

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.03.2021

CORAM:

THE HONOURABLE MR. JUSTICE T.RAJA
and
THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

CMA Nos.1419 and 1423 of 2020

S.Katheeja Nasriya ... Appellant in both CMAs.

..vs..

M.A.Kazhi Alaudeen ... Respondent in both CMAs.

These Civil Miscellaneous Appeals filed under Section 19 of the Family Court's Act, 1984 read with Section 47 of the Guardians and Wards Act, 1890, against the common order passed by the learned VII Additional Judge, Family Court, Chennai in GWOP No.2202 of 2017 and I.A.No.1949 of 2017 respectively dated 22.07.2020.

For Appellant in both CMAs. : Mr.R.Abdul Mubeen

For Respondent in both CMAs. : Mr.George Graham

JUDGMENT

(Judgment of the Court was delivered by G.CHANDRASEKHARAN, J.,)

These Civil Miscellaneous Appeals are filed against the common order passed by the learned VII Additional Judge, Family Court, Chennai in GWOP No.2202 of 2017 and I.A.No.1949 of 2017 in GWOP No.2202 of 2017 on 22.07.2020.

2. The appellant, as the petitioner, filed a petition under Section 7 of Guardian and Wards Act, 1980 to appoint her as guardian of wards and to have the custody of minor Abubaker and minor Sheik Abdul Kader, aged 10 years and 9 years respectively against her former husband Thiru.M.A.Kazhi Alaudeen. The said Kazhi Alaudeen filed a counter claim in I.A.No.1949 of 2017, to appoint him as guardian of minor Abubaker and minor Sheik Abdul Kader and to have their custody with the prayer to dismiss the petition filed by the appellant.

3. The facts of the case, in brief, are as follows:-

Appellant's first marriage with the respondent was held on 09.05.2004. Out of the said wedlock, two sons master Abubaker

and master Sheik Abdul Kader were born on 11.03.2007 and 14.08.2008 respectively. Due to strained marital relationship, the marriage between the appellant and respondent came to end by the appellant obtaining divorce (by kula) during June 2012. Thereafter, respondent remarried one Ayisha and the appellant also got remarried with Riyaz Ahamed on 15.07.2016. After the first marriage was broken, appellant resided at Kayalpattinam along with two sons for some time and now residing in Choolaimedu, Chennai. Master Abubaker was studying 6th standard. Master Sheik Abdul Kader is a problematic child having 'low average intelligence with behaviour problem' and he is under treatment. At the age of studying 5th standard, he is studying 3rd standard in SIET Boys School, Chennai. Appellant is taking care of minor children. Respondent is trying to get the custody of minor children by hook and by crook. He tried to kidnap the children and spoil the peaceful marital life with the appellant's second husband Riyaz Ahamed. For the paramount interest of the minor children, it is necessary that the custody of the minor children should be left with appellant. Therefore, this petition.

4. Respondent opposed the claim of the appellant by filing counter claim. He admitted his marriage with appellant and the birth of two sons. He disputed appellant's claim that the second child is suffering from 'low average intelligence with behaviour problem', but claimed that he has 'low average intelligence in studies and not in his behaviour'. He has taken the second son to many physicians at Trichy, Chennai and CMC at Vellore for his treatment. Appellant, after her second marriage, is not able to take care of welfare of the minor children. Till her second marriage, respondent was closely monitoring the progress of the children and also was providing for their maintenance. Appellant's second husband Riyaz Ahamed has two children through his first wife. Appellant, her parents, respondent's two sons and Riyaz Ahamed's children are staying with Riyaz Ahamed in a small house. Neither appellant nor Riyaz Ahamed has regular or sufficient income to meet the expenses and provide a quality life to the minor children. Riyaz Ahamed is a total stranger to respondent's minor children. After the appellant's second marriage, respondent sought custody of minor children and the matter was referred to Islamic scholars. After hearing both sides, Islamic scholars issued temporary fatwa giving custody of minor children to appellant for the reason that respondent's second wife was carrying at that time and second son was having learning problem. It was further decided that after completion of academic year 2016-17, a permanent fatwa will be issued after hearing the parties. Under the said circumstances, custody of minor children were entrusted with the appellant on temporary basis. As per temporary fatwa, custody of minor children was handed over to the respondent during vacation. On 02.06.2017, appellant kidnapped minor children from respondent's house.

