

Reserved on : 09.02.2021

Pronounced on : 19.02.2021

O.P.No.302 of 2017  
and A.No.1218 of 2020

**R.PONGIAPPAN, J.**

The Original Petition has been filed under Sections 3,7 to 10 and 25 of the Guardian & Wards Act, 1890 r/w Order XXI Rule 2 & 3 of the Original Side Rules, seeking the relief to appoint the petitioner as the guardian of the minor child by name S.S.Sana born on 31.03.2012 and for the permanent custody of the said minor female child.

2. The case of the petitioner in brief is as follows:

(i) After fell in love with the respondent right from their school days, the petitioner sacrificing his parents and foregoing his religion married the respondent on 24.10.2010, under the Special Marriage Act. Due to the wedlock, a girl baby by name Sana was born on 31.03.2012. After some time from the date of marriage, from the month of June 2015, the respondent regularly visited on Dr.Sudheer, practicing at Kottakkal Arya Vaidyasalai, Thiruvannamiyur, Chennai. Later, the attitude of the respondent changed and thereafter, she started to desert the petitioner,

without performing the basic and fundamental duties of a muslim wife. When the petitioner reprimanded the respondent about her uncouth and uncivilized behaviour, the respondent deliberately degraded not only the petitioner, but also his parents.

(ii) Thereafter, the respondent started to go for a job at State Bank of Hyderabad, Sholinganallur Branch, on and from 20.05.2013, without taking care of the child. On 25.11.2016, after attending a training camp at Coimbatore, the respondent did not turn up for two days. When the same was enquired by the petitioner, he came to know that the respondent had spent entire night with Dr.Sudheer. The petitioner caught hold of the respondent, who confessed having had an extra marital affair with her paramour, who is also married and with two children. When at the time, petitioner approached the said paramour during January 2017, he also confessed for having indulged in such betraying activities. Consequently, from 06.01.2017, the respondent left the matrimonial home. The attempt made by the petitioner for reunion ended in vain.

(iii) In the interregnum period the respondent shot out a lawyer's notice dated 30.01.2017, levelling unwanted and unnecessary allegations against the petitioner apart from demanding 'KULAH'. In the meanwhile, the school authorities, noticed a drastic change in the behaviour of the child and summoned both the parties. Even after giving sufficient advice, the respondent filed the petition before the I Additional Family Court, in O.P.No.884 of 2017, to dissolve the marriage. Now the petitioner's daughter is being deprived of her right to grow up in a safe and morally sound atmosphere. Therefore, the petitioner is before this Court for the relief stated supra.

3. Denying the allegations levelled against her, the respondent who is the wife of the petitioner filed her counter affidavit wherein she has stated that in view of the order passed in A.No.1563 of 2018 dated 20.06.2018, the minor child Sanah has to go to her father's house on every Friday at 7.00pm to Sunday 3.00pm. On 07.06.2019, Friday, he did not take Sanah to his house citing some reasons. On 14.06.2019, Sanah left to his house and came back on Sunday on 16.06.2019 mid

night with high fever and vomiting. When the minor child was enquired by the respondent, it was informed by the child that the petitioner gave a prawn curry for dinner, which was taken out from the refrigerator. Further, the child had complained of stomach ache to the petitioner on Saturday evening itself. Subsequent to that due to fever, the child was admitted in Fortis Malar Hospital from 22.06.2019 to 24.06.2019. Thereafter, the child is not willing to go to her father's house every Friday. Due to the said incident, the child was mentally disturbed.

4. Further, on 26.01.2018 morning, the petitioner sent his aunt's daughter Ms.Priya and thereafter, the said Priya had only taken the minor child from the respondent's house and later on 27.01.2018 at about 6.30pm, only his aunt's son dropped the minor child, which is a clear violation of the orders passed by this Court on 25.01.2018. After coming back to the respondent's house, the child complained about her discomfort, for which the respondent had taken the minor child to the Doctor for treatment on 29.01.2018. Only due to the negligent act of the petitioner, the child was admitted in the Malar Hospital. The marriage between the petitioner and respondent was dissolved on 08.11.2018 by a

mutual consent petition in O.P.No.3947 of 2018 before the I Additional Family Court, Chennai and thereafter, the petitioner again got married to one Ayesha Be D/o. Kalidh Abdullah on 20.01.2019 at Kallakurichi. Due to the wedlock, one another girl baby was born on 14.11.2019 viz. Afiya. After the second marriage of the petitioner, the child Sanah was tortured by her father by stating false and cooked up stories. In otherwise, it cannot be said that the present application A.No.1218 of 2020 has been filed only to harass the petitioner. According to her, this original petition is liable to dismissed in limine.

