



C.M.A.No.929 of 2022

WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

C.M.A.No.929 of 2022

Mr.M.S.Prakash
S/o.M.Sellamuthu

...Appellant

Vs.

Mrs.M.Aiswarya

...Respondent

PRAYER : The Civil Miscellaneous Appeal is filed under Section 47(a) of Guardianship and Wards Act, 1890, to set aside the order passed by the Principal District Judge, Tirupur dated 31.01.2022 in GWOP.No.79 of 2018 and permit the petitioner/appellant to have visitation right of the minor child as well as to declare the petitioner/appellant as the guardian of the minor child Meegan Mithun, S/o.M.S.Prakash aged about 6 years.

For Appellant : Ms.S.Pooja Shree

For Respondents : Ms.R.Rebecca Vasanthini Percy
for Mr.D.R.Arun Kumar



WEB COPY



C.M.A.No.929 of 2022

JUDGMENT

This Civil Miscellaneous Appeal has been filed challenging the dismissal of the petition filed by the appellant seeking custody of the minor child.

2. The appellant filed a petition seeking custody of the minor child on the ground that the marriage between the appellant and the respondent was solemnized on 29.08.2014; that out of the wedlock a male child by name S.P.Meegan Mithun was born on 12.09.2015; that the respondent after birth of the child started picking up frequent quarrels; that on 14.07.2016, the respondent left the matrimonial home without informing the appellant; that the appellant therefore filed a petition seeking for restitution of conjugal rights in H.M.O.P.No.110 of 2017; that the respondent never allowed the appellant to visit the child; that the appellant was willing to take care of the child and that it would be the best interest of the child if the appellant has the custody of the child.



C.M.A.No.929 of 2022

WEB COPY

3. The respondent resisted the said petition on the ground that the child was only 3 years old; that she had been taking care of the child ever since the birth of the child and; that considering the welfare of the child, the custody of the child may be retained by the respondent.

4. The appellant examined himself as P.W.1 and marked Exs. P1 to P5. The respondent examined herself as R.W.1 and marked Exs.R1 to R5. The Lower Court, after considering the oral and documentary evidence had held that the financial capacity to maintain the child cannot be the sole reason to order either the guardianship or the custody. Considering the welfare of the minor child, the Trial Court observed that the petition of the appellant deserved to be dismissed.

5. The learned counsel for the appellant submitted that the respondent had never allowed the appellant to visit the child. The appellant had filed a petition for restitution of conjugal rights and the respondent as a counter blast had filed a petition for divorce. The



C.M.A.No.929 of 2022

respondent did not appear regularly before the Trial Court in the petition filed for custody by the appellant and she was set *ex-parte* thrice.

6. The learned counsel further submitted that the appellant is well placed in life and it would be in the best interest of the child, if the custody of the child is handed over to the appellant. The finding of the Lower Court that the respondent is entitled to the custody is erroneous and therefore, the same has to be set aside.

7. *Per contra*, the learned counsel for the respondent submitted that the child is in the custody of the mother ever since he was born. The child is studying in a school at Udumalpet, where the respondent is residing. The respondent is taking care of the education of the minor child. The learned counsel further submitted that in custody matters, the only consideration for the Court is, the welfare and the interest of the minor, that the Court would not consider the rights of the parties to claim custody in such petitions; and that the children cannot be treated as objects by disturbing their custody. Therefore, the learned counsel



C.M.A.No.929 of 2022

WEB COPY

submitted that the order passed by the Principal District Court, Tiruppur does not suffer from any infirmity and hence, the appeal may be dismissed.

8. This Court, on perusal of the order passed by the District Court finds that the District Court had taken into consideration the fact that the child was in custody of the respondent since his birth and after referring to the law on the subject held on facts that in the interest of the minor child, the custody should be with the respondent. This Court finds that the child is aged about 7 years. It is well settled that the primary consideration is welfare of the minor child. While dealing with the custody petition, this Court also can consider the preference of the minor child, however since the minor child is not old enough to form a judgment, this Court has to take a decision in the best interest of the minor child. The child is in the custody of the respondent for a long time and the child is also pursuing education, in the place where the respondent is residing. In such circumstances, it is highly undesirable to grant custody of the minor child to the appellant. This would affect the



C.M.A.No.929 of 2022

intellectual, moral physical development of the child. Considering all the above facts, this court is of the view that the order passed by the Trial Court does not suffer from any infirmity and has to be confirmed.