Respondent has given a police complaint before Arumuganeri police station, Thoothukudi District. Respondent owns properties, own house and runs lucrative business. He has sufficient means to provide good food, clothing, accommodation, education, tuition, transport, medical care, entertainment e.t.c., to the minor children. Appellant and her second husband are not able to provide these necessities and quality life to the minor children. Respondent's family own three schools in Kayalpattinam at Thoothukudi District, where the second son can be provided good education with personal care. Respondent is a football player and he can engage his children in football and other sports activities. These facilities cannot be provided by the appellant. Therefore, respondent prayed for the custody of minor children and the dismissal of appellant's petition.

5. During the trial, PW.1 to PW.4 were examined on the side of appellant and Exs.P1 to P40 were marked. RW.1 to RW.3 were examined on the side of respondent and Exs.R1 to R81 were marked. On considering the oral and documentary evidence, learned VII Family Court Judge, Chennai rejecting the claim of appellant for the custody of minor children and allowed the counter claim by respondent to appoint him as guardian of minor children master Abubaker and master Sheik Abdul Kader. Appellant was granted visitation right. Against the said order, appellant preferred two CMAs. ie., CMA No.1419 of 2020 against the dismissal of GWOP.No.2202 of 2017 and CMA No.1423 of 2020 against allowing I.A.No.1949 of 2017 in GWOP No.2202 of 2017.

6. Points for consideration in both the appeals are:-

1. Whether the finding of trial Court that the welfare of minor children master Abubaker and master Sheik Abdul Kader would be better, if they are in the custody of respondent is correct ?
2. Whether these appeals can be allowed?

7. The issue involved in this case is who is best person to have the custody of minor children, master Abubaker and master Sheik Abdul Kader whether the appellant S.Katheerja Nasriya or the respondent M.A.Kazhi Alaudeen. When it comes to custody of minor children, welfare of minor children is the paramount consideration of the Court. Admittedly, appellant and respondent got married on 09.05.2004 and both the minor children were born to them. Appellant obtained divorce from respondent during June 2012. Thereafter both got remarried. Though the evidence of parties and witnesses centered around the entitlement of custody of minor children, the witnesses also spoke about peripheral issues like, the reasons for divorce between the appellant and respondent, cause for their second marriage, issues arose between the families due to the marital dispute, the marriage and subsequent divorce between

respondent's sister and appellant's brother e.t.c., Admittedly the appellant and respondent were closely related before the marriage. In fact the respondent, appellant's father and her brother were working in Dubai and they were living in a flat rented by them by sharing the household and other expenses. That was the closeness between two families. Appellant's brother was married to respondent's sister. Their marriage also ended in failure. The reason, according to respondent, was the failed marriage between him and appellant and also the issue with regard to the custody of minor children. The parties and witnesses have given elaborate evidence with regard to these peripheral issues. But we are not concerned about those issues. This Court's focus and endeavour is only to find out who is the best person to have the custody of minor children.

8. It is settled proposition of law that the welfare of the minor children is the paramount consideration for the Court when it comes to decide upon the custody of minor children. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable considerations.