5. During enquiry on the side of the petitioner, the petitioner himself examined as PW1 and marked twenty five documents as Ex.P1 to Ex.P25. On the side of the respondent three witnesses have been examined as RW1 to RW3 and six documents have been marked as Ex.R1 to Ex.R6.

6. In respect to the case of the petitioner, the learned counsel appearing for the petitioner would contend that though immediately after solemnization of marriage, the respondent was a dutiful lady, after

securing a job in the State Bank of Hyderabad and after contacting Dr.Sudheer, she neglected the duties, which are all necessary towards the minor child. Further only in order to reunite with the respondent, the petitioner has refused to give 'Thalak' for dissolution of marriage. More than that, during the time when the minor child was in the hospital, he only spent for medical expenses. Therefore, the custody of the minor child with the respondent is not good enough for the welfare of the child. Accordingly, he prayed to allow the petition in entirety.

7. In response to the submission made by the learned counsel appearing for the petitioner, the learned counsel appearing for the respondent would contend that without any iota of evidence the petitioner has levelled allegations against the respondent in touching her morality. Raising a false allegation against the respondent would amount to cruelty and the said attitude of the petitioner alone is sufficient to hold that this petition has been filed with an intention to harass the respondent.

8. Learned counsel for the respondent would further submit that after remarriage, the petitioner is concentrating only in the welfare of his second wife and the daughter born through the second wife. Further, the respondent being the natural guardian, she is alone entitled for the custody of the minor child. Moreover the respondent being employed, she is having sufficient wealth to protect the health and life of the minor child. In otherwise, the allegation levelled by the petitioner in respect to the extra marital relationship is not proved through relevant and substantial evidence. According to him, the petition filed by the petitioner is liable to be dismissed.

9. I have considered the rival submissions made by the learned counsel on either side.

10. Initially, on going through the cross examination of PW1, and the evidence given by RW1 and RW2, they are all revolving around the expenses borne at the time of giving treatment to the minor child in Malar Hospital. One thing this Court is unable to understand is that, being the parents, both the petitioner and the respondent are having the

joint liability to spend the medical expenses which was incurred at the time of giving treatment to the minor child. Without knowing the said primary duty, quarreling each other in respect to spending of medical expenses is unnecessary. Therefore, speaking about the medical expenses either by the petitioner or by the respondent shows that both of them are having ego and only due to the same both of them are before this Court without caring the welfare and life of the child. At this juncture, it is necessary to see the judgment of our Hon'ble Apex Court, in ***Sheoli Hati Vs. Somnath Das***, reported in **2019 (7) SCC 490**, wherein our Hon'ble Apex Court has held as follows:

“17. It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. This Court in *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42, had occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of Guardian and Wards Act, 1890 and provisions of Hindu Minority and Guardianship Act, 1956, this Court laid down following in paragraph Nos. 43, 44, 45, 46 and 51:

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the welfare of the child and not rights of the parents under a statute for the time being in force.

44. The aforesaid statutory provisions came up for consideration

before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

45. In *Saraswathibai Shripad Ved v. Shripad Vasanji Ved*, ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;

'....It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration.....' (emphasis supplied)

46. In *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840, this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of wards health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

51.....”

11. Therefore, it is made clear that these type of applications cannot be decided by considering the rights of the parents. The paramount consideration of the Court is only the welfare of the minor child. Here it is a case, by levelling two allegations against the respondent, the petitioner contended that the respondent is not a fit person for giving the custody of minor child.

