

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 07.12.2020  
CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A. NO.2906 OF 2017 AND  
C.M.P. NO.17110 OF 2017

Anandan

..Appellant

vs

Neelakandan

..Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 47(e) of Guardians and Wards Act, 1980 against the decree and judgment passed by the Principal District Judge, Thiruvannamalai in G.W.O.P. No.7 of 2016 dated 13.06.2017.

For Appellant : Mr.N.Manokaran for  
Mr.E.Sathiyaraj  
For respondent : Mr.P.G.Thiyagu

JUDGMENT

The appeal has been directed against the decree and judgment dated 13.06.2017 passed by the Principal District Judge, Thiruvannamalai in G.W.O.P. No.7 of 2016 refusing to accept the prayer of the appellant father to hand over him the custody of the child.

2.Mr.N.Manokaran, learned counsel appearing for the appellant, challenging the correctness of the impugned order, pleaded that after solemnisation of marriage on 15.02.2009 at K.K.S.Mandapam, Vinnamangalam, Arni Taluk, Thiruvannamalai District as per Hindu rites and customs between the appellant and his wife namely Dharani, who is the daughter of the respondent herein, a male child, viz. Nithish was born on 08.01.2013. At the time of marriage, the appellant was working in defence service at Lucknow. Thereafter, the wife of the appellant unfortunately passed away on 15.07.2014. After her death, the respondent got back all the jewels and Sridhana articles which were presented during the marriage and he has forcibly brought the appellant's minor child from his custody. Despite request made by him, the respondent has not come forward to hand over the custody of the minor child. Thereafter, the appellant, who is working in Ooty, got married and they were blessed with two children. However, taking note of the future of the son Nithish, when he has approached his in laws for getting

the custody of his minor son, the respondent, who is the father in law of the appellant has filed a petition in G.W.O.P. No.7 of 2016 under Section 7(1)(a) of the Guardians and Wards Act 1890 before the Principal District Court, Thiruvannamalai seeking directions to appoint him as a fit and proper person to be the guardian of the minor son Nithish and to pay him the amount or to deposit the amount as per the promissory note executed by the appellant to the respondent as compensation and for maintenance of the minor child.

2.1.Opposing the above prayer, the appellant has filed a detailed counter affidavit on 22.12.2016 stating that since the appellant, who is the father and natural guardian for his minor son, is longing for his minor son Nithish, the prayer for appointing the respondent as a fit and proper person to be the guardian of his minor son Nithish cannot be granted. But, the learned Principal District Judge, Thiruvannamalai, without considering the welfare of the child and overlooking the future of the child, allowed the petition appointing his maternal grand father as the guardian of the child. Aggrieved thereby, the present appeal has been filed.

2.2.Mr.N.Manokaran, learned counsel appearing for the appellant, heavily relying on Section 6(a) of the Hindu Minority and Guardianship Act 1956 argued that when the father is the legal guardian of the Hindu minor, the approach adopted by the Trial Court is running contrary to Section 6(a) of the said Act. Referring to the judgment of the Division Bench of this Court in the case of Krishna Raj vs Rajasekar and another reported in 1997 (II) CTC 92 holding that the maternal grand father has no legal right to have the custody of the minor child and that the custody of the minor child should be handed over to the father, who is the natural father and guardian of the minor child, pleaded that if any dispute with regard to the custody of the minor child arisen between the father and the maternal grand father of the child, as per the above ratio laid down by this Court, the father alone should be appointed as a natural guardian.

2.3.Learned counsel for the appellant, referring to Section 10 of the Guardians and Wards Act 1890, which states that the application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by atleast two witnesses, submitted that when the mandatory provision has not been complied with in the present case, the said application for appointment of guardian filed by the respondent should be rejected. Therefore, the impugned decretal order passed by the learned Principal District Judge, Thiruvannamalai is liable to be set aside.

2.4. Again placing reliance on the judgment of this Court in the case of G.Bakthavatsalam and others vs K.Srinivasan reported in CDJ 1999 MHC 803 holding that a Hindu father is the natural guardian of the children during their minority and has prima facie a paramount right to their custody and must be given such custody unless he is unfit or there are other circumstances and moreover the welfare of the minor child is a very important matter for consideration and the interest and welfare of the minor are even paramount to the rights of the father, learned counsel for the appellant pleaded that the said judgment finally dealt with the welfare of the child and also the rights of the natural father of the child. The said judgment is clearly and categorically held that if there is nothing to show that the father had made himself unfit to loose the custody of the child, the father who is the natural guardian has prima facie and paramount rights to have the custody of the minor. In the present case, when the father is still working in Ooty and there is no criminal case pending against him and there is no bad character or antecedent alleged against him, the respondent father-in-law cannot come in the way of taking care of the child.