(i) In the case reported in (2019) 7 SCC 490 (Sheoli Hati v. Somnath Das), the Hon'ble Apex Court has held as follows:-

"19. Every child has right to proper health and education and it is the primary duty of the parents to ensure that child gets proper education. The Courts in exercise of parens patriae jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also. In reference to custody of a minor, this Court had elaborated certain principles in Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, where this Court again reiterated that welfare of the child is of paramount importance. In paragraph No.17, following was laid down:

"17. The principles of law in relation to the custody of a minor appear to be well established. It is wellsettled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special

responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

(ii) In an unreported judgment of the Hon'ble Supreme Court in a case between Soumitra Kumar Nahar v. Parul Nahar, it has been held as follows:-

" 31. It is also well settled by the catena of judgments of this Court that while deciding the matters of custody of the child, primary and paramount consideration is always the welfare of the child. If the welfare of the child so demands, then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The Courts should decide the issue of custody on a paramount consideration which is in the best interest of the child who is the victim in the custody battle. "

9. The appellant examined herself as PW.1 and has given elaborate evidence as to how she had taken care of children after their birth and after her first marriage was broken. It is her evidence that she is a B.Com graduate with Masters in Business Administration. She had also underwent Intelligence Teacher Training Program in specific learning disability or dyslexia from Madras Dyslexia Association, which helped her to take care of her second son. It is her evidence that her second husband Riyaz Ahamed is an understanding father and he is also taking care of the minor children as his own children. He has sufficient income to provide good food, accommodation, education and all the necessary and incidental expenses relatable to the minor children. PW.2 is her father. He had also given evidence and produced documents to show that he owns properties and has sufficient income and he is prepared to support his daughter and the minor children. His income tax returns are produced as Exs.P26 and P27. So is also the evidence of PW.3, mother of appellant. Her income tax return is produced as Ex.P28. PW.4, appellant's second husband Riyaz Ahamed also stepped in, in support of appellant and produced documents to show that he is a man of means and is capable of maintaining not only his own children, but also the children of appellant. Sale deeds and lease deeds in his name and his income tax returns are produced as Exs.P29, 30, 35, 36, 37. On the side of respondent, the respondent was examined as RW.1 and

he produced lot of documents to show his income and wealth, his interest in football, jointly owning successful businesses with his brother, running of schools by family members and running of hospitals by family members. He produced income tax returns of the company. That apart, he has also produced his personal income tax returns to show his capacity to provide comfortable life, education, sports and other extra curricular activities to the minor children. He is supported by RW.2 and RW.3. RW.2 was the person, who was arranging for Islamic scholars meeting and issuance of fatwa. RW.3 is the second wife of respondent. She claims that she loves the children of respondent through his first wife and she undertakes to take care of the minors welfare by providing care, love and affection.

10. The consideration of oral and documentary evidence produced by both the parties shows that economically the respondent is better placed than the appellant and her family members. We are more concerned about the capacities of the parties to the lis to provide good living atmosphere with good education, health care, sports e.t.c., to the minor children. Appellant is a woman. She has not produced any material to show her independent source of income. She has to depend only on her second husband Riyaz Ahamed to maintain not only her minor children, but also the two children born to his second husband Riyaz Ahamed through his first wife. Admittedly, they are living in rented house in Choolaimedu, Chennai. Appellant's father-PW.2 is willing to help the appellant in maintaining the minor children. Even his properties and income details will not match economic wellness of the respondent. PW.2 may not be in a position to support the appellant and the minor children for a long time in view of his advancing age and that he has also a son to claim share from him. We are concerned about the appellant's individual ability to provide reasonably comfortable life to minor children and not with the help of her father.

11. Some of the documents produced by the respondent like Exs.R28 to R.33, R36 to R.39 show that the respondent is one of the directors of United TAS EXIM Private Limited and Team Granite Private Limited. The income tax returns, profit and loss statement, balance sheet of these companies show that these companies are being run profitably. Respondent's personal income tax returns also show that he has about Rs.6,00,000/- annual income. The broucher of KMT hospital has been produced as Ex.R28. Ex.R60 letter from KMT hospital shows that the hospital has speech, audio and occupational therapy facility with facility to provide special attention to slow learning children. Ex.R61 letter shows that Wisdom Public School has appointed a Montessori trained special teacher to take care of and give special attention to slow learning students. Respondent has also produced Exs.R62 to R64 to show