12. The first allegation is he alone spent medical expenses. As already observed, spending medical expenses is not a criteria for deciding these types of applications. Even a third person, i.e., a wealthy man can spend much money towards the health of an orphan minor child. In the said situation, making quarrel for spending the medical expenses shows, both the petitioner and the respondent have acted like a child. Being educated, employed and wealthy persons, both of them are having responsibility in the welfare of the grown up child. Forgetting those aspects, examining the witnesses on either side towards the spending of medical expenses, is unwarranted and that only is not a criteria for deciding this application.

13. Now, the petitioner has raised one another allegation against the respondent that the respondent is having an extra marital relationship with one Dr.Sudheer. In order to prove the same, he has filed a copy of some messages which transpired in the mobile phone. Whether the said document is certified under Section 65(B) of the Indian Evidence Act or not, is not a question. Mere receiving the call from one telephone number is not sufficient to prove

that the person who rang up is having illegal contact with the other. The exhibits marked in respect to the conversation between the respondent and petitioner clearly shows that the petitioner is having full of confidence that the respondent is having extra marital relationship with the said Dr. Sudheer. As already stated, without any admission and without any eye witness, this Court cannot come to the conclusion that the respondent is having extra marital relationship with Dr.Sudheer.

14. In fact, the extra marital relationship probably has to be proved only by showing the photos, videos and spouse's admission. Phone recordings showing phone calls between the two offices or the email or the text messages between them has to be taken into account only along with the other documents which are narrated as above. The indirect evidence is not a most effective way to prove the extra marital relationship. The phone calls/messages, are probably not enough to prove that the respondent had an affair with another person.

15. In general, the burden of proving the adultery is always on the person alleging adultery, there being a presumption of innocence. As

a general rule, in matrimonial proceedings the Court is vigilant to see that burden of proof is satisfactorily and properly discharged by the applicant and that the respondents putting forward a false defence is not regarded as sufficient by itself to establish the truth of the applicant's case. At the same time putting forward a false defence destroys the credibility of the petitioner.

16. Normally, any extra marital relationship is expected to be established by circumstantial evidence. In the nature of things, the direct evidence of eye witness is seldom, and reliance must be placed upon the circumstantial evidence. It should be directed to showing both intention and inclination and the opportunity to gratify it and proof will be required of the actual adultery alleged in the petition.

17. Herein, it is a case the petitioner gave evidence as while at the time of respondent engaged in the Coimbatore for attending a meeting, she stayed along with Dr.Sudheer. He specifically stated that he acquired knowledge about it, only by enquiring other staffs, who are all worked in the same bank wherein the respondent is working. Therefore,

for proving the said allegation, it is for the petitioner to call for the persons who all had stated about the extra marital relationship of the respondent with Dr.Sudheer. But herein it is a case none of the witnesses have been examined on the side of the petitioner to prove the said allegation. Therefore, this Court is of the considered view that the telephonic conversation between the petitioner and respondent; respondent and Sudheer are not sufficient to hold that the respondent is having extra marital relationship with one Sudheer. More than that, in this application, it is not at all necessary to go into the said allegation fully relying upon the evidence let in by the petitioner.

18. In support of his contentions, the learned counsel appearing for the petitioner relied on the following decisions.

1. Allahabad High Court - ***Sanju and others Vs. Sobhanath and Others***, reported in **AIR 1995 All 90**;
2. Delhi High Court - ***Lekh Raj Kukreja Vs. Raymon***, reported in **AIR 1989 Delhi 246**;
3. Rajasthan High Court - ***Tara Chand Mavar Vs. Smt.Basanti Devi***, reported in **1988 WLN UC 500**; and

4. Hon'ble Supreme Court – ***Kumar V. Jahgirdar Vs. Chethana Ramatheertha***, in SLP (Civil) No.4320 – 4321 of 2003.

19. Now, all the judgments referred by the learned counsel appearing for the petitioner would make it clear that the sole paramount consideration of welfare of the children alone, is necessary and sufficient for deciding these type of applications.

