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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.12.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

CMA.Nos.3531 and 3532/2021 and
CMP.Nos.20453 and 20456/2021

1. Mohammed Sadique
2. Salmas Begum

... Appellants/Respondents 3,4 in CMA.No.3531/2021
... Appellants/Petitioner CMA 3532/2021

-vs-

1. Mohammed Dastageer ..Respondent/Petitioner in CMA 3531/2021
2. Mohammed Usman
3. Zubaidha Begum
..Respondents 2& 3/Respondents 1 & 2 in CMA 3531/2021 &
Respondents 1 to 3/Respondents in CMA 3532/2021

Civil Miscellaneous Appeals filed under Section 19 of the Family Courts Act against the Common fair and decreetal order dated 31.08.2021 passed in G.O.P.Nos.19 and 17/2017 by the learned District Judge, Family Court, Puducherry.

In both CMAs.

For Appellants : Mr.S.C.Vishwanth

For Respondents : Mrs.Dakshayini Reddy
for M/s.A.Asif Basha

COMMON JUDGMENT

(Judgment of the Court was pronounced by T.RAJA, J.)

Both these Civil Miscellaneous Appeals have been filed against the Common fair and decreetal order dated 31.08.2021 passed in G.O.P.Nos.19 and 17/2017 respectively by the learned District Judge, Family Court, Puducherry.

2. The father on one hand and the maternal grandfather on the other hand are fighting for the custody of the minor female



child, namely, Afsana, who is now aged about 6 years 11 months. When the 1st respondent herein married the daughter of the appellants, they were blessed with a female baby, namely, Afsana on 18.01.2015. But life was so cruel to the couple, since the mother of the minor child Afsana died due to cancer on 26.08.2017 at the age of 26 years. Before the demise of the mother of the minor child Afsana, she was handed over to the appellants, the in-laws of the 1st respondent herein with the promise to look after the child. Now the child is under the care and custody of the appellants herein. The natural father of the child, namely, the 1st respondent herein is highly educated and working in an I.T. Company, by name, WHIPRO in Chennai and is getting a gross monthly salary of Rs.1,10,000/- and after deduction, his take home salary is around Rs.90,000/-. Finally, the natural father 1st respondent herein asked for the return of the custody of the minor child, but that was refused by the appellants-maternal grandparents, resultantly, Guardian Original Petition in G.O.P.No.17/2017 was filed under Sections 7, 8 and 25 of the Guardian and Wards Act, seeking to declare them as Lawful Custodians of the minor till she attains puberty on the ground that when the child was 2 ½ years old as the custody of the minor female child was with the maternal grandparents for the past 3 ½ years from August, 2017, the love, affection and care shown by them would reflect that the child likes to be in the family of the maternal grandparents. The said petition was opposed by the 1st respondent herein-natural father by filing yet another Guardian Original Petition in G.O.P.No.19/2017 under Sections 7, 8(a) and 10 of the Guardians and Wards Act seeking to appoint him as a fit and proper person to act as a Lawful Guardian to the minor female child Afsana.

3. A separate Counter Affidavit was also filed in both petitions. The trial court, trying the matters together, finally by a common order dated 31.08.2021, dismissed the GOP.No.17/2017 filed by the maternal grandparents and allowed the GOP.No.19/2017 filed by the natural father-1st respondent herein, thereby granting the custody of the minor female child Afsana to her natural father with the visitation rights to the maternal grandparents and their family members. Aggrieved thereby, these two Civil Miscellaneous Appeals have been brought up before us by the maternal grandparents-appellants herein.

4. Mr.S.C.Vishwanth, learned Counsel appearing for the appellants heavily opposing the stand taken by the Family Court, placing reliance on a decision of this Court in which one of us was a party (Mr.T.RAJA, J.) in J.Sadiq Batcha and another vs. A.Mohamed Kasim and another in CMA (MD) No.743/2012 dated 22.03.2013 submitted that although the Guardian Original Petitions were filed by both the parties, under Sections 6, 8, 10 and 25 of the Guardians and Wards Act, 1890, a mere reading of Section 6 of the Act shows that the Court has to see by which law the minor is subjected to for applying the correct law on



the prayer. In the present case, both the parties are Muslims, therefore, the Personal Law should prevail over the parties. Reading further the other provisions of law, learned Counsel for the appellants submitted that as per Section 17 of the Act, in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this Section, be guided by what, consistently with the law to which the minor is subject to, appears in the circumstances to be for the welfare of the minor. Adding further, it was pleaded that if we apply Para 353 of the Personal Law, it leans in favour of the maternal grandparents.