the facilities available to provide special care to children with learning disability near Kayalpattinam. Respondent has produced Exs.R19, R20, R21 and R71 photographs to show how he was very close with the minor children. It is an admitted fact that he is a football payer and he is an empowered person in Kayal Veteran Football Club. Photos and certificate of registration of Kayal Veteran Football Club are produced as Exs.R50 and R52. He produced Exs.R40 and R41 to show that he owns a house with two floors. He also produced Exs.R42 to R46 sale deeds to show that he owns landed properties. When compared to the oral and documentary evidence produced on the side of the respondent with regard to his economic status, the oral and documentary evidence produced on behalf of the appellant shows that neither appellant nor her parents and second husband possess satisfactory level of income and properties, which yield income. Thus, it is clearly proved on the side of respondent that the respondent has more than sufficient means to maintain the minor children with good accommodation, education, sports, medical care e.t.c.

12. It is seen from the evidence of appellant that the respondent was paying Rs.15,000/- per month towards minor children's education and maintenance apart from spending school fees and medical expenses. She admitted that the respondent was working as General Manager in Emirate Bulk Logistics Company in Dubai. Before that, he was working in Ahmed Ramadhan Juma Establishment and Al Jamiah Trading Company in Dubai. She admitted that minor children used to stay with respondent during school holidays. She admitted the mediation held by Islamic scholars and issuance of temporary fatwa. Though she claimed in her petition that respondent tried to kidnap the minor children, she gave contrary evidence and stated that neither respondent nor his relatives kidnapped the children. She stated that she had not given any complaint against respondent for the alleged attempt of kidnapping of minor children. She had also admitted that she sent the children during May 2017 to the respondent's house at Kayalpattinam and on 02.06.2017, she brought the minor children without the knowledge of respondent. She admitted that the house, in which they are living in Choolaimedu, has two bed rooms and she had also taken on lease another flat with single bed room. She admitted that the respondent constructed a house in Kayalpattinam.

13. Thus, it is clear from her own evidence that the respondent is better off in terms of economic condition and he was providing maintenance, education and medical expenses of minor children till 2017. It shows that when both the minor children were in the custody of appellant, respondent was taking care of the minor children. The minor children used to go to respondent's house at Kayalpattinam during vacations and were happily spending time with him. It is seen from the

documentary evidence produced that the respondent's family owns and holds important position in Schools, namely Wisdom Public School and Elkay Higher Secondary School in Kayalpattinam. Facilities are available in and around Kayalpattinam to take care of children with learning problem. As a footballer himself, respondent can coach the minor children to become good football players. The children suffering from dyslexia may be slow learners, but there are cases persons with dyslexia excel in various sports, like Magic Johnson in basketball, Sir Steve Redgrave in Rowing, Mohammad Ali in Boxing e.t.c., Therefore, this Court is of the considered view that the respondent can provide good living environment with good education, health care, sports e.t.c., to the minor children than the appellant.

14. The learned trial Judge has considered every aspect of claim and counter claim made by the parties and rightly decided to give custody of the minor children to respondent, who is father of minor children with visitation right to appellant. We find no reason to interfere with the well reasoned common order of the learned VII Additional Family Court Judge in GWOP No.2202 of 2017 and I.A.No.1949 of 2017 in GWOP No.2202 of 2017 on 22.07.2020 and consequently, these appeals are dismissed. Parties are directed to bear their own costs. The points are answered as above.

Sd/-

Assistant Registrar(CS-IX)

//True copy//

Sub Assistant Registrar

mra

To

The VII Additional Judge,
Family Court, Chennai.

+1cc to Mr.R.Abdul Mubeen, Advocate SR.No.14742

+4ccs to Mr.Devadason & Sagar, Advocate SR.No.14459, 14460

CMA Nos.1419 and 1423 of 2020

JP(CO)
GMY(03/05/2021)