20. Similarly, the learned counsel appearing for the respondent has also relied on the judgment of our Hon'ble Apex court in **Crl.A.No.395 of 2015 dated 27.02.2015**, in ***Surya Vadanam, Vs. State of Tamil Nadu & Others***, wherein it was held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

21. Further in the case of ***Gaytri Bajaj Vs. Jiten Bhalla***, [Civil Appeal Nos.7232-7233 of 2012], our Hon'ble Apex Court observed as

follows:

“13. The views expressed in Para 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli [(2008) 7 SCC 673] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree [(2006) 3 SCC 62] would also require a special mention.”

22. From the above, it is clear that an order of custody of minor children either under the provisions of The Guardians and Wards Act or 1890 of Hindu Minority and Guardianship Act 1956, is required to be made by the Court treating the interest and the welfare of the minor to be of paramount interest.

23. Herein, it is a case both the father and mother are the earning members. The only allegation levelled by the petitioner against the respondent is not proved. In otherwise, when at the time the child was enquired by this Court, child is not willing to go along with her

father. Therefore, it appears that the child is having the interest to join with her mother only. More than that it is admitted on either side that after separation from the respondent, the petitioner remarried another girl, through which he gave birth to one female child. So, it is natural that the petitioner is not in a position to give his full importance to the minor child in the presence of second wife and in the presence of one another child.

24. Therefore, taking into account of all the above said facts, this Court dismisses this Original Petition filed by the petitioner. In otherwise, the visitation right dated 11.04.2018 shall continue till the minor child attains majority. The Application in A.No.1218 of 2018, is ordered accordingly.

सत्यमेव जयते

**19.02.2021**

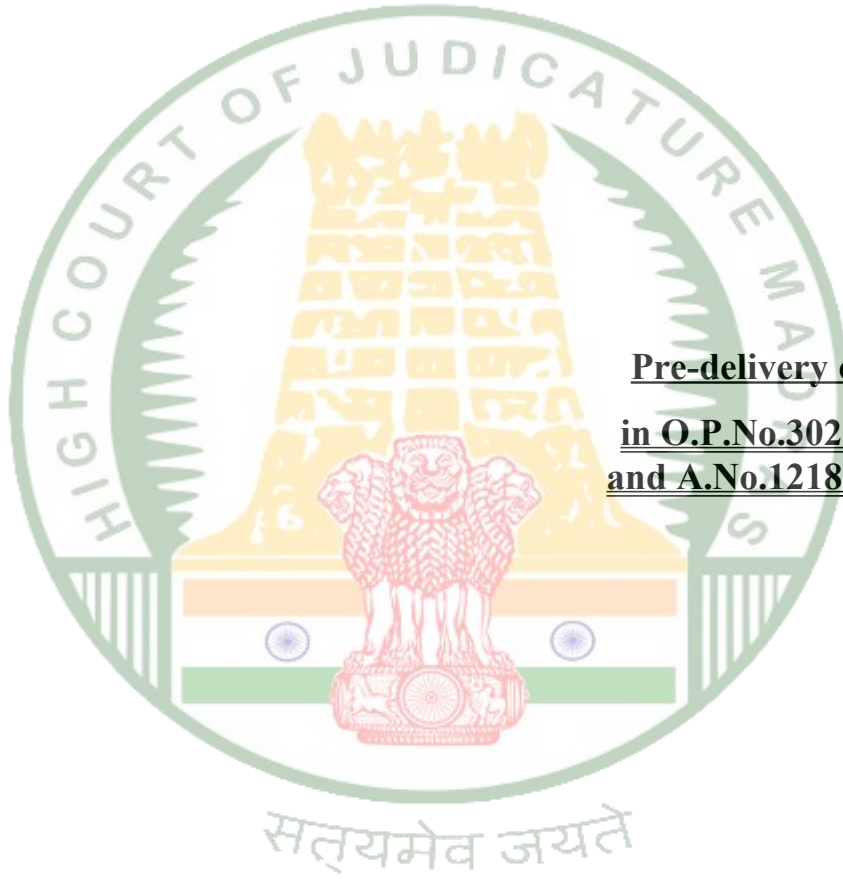
ars

WEB COPY

O.P.No.302 of 2017  
and A.No.1218 of 2020

**R.PONGIAPPAN, J.**

ars



**Pre-delivery order in**  
**in O.P.No.302 of 2017**  
**and A.No.1218 of 2020**

**WEB COPY** **19.02.2021**