9. This Court while admitting the above appeal had passed a series of orders as regards the visitation rights of the appellant/father. This Court is of the view that the visitation rights of the father/appellant cannot be denied. This Court after interacting with the child had passed the following orders on 25.07.2022:

“It was informed that on 23.07.2022 at 05.00 p.m., the father had met his child and the interaction had proceeded well.

2. The child shall once again meet his father on 29.07.2022 and 30.07.2022 at 05.00 p.m at the residence of Mr.Muruganandham, S.S. Colony, Udumalpet.”

10. Subsequently the following order was passed on 08.08.2022:

“At the request of learned counsel for the appellant, the day of visiting is revised to every Friday and Saturday. This arrangement shall continue till 03.09.2022. Post the



C.M.A.No.929 of 2022

WEB COPY

matter on 05.09.2022 under the caption “For Reporting Compliance.”

11. On 31.10.2022 on the complaint given by the appellant that the maternal aunt and the maternal grand mother were preventing the appellant from freely interacting with the child, this Court had passed the following order:

“It is informed by the learned counsel for the appellant/father that the interaction between the father and son is going on smoothly. It is the maternal aunt and maternal grand mother who appear to be putting spokes to the father's free interaction with the child. It is made clear that in any of the further meeting of the child with his father, the maternal aunt and maternal grand mother of the child shall not be present or in any way interfere with the father and the son's interaction. In case, it is reported that there is an interference, this Court will be constrained to pass restraint order.”



C.M.A.No.929 of 2022

WEB COPY

12. In the same order i.e., order dated 31.10.2022, this Court also had recorded an affidavit of undertaking filed by the appellant in paragraph 2 of the said order, which reads as follows:

“2....

3. *I beg to submit that I wholeheartedly accept, assure and undertake to borne the entire educational expenses of my son namely S.P.Meegan Mithun as a dutiful father for the welfare of my son. Further, I am intended to open a post office savings in the name of my son for his future welfare.*

4. *I beg to submit that there is no force or coercion or undue influence involved and wholeheartedly I undertake to borne the educational expenses of my son.*

It is therefore most humbly prayed that the Honourable Court may kindly be pleased to direct the respondent to furnish the school details and a copy of the Aadhar Card of the minor child namely S.P.Meegan Mithun to me so as to enable me to borne the educational expenses of my son as well as to open a post office saving account in my son's name.”



C.M.A.No.929 of 2022

WEB COPY

It is submitted by the learned counsel on either side that the appellant had since borne the educational expenses of the child, the said fact is recorded.

13. It is submitted that originally the father visited the child at a relative's house of the respondent and subsequently, he visited the child every Friday and Saturday at the residence of the respondent at Udumalpet. The learned counsel appearing for the appellant further prays that the appellant may be permitted to visit the child on his birthdays. Hence there shall be a direction as follows:

(a) The appellant shall continue to visit the child at the residence of the respondent every Friday and Saturday at 5.00 p.m.

(b) The appellant shall be entitled to visit the child on his birthday on the 12th September of every year.

(c) It is also made clear that the appellant shall be entitled to interact with the child freely without anybody's interference on all the days of his visit.



C.M.A.No.929 of 2022

WEB COPY

(d) The appellant shall continue to support the education of the minor child in terms of his Affidavit of underataking, which was recorded by this Court on 31.10.2022.

14. With the above observations, the appeal is disposed of. No costs. It is made clear that if the parties have any difficulty in complying with the above directions relating to visitation, it is open to them to approach the District Court concerned, for necessary modification.

14.07.2023

Index: Yes/No
Speaking Order /Non-speaking order
mp

To

1. The Principal District Judge,
Tiruppur.
- 2.The Section Officer
VR Section, High Court of Madras.



WEB COPY



C.M.A.No.929 of 2022

SUNDER MOHAN,J.

mp

C.M.A.No.929 of 2022

14.07.2023