2.5. Concluding his argument, learned counsel for the appellant argued that after deciding the welfare of the minor Nithish, who is now with the respondent maternal grand father, the custody of his son should not be given to the respondent and therefore, by reversing the order passed by the learned Principal District Judge, Thiruvannamalai, the custody of the child should be given to the appellant father who is the natural guardian, he pleaded.

3. Opposing the above prayer, Mr.P.G.Thiyagu, learned counsel appearing for the respondent submitted that from the death of the mother of the minor child Nithish namely, on 15.07.2014, the minor child had been living with the maternal grand parents. Therefore, before the minor reached the age of maturity, considering the welfare of the child, he may not be separated forcibly against his will. Although Section 6(a) of the Hindu Minority and Guardian Ship Act 1956 mentions clearly that in the case of a boy or an unmarried girl, the father and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother, Section 13 of the Hindu Minority and Guardianship Act, over riding the above Section 6(a) of the Act, vividly says that the welfare of the minor shall be the paramount consideration in the appointment of declaration of any person as guardian of a Hindu minor by a Court.

3.1. Replying to the argument advanced by Mr.N.Manokaran on the judgment of the Division Bench of this Court in the case of

Krishna Raj vs Rajasekar and another reported in 1997 (II) CTC 92, learned counsel for the respondent would submit that the said judgment was decided in Interlocutory Application, but Section 6(a) of the Hindu Minority and Guardianship Act has not been referred to in the said judgment. In the present case, Section 13 of the Hindu Minority and Guardianship Act is applicable since the welfare of the minor child shall be the paramount consideration in the appointment of declaration of any person as guardian of a Hindu minor by a Court. Therefore, considering and keeping in mind the welfare of the minor child, the custody of the child be given to the respondent till he completing the age of 18 years. Thereupon, it is for the child to take a final decision as to whom the custody should be given, considering the relevant factors, namely, real love, care and affection shown by the father or the maternal grand father and the education given by them.

4.I also find some merits on the submission made by the learned counsel for the respondent. No doubt, so far as the real father is concerned Section 6(a) of the Hindu Minority and Guardianship Act 1956 says that the natural guardians of a Hindu minor is only a father and after him, the mother, provided that the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother. In the present case, the minor son is aged about 8 years and has been living with his grand parents from the date of death of his mother.

5.One of the arguments advanced before me by the leaned counsel for the appellant is that though the father has married second wife and through her two more children have been born, the same cannot be put against him as a disqualification to get the custody of the minor son from his in laws. But the point for consideration is that the welfare of the child has to be given top most priority as per Section 13(1) of the Hindu Minority and Guardianship Act. Therefore, it is relevant to extract Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956 for better understanding of the issue raised by both the parties herein:

'6.Natural guardians of a Hindu minor - The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a)in the case of a boy or an unmarried girl - the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

13.Welfare of the minor to be paramount consideration -  
(1) In the appointment of declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.'

6.A repeated reading of the judgment in the case of G.Bakthavatsalam and others vs. K.Srinivasan reported in CDJ 1999 MHC 803 comes to the core of the issue. It is also relevant to extract paragraph 10 of the above judgment as under:

'10.Considering the over all circumstances in this case, it is evident that the appellants herein are not nearer relatives then the respondent to the minor child the minor is aged 2 ½ years, child of tender age, which has not developed any likes or dislikes towards any of its relative. No bad character or antecedent is alleged against the father. In other words, there is nothing to show that the father had made himself unfit to loose the custody of the child. By virtue of being the natural guardian, he has prima facie and paramount rights to the custody of the minor. The appellants are the maternal uncles and the maternal grand mother. They have the custody of the child only for the past 2 ½ years. To mould the future of the child, it would be conducive if the child is left in the custody of the father. The Trial Court has rightly held so. But, the Trial Court could have given visiting rights to the appellants. The appellants have the right to visit the minor as and when they wish. It is said that the appellants and the respondent are living in the apposite houses. The respondent would also allow the child's maternal relations to visit the child as and when they desire. It would be conducive, if the respondent sends the child to the grand-mother's house one day in week to enable them to show their love and affection to the child.'

7.While considering the overall circumstances in this case, this Court is the view that the character and the antecedent against the father may be taken into account. In the present case, there is no criminal case registered against the father after the death of his wife by his in-laws which shows that there is no bad character or bad antecedent against the appellant to get the custody of the child. Therefore, the character and antecedent of the father is clean and clear and that is what more important as per Section 13 of the Hindu Minority and Guardianship Act which says that paramount consideration should be given to the welfare of the child. While considering the welfare of the child, this Court finds that no doubt, both the parties are competing to take care of the minor child. Since the minor child has been staying and living with

his maternal grand parents, who are also giving better education to him, this Court is afraid of snatching away the child forcibly and handing over the custody and care of the child to the father at his tender age.

