrete measures to fulfill his parental duties towards his children and his conduct, as on date, does not warrant providing him custody. Nevertheless, for the children's sake, one must hope that he turns a new leaf and takes on such parental responsibilities in future. As held by the Hon'ble Supreme Court in **Srinath Prasad** at paragraph 11, the settled principle is that custody orders, by their nature, can never be final. Accordingly, I dispose of the present petition with the following directions:

(i) The request for permanent custody of the minor female children, namely, E.Priyanka and E.Priyadharshini is rejected.

(ii) The custody of the said minor children shall, however, remain with the Petitioner.

(iii) This order will not preclude a request for visitation by the Respondent

(iv) Both parties are granted leave to apply in the event of a material change in the facts and circumstances.

**11.03.2020**

Speaking order  
Index : Yes  
Internet :Yes  
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**SENTHILKUMAR RAMAMOORTHY, J.**

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