5. Learned Counsel for the appellants referring to para 353 of the Personal Law dealing with the right to female relations in default of mother submitted that mother's mother is having all right over the minor. In the absence of the mother of the female child, the mother's mother is having all right over the minor female child till she attains puberty. In support of his submission, referring to a decision of a Division Bench of the Hon'ble High Court of Andhra Pradesh in Syed Liaquat Hussain vs. Superintendent of Police and others reported in 2002 (6) ALD 145, learned Counsel for the appellants submitted that in an identical issue, the Division Bench of the High Court of Andhra Pradesh has come to a conclusion that by virtue of para 353, the mother's mother is having all right over the minor female child till she attains puberty. Therefore, now in the present case, admittedly, the girl child, namely, Afsana, who was born on 18.01.2015 has not even completed 7 years and has completed only 6 years 11 months. Therefore, the findings and conclusions reached by the Family Court, disagreeing with the prayer made by the appellants, are liable to be set aside and the maternal grandparents shall be given the lawful custody of the female child Afsana till she attains puberty, it is pleaded.

6. Opposing the above prayer, Mrs. Dakshayini Reddy, learned Counsel appearing for the respondents would submit that although the parties have filed the Guardian Original Petitions under Section 7, 8 and 25 of the Guardians and Wards Act, 1890, after the demise of the mother, the father shall be adjudged as the natural guardian. A conjoint reading of Sections 6 and 17 of the Act takes us to Section 19 of the Act which makes it further clear that nothing in this Chapter shall authorise the Court to appoint or declare a guardian of a person of a minor other than a married female, whose father or mother is living and is not, unfit to be guardian of the person of the minor and the father should be granted the custody. She pleaded that the learned Family Court, rightly appreciating the said settled legal position, has allowed the GOP.No.19/2017 filed by the natural father, the 1st respondent herein, thereby declaring him as a natural father, who is entitled to have the custody of the minor female child Afsana with a further direction to the appellants herein to hand over the custody of the minor child



Afsana to the 1st respondent herein. Therefore, such findings given by the learned Family Court is unimpeachable in law.

7. Further relying upon the judgment given by this Court in (J.Sadiq Batcha and another vs. A.Mohamed Kasim and another in CMA (MD) No.743/2012 dated 22.03.2013) referred to above stated that when in that case, one Sadiq Batcha, father of the minor female child after the demise of his first wife married a widow and through her also begot an another female child and consequently, left India, living in abroad with his second wife and child, this Court has rightly come to the conclusion that he stands as disqualified for the reason that he has gone away from India, living with the second wife and the child was borne through the second wife. Therefore, the judgment cited above by the learned Counsel for the appellants cannot be relied upon since the same is completely distinguishable in nature.

8. In support of her submissions, learned Counsel for the respondents also relying upon a decision of the Rajasthan High Court in Rafiq v. Smt.Bashiran and another reported in AIR 1963 Rajasthan 239 submitted that while considering the provisions of the Personal Law which are in conflict with the provisions of the Guardians and Wards Act, 1890, Rajasthan High Court has finally held that when the provisions of the Personal Law are in conflict with the Guardians and Wards Act, 1890, the latter shall prevail over the former for the reason that Section 19 provides with a notwithstanding clause saying that nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person of a minor other than a married female whose father or mother is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

9. In the present case, the grandmother, namely, Salmas Begum, of the female minor child is employed in JIPMER as a staff and the minor female child's mother's sister also after marriage has been settled down in Chennai. However, the learned Counsel for the appellants would submit that the minor female child's grandmother who is employed in JIPMER, their residence is also within the same campus, therefore, whenever she goes to the office, she drops the child in the school which is also situated within the campus and her husband goes and picks her back to the home. But, this fact has not been properly appreciated by the Family Court. Hence, there is no question of not taking care of the child by the appellants would arise. Therefore, the final approach adopted by the Family Court to declare the father as a Natural Guardian and consequently, directing the appellants to hand over the custody of the child are liable to be set aside.

