



C.M.A.No.2543 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	18.04.2023
Pronounced on	27.04.2023

CORAM

**THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND**

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI,J.

**C.M.A.No.2543 of 2016
and C.M.P.No.20445 of 2016**

Dhatshayani

...Appellant

Vs.

Pounraj

...Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of Family Courts Act, 1984 r/s 47(c) of Guardians and Wards Act, 1890, appeal against the fair and decretal order dated 13.10.2016 made in F.C.G.O.P.No.2 of 2016 passed by the learned Judge, Family Court, Dharmapuri,



For Appellant : Mr.T.Dhanasekaran

For Respondent : Mr.A.Sakthivel

JUDGMENT

(Judgment of the Court was delivered by K.GOVINDARAJAN THILAKAVADI,J.)

The above appeal arise out of the fair and decreetal order dated 13.10.2016 in F.C.G.O.P.No.2/2016 passed by the learned Judge, Famil Court, Dharmapuri.

For the sake of convenience referred to as husband and wife.

2.By the impugned order, it was directed that the children would remain in the custody of their father/respondent and it will be open to the parties to move the above Court for modification of the said order or for seeking any direction regarding the custody and well being if there is any change in the circumstances.

3.Aggrieved by this,the wife is on appeal.

4.The wife had earlier filed F.C.G.O.P.No.2/2016 before the Family Court, Dharmapuri, under Section 7 & 8 of Guardian and wards Act, 1890 seeking the custody of the children. She had also filed another petition in



C.M.A.No.2543 of 2016

F.C.H.M.O.P.No.27/2016 under Section 13(1)(i-a)(i-b) of Hindu Marriages Act 1955 for the dissolution of marriage. This appeal is preferred only against the judgment and decree passed in F.C.G.O.P.No.2/2016 on the file of the Family Court, Dharmapuri.

5.Before the Family Court, Dharmapuri, the petitioner/wife has filed F.C.H.M.O.P.No.27/2016, in which she had stated that the marriage between the petitioner/wife and the respondent/husband was solemnised on 11.02.2001 at Mallikunda Murugan temple. Out of the said wedlock two children were born and the respondent/husband who was working as a Head Master in Panchayat Union Elementary School used to drink and abuse the wife by demanding money for his personal use. He also suspected her fidelity and subjected her to cruelty. Unable to bear the torture given by the respondent/husband she preferred the complaint before the Dharmapuri Police Station. In spite of the advice given to the respondent/husband in the police station, he continued to behave unruly, which forced the petitioner/wife to leave the matrimonial home. On 11.09.2015 the respondent/husband sent a legal notice seeking for divorce, which was duly replied by the petitioner/wife on 04.02.2016. However, the respondent/husband did not



C.M.A.No.2543 of 2016

file any petition for divorce. Hence, the petitioner/wife filed the petition in

F.C.H.M.O.P.No.27/2016 in which an order of divorce was granted.

6.The petitioner/wife had earlier filed F.C.G.O.P.No.2/2016 under Section 7 & 8 of Guardian and wards Act,1890 seeking custody of the children. In the said petition, in the said petition she had stated that the respondent/husband never care to look after children and appellant/wife was not allowed to see her children. She had further stated that since she is a teacher by profession she can provide good education and taught good manners to the children when she was in a matrimonial home. Hence, she filed the above petition for the custody of her minor children. The Family Court has directed the custody of the children to remain with the father until there is any change of circumstances.

7.In the counter affidavit the respondent/husband would submit that the petitioner/wife is leading her immoral life and never bothered about the children and their future. Therefore, if the children are given custody to the petitioner/wife their life will be ruined. The respondent/husband will take care of their health,



C.M.A.No.2543 of 2016

growth, education and development and there is no ground made out to change the custody. Hence, prayed for dismissal of the petition.

