



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.03.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.No.1184 of 2018

C.M.P.No.9752 of 2018

M.Muhammed Ibraheem

.. Appellant/Petitioner

vs.

Rathia Mohamed

.. Respondent/Respondent

PRAYER : Civil Miscellaneous Appeal filed under Section 47 of the Guardians and Wards Act, 1890, (Act VIII of 1890), against the order dated 20.04.2017 made in G.O.P.No.25 of 2016 on the file of the learned Principal District Judge, Thiruvavur.

For Appellant : Mr.T.A.Shagul Hameed

For Respondent :Mr.P.Vijendran

J U D G M E N T

The Fair and decreetal order dated 20.04.2017 passed in G.O.P.No.25 of 2016 is under challenge in the present Civil Miscellaneous Appeal.

2. The appellant filed a petition under Sections 7 and 25 of the Guardian and Wards Act and sought for declaration to declare the appellant as guardian of the minor children and also for custody. The said petition was contested by the respondent/mother of the minors.

3. The marriage between the appellant and the respondent was solemnized on 13.04.2008. From and out of wedlock, a female child born on 20.02.2009 namely Yafiah Mohamed and a male child born on 04.06.2013 namely Muhammed Rafan. Now, the minor girl is aged about 12 years and the boy is aged about 7 years. Admittedly, both of them are with the custody of the respondent/mother and the mother and the children are living with her parents. It is contended that the father of the respondent is looking after the interest of the respondent as well as the minor children. The trial Court adjudicated the



issues with reference to the documents and evidences. It was contended by the appellant that the father is the natural guardian. Therefore, he is entitled for decree of declaration as prayed for. The appellant raised serious allegation against the respondent/wife and those allegations are strongly disputed by the respondent. Considering the fact that the minor children are living with the mother right from their birth, the trial Court dismissed the petition. The Trial Court made a finding that the appellant has raised very serious allegations against the respondent regarding her illicit relationship and the said allegations are subject to the proof and to be established by the appellant. However, the Trial Court formed an opinion that such allegations cannot be accepted based on the mere affidavit filed before the trial Court.

4. The learned counsel appearing for the respondent strenuously objected the contention of the appellant by stating that the respondent/mother is taking care of the minor children all along and they are capable of maintaining the children. The children are provided education and the father of the respondent is running Rice Mill at Muthupet, Thiruvavur District and capable of maintaining the respondent as well as the minor children. Stating these facts, the learned counsel for the respondent reiterated that the interest of the children is to be considered by this Court and the children are not willing to go back with the appellant/father. The appellant/father has not shown any interest for long years and he raised unnecessary and serious allegations affecting the character of the respondent. Under these circumstances, there is no possibility of permitting the appellant to have the custody of the minor children.

5. This Court has to consider the interest of the children and to ensure that the rights of the children are protected. In order to ascertain the wishes of the minor children, this Court directed the parties to be present. Both the appellant as well as the respondent along with the children and grand father are present before this Court. The appellant has stated that he married another woman and living with her. However, there is no issue for the second wife. Still, he is having love and affection with the children and he is ready to provide means for the development of the children. The appellant has stated that he wants to have the visitation rights so as to meet the children and express his love and affection.

6. This Court examined the respondent as well as the minor children. The respondent made a submission that there is no possibility of giving custody as right from the birth, the children are with the custody of the respondent. This apart, the appellant has not shown any interest for many years and he is



going on raising unnecessary allegations against her affecting her character and the image of the entire family.

7. The minor girl child namely Yafiah Mohamed is a clever girl. She is capable of understanding the Court proceedings. She is courage enough to express her wishes and willingness before this Court. When this Court asked her about visitation rights to the father, the minor girl child in unambiguous terms said that she is not at all interested to talk to her father/appellant. Even, she is not ready for visitation by her father. When the girl child is capable of speaking both in English and Tamil language as she is studying in a Convent school, she has taken a decision not to talk to her father. When this Court repeatedly asked the question as the father is having love and affection towards her, she has refused to accept the request made by the appellant and she said that she is not interested in talking to her father.

8. The minor boy namely Muhammed Rafan also said that he is not willing to go back to his father and even before this Court, they have not responded to the father/appellant. When both the children are capable of understanding the situation and said that they are not willing to talk to their father, this Court is not inclined to give any visitation rights to the appellant. However, the respondent/mother informed this Court that if the children are willing to talk with their father, she may not have any objection and thus the time alone has to provide solution for the emotions of the appellant/father. However, this Court has to protect the interest of the minor children and the Statute provides that the interest of the child is of paramount importance.

9. Consideration before the Court would be, whether the children are peaceful and happy and the person, who is having custody is capable of feeding the children and able to provide better education for the future of the minor child. When these criterias are established, then there is no reason to change the custody affecting their wishes and rights.

10. Undoubtedly, the appellant/father is expressing love and affection towards his children. However, the fact remains that after separation from the matrimonial home with the respondent, he got re-married to another woman and living with the second wife. This fact is also to be considered by this Court. Thus, this Court has no hesitation in arriving a conclusion that the Trial Court has not committed any perversity or infirmity as such in arriving a decision. This Court has further examined the children on account of efflux of time and even now, the minor children are not interested to talk to the appellant/father. Therefore, this Court is not inclined to act against the wishes



of the minor children and it seems that they are very happy with the mother and grand parents with whom they are living. Thus, this Court cannot make any alteration or provide any further relief affecting the wishes and the interest of the minor children.

11. Accordingly, the Fair and Decreetal order dated 20.04.2017 passed in G.O.P.No.25 of 2016 stands confirmed and the Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

ssb

To

1.The Principal District Judge, Thiruvarur.

2.The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.P.Vijendran, Advocate, S.R.No.20100

+1cc to Mr.T.A.Shagul Hameed, Advocate, S.R.No.20570

C.M.A.No.1184 of 2018

AK(CO)
CB(29/10/2021)