10. We find merits in the arguments of the learned Counsel for the father of the child-1st respondent herein. The reason



being that when the law is well settled that so far as the minor female child is concerned, no doubt, we have been repeatedly apprised by both the counsels that till the minor female child attains puberty, the custody will always go with the maternal grandparents. But a conjoint reading of Section 6, 17 and 19 of the Guardians and Wards Act, 1890, would clearly take us to the penultimate conclusion that Section 19 would prevail over Section 16 and 6 of the Act, resultantly, the father being the natural guardian shall be appointed as Guardian and he is entitled to have the legal custody of the female child. As we have already highlighted, whenever the provisions of the Personal Laws are conflict with the provisions of the Guardians and Wards Act, 1890, the latter shall prevail. The relevant portion is given as under :

'Where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former. The provisions of Sec.19 of the Guardians and Wards Act prevail over the provisions of Sec.17. There is a presumption that the parents will be able to exercise good care in the welfare of their children. Where the father of a Mahomedan minor girl is living and there is nothing to show that he is unfit to be the guardian of the minor he is entitled to retain the custody of the minor. The maternal aunt of the mother of the minor cannot be given custody of the minor on the ground that under Mahomedan law she has a preferential right to the custody of the minor.

11. But the question raised in these appeals for consideration is when the mother died whether her parents are entitled for the custody of the minor female child or the natural father?

12. In this context, it is relevant to extract Para Nos.353 and 357 of the Mulla's Principles of Mohammedan Law here under :

'353. Right to female relations in default of mother :

Failing the mother, the custody of a body under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:

- (1) mother's mother, how highsoever;
- (2) father's mother, how highsoever;
- (3) full sister;
- (4) uterine sister;
- (5) [consanguine sister];
- (6) full sister's daughter;
- (7) uterine sister's daughter;
- (8) [consanguine sister's daughter];



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- (9) maternal aunt, in like order as sisters; and
(10) paternal aunt, also in like order as sisters.''

''357. Right of father and paternal male relations to custody of boy over seven and of girl who has attained puberty:-The father is entitled to the custody of a boy over seven years of age (u) and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in Section 355 above, and subject to the proviso to that Section. (See paragraph 355 and the case noted there.) If there be none of these, it is for the Court to appoint a guardian of the person of the minor.

2. From this it is evident that the father or the paternal relations of the boy are entitled to the custody of the boy only after he completes 7 years and in case of girl after attaining puberty. In fact, Mr.Md.Sheriff learned Counsel for the petitioner do not know the fact that the Guardian and Wards Act also applies to Muslims wherein the custody of the minor Muslim child up to the age of 7 years shall be with the mother''

13. In this case, the 1st respondent herein-father is the natural guardian of the minor girl. At the request of the appellants to perform the last rituals, the father handed over the child to the appellants herein/Respondents 3 and 4 in G.O.P.No.19/2017 on the file of the learned District Judge, Family Court, Puducherry. On completion of the rituals performed, they refused to handover the child and shifted the child to Tamil Nadu area. The objections raised by the father of the minor child shows that the 1st appellant has been doing money lending business and the 2nd appellant goes for a job daily morning and their yet another daughter is also going for a job in a Private Concern. Therefore, they could not look after the child properly. Whereas the father is having sufficient means to take care of the child as a Natural Guardian can provide better education and bright future. According to Muslim Law, the minor is 17 years for boy and for girl until she attains puberty. Here the age of the minor is 7 years. As per Indian Majority Act 1875 under the age of 18 is the minor. Under Muslim Law, the guardianship is called 'HIZANAT'. Although the mother is not the natural guardian of the child under Muslim Law, but she has a right to the custody of the child until the child attains specific age. Here the mother of the child died. For the reasons mentioned above that the 1st appellant is doing money lending business and the 2nd appellant goes for a job daily morning and their another daughter is also going for a job in a private concern, the father/1st respondent is considered as a natural guardian under all the schools of Muslim Law and the natural guardian is also a legal guardian. Therefore, we do not find any infirmity to interfere with the impugned order.



14. Accordingly, these Civil Miscellaneous Appeals fail and the appellants herein are directed to hand over the custody of the child as ordered by the learned District Judge, Family Court, Puducherry. However, considering the relationship and the place in which both the parties are residing in Puducherry within a distance of 1 k.m., the visitation right given by the court below is hereby confirmed.

15. At this stage, it is agreed between both the parties that the appellants shall hand over the female child Afsana on 06.01.2022 and the 1st respondent-natural guardian of the child shall go and take the child with him and further, on every Sunday, the father of the female child will bring the child from his house at around 9.00 a.m. and leave her to the appellants' home and thereafter, on the same day evening at 7.00 p.m., he will come and take the child back.

16. With the above observations and directions, these Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-VII)

//True copy//

Sub Assistant Registrar

To

The District Judge,
Family Court,
Puducherry.

+3ccs to Mr.S.C.Vishwanth, Advocate SR.No.69639

+2ccs to Mr.A.Asif Basha, Advocate SR.No.69616, 69617

CMA.Nos.3531 and 3532/2021

SSI (CO)
GMY (02/02/2022)