8.By the impugned order, the Family Court held that the children would remain in the custody of their respondent/Father and it will be open to the parties to move for modification or for seeking any direction regarding the custody and well being of the children in case if there is any change of circumstances. Accordingly, dismissed the petition.

9.Aggrieved by this, the petitioner/wife is on the present appeal. The learned counsel appearing for the appellant/wife would contend that the respondent/husband has driven out the appellant/wife from the matrimonial home for his convenience and also to harass her. He also remained ex-parte in H.M.O.P.27/2015 on the file of Family Court, Dharmapuri, filed by the wife for divorce. The Family Court failed to consider that the welfare and well being of the children is the paramount consideration, while dismissing the petition filed by the wife for custody of the children. He would further submit that the appellant/wife is



C.M.A.No.2543 of 2016

working as a Teacher and capable of maintaining the children by providing good education with due care and caution and love and affection. The mother being the lawful guardian under the Guardian and Wards Act, the custody of the children cannot be deprived merely on vague allegation made against her. The first child being a female needs proper advice and care at her adolescent age which can be provided only by the mother and the same cannot be compensated by the father merely because of money and muscle power vested in him.

10.Learned counsel for appellant/wife seriously challenged the finding of the Family Court in directing custody of the children to the father.

11.Parties to this case are Hindus. Petition for divorce has been filed under the Hindu Marriages Act, and the application for getting custody of the child has been filed under Section 7 & 8 Guardian and Wards Act 1890. The said Sections reads thus:

"7.Power of the Court to make order as to guardianship



(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly,

(2) An order under this section shall imply the removal of any gurdian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

(d) the Collector having authority with respect to the class to which the minor belongs.

8. Persons entitled to apply for order:- *An order shall not be made under the last foregoing section except on the application of-*

(a) the person desires of being, or claiming to be, the guardian of the minor, or



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(b) any relative or friend of the minor, or
(c) the Collector of the district or other local area within
which the minor ordinarily resides or in which he has property,
or."

12. With regard to custody, it is the welfare of the child that has to be taken into consideration, which is of paramount importance. The Court can also revoke, suspend or vary its order from time to time. We have to consider whether the impugned order warrants interference by this Court, taking into consideration the 'welfare principle'. The disqualification alleged as against the mother in this case is, she is leading an immoral life. The Family Court, after considering the serious allegations against the appellant/wife as to her character that she has developed illicit intimacy with one Suresh. The Family Court also considered the documentary evidences marked on the side of the respondent/husband as Exs.R.1 to R.5 as evidences of the immoral character of the appellant/wife. The photographs marked as Ex.R.4 was also confronted to the appellant/wife and the same was admitted by her stating that the photographs were taken when she had gone to Ranga hotel during the evening hours on 04.09.2016. The learned Judge



C.M.A.No.2543 of 2016

after scrutinizing the documents, has come to the conclusion that, the appellant/wife is guilty of misconduct which would affect the welfare of the children and considering the welfare and well being of the children has rightly entrusted the custody of the children to the father. Moreover, orders relating to custody of children are by their nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody, but such change in custody must be proved to be paramount in the interest of the child.

13.In catena of decision, this Court and the Hon'ble Supreme Court as only reiterated the principle that the welfare of the child is of paramount consideration and not the right of the parent to have custody. The learned Judge, Family Court after considering the facts and circumstances of the case, rightly entrusted the custody of the children to the father. Hence, the order of the Family Court, Dharmapuri calls for no interference.



C.M.A.No.2543 of 2016

14.In the result, the Civil Miscellaneous Appeal stands dismissed. No costs.

WEB Consequently, connected miscellaneous petition is closed.

(D.K.K.,J.) (K.G.T.,J.)

27 .04.2023

vsn

Internet:Yes/No

Index:Yes/No

To:-

The Motor Accident Claims Tribunal,
Family Court, Dharmapuri,



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C.M.A.No.2543 of 2016



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C.M.A.No.2543 of 2016

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