8. Therefore, considering the facts that the father is the natural and legal guardian of the child that cannot be wiped out and that the minor child has already been staying with his maternal grand parents, this Court is of the view that the custody of the child be granted to the respondent till he reaches the age of 18 years by granting unlimited and unrestricted visitation rights to the appellant father by making use of the visitation rights during Saturday, Sunday, School holidays, Quarterly, half yearly and summer holidays.

9. Accordingly, the custody of the child is granted to the respondent till the minor child reaches the age of 18 years and simultaneously unlimited and unrestricted visitation rights are given to the appellant father so that by making use of the visitation rights during Saturday, Sunday, School holidays, Quarterly, half yearly and summer holidays, the father can build a confidence in his mind to come to his side. After reaching the age of 18 years, the child is at liberty to take decision as to who is the legal guardian to take care of him and to whom he can stay considering the love and affection shown by the father and maternal grand parents towards him.

10. It is made clear that if the father wants to take the child to Ooty during the holidays, without affecting the study of the child, the maternal grand father the respondent herein and his family members shall not raise any objection. Needless to mention that if the child is taken by the father to his native place or else, the child shall be restored back to the maternal grand parents. This arrangement shall continue till the child reaches the age of 18 years.

11. With the above direction, the appeals stands disposed of. Consequently, C.M.P. No.17110 of 2017 stands closed. No costs.

WEB COPY

Sd/-  
Asst. Registrar (CS VI)

/true copy/

Sub Asst. Registrar

vga

To

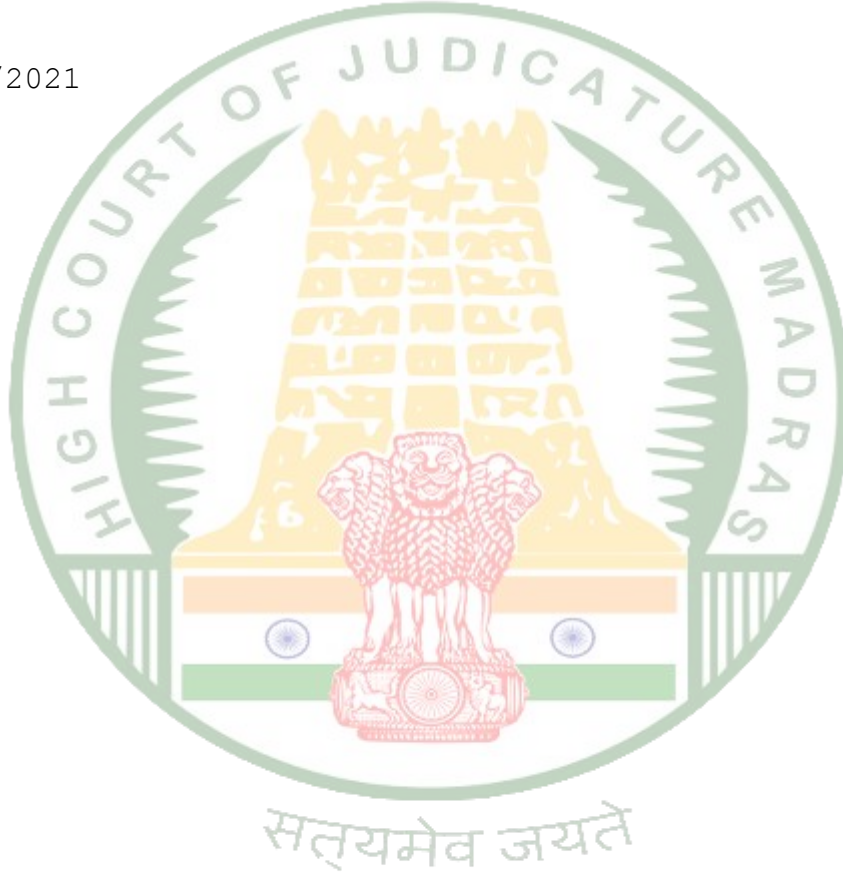
The Principal District Judge,  
Thiruvannamalai.

+1cc to Mr.E.Sathiyaraj, Advocate, Sr.No.39457

+1cc to Mr.P.G.Thiyagu, Advocate, Sr.No.39285

C.M.A. No.2906 of 2017 and  
C.M.P. No.17110 of 2017

PM(CO)  
KKV/16/03/2021



WEB COPY