



WEB COPY



O.P.No.229 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 15.06.2023

DELIVERED ON: 17.07.2023

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

O.P.No.229 of 2019
and A.No.8579 of 2019

Sabiha Begum

...Petitioner

vs.

K.Zubair Ahamed

...Respondent

Prayer:Original Petition filed under Sections 3, 7, 8, 9, 10 and 25 of the Guardians and Wards Act, 1980 r/w Order XXI, Rules 2 and 3 of Original side Rules, prayed that (i) the minor children's Z.Safaa Tamanna and Z.Fardeen Ahmed may be returned to the custody of the petitioner, (ii) the petitioner may be appointed as guardian of the person of the minor children's Z.Safaa Tamanna and Z.Fardeen, (iii)for such other relief as this Court may deem fit and proper and thus render justice.

For Petitioner : Mr.G.Rajaganapathy

For Respondent : Mr.D.Saikumaran



ORDER

WEB COPY

This petition has been filed seeking for the custody and to declare the petitioner as the guardian of the minor children.

2.Heard Mr.G.Rajaganapathy, learned Counsel appearing for the petitioner and Mr.D.Saikumaran, learned counsel for the respondent.

3.The learned Counsel appearing for the petitioner would submit that the the petitioner is the mother and the respondent is the father of the minor children Z.Safaa Tamanna and Z.Fardeen Ahmed. The marriage between the petitioner and the respondent was solemnized on 13.05.2007, in accordance with Islamic Sunni rites and customs. Out of the wedlock, the said minors were born on 14.11.2008 and 25.12.2012 respectively. The petitioner resided in the matrimonial home along with the respondent till 2010, thereafter at the respondent's request the petitioner resided at her parents home along with her children at Pallavaram.

4.He would submit that the respondent did not support the petitioner and his children, and did not discharge his obligation as a husband and a



father either financially or morally. Thereafter a dispute arose among the petitioner and the respondent and from January 2018 the respondent started to threaten the petitioner demanding for divorce, and the same was denied by the petitioner.

5.He would further submit that on 22.03.2018, the respondent entered into the petitioner's parents residence and forcefully took away the children from the petitioner's custody, and has stolen 80 grams of gold jewellery, original document of a property belonging to the petitioner, and also took the car which was jointly purchased by the petitioner and the respondent. He further contends that when she went to lodge a police complaint, the same was refused by Pallavaram station and diverted her to Tambaram police station, thereafter the petitioner had filed an online complaint on 26.03.2018, and the same was closed without any proper enquiry.

6.He would rely upon the cross examination of the respondent, particularly regarding the financial support given by the respondent, from answers to question Nos.40 to 42, and 98 to 100 of the respondent's deposition he would submit that the respondent failed to support the petitioner and the children financially. It was evident from the questions whether the respondent has made any financial support to the petitioner as



to when his father-in-law was hospitalized to which he answered that as when there was shortage of funds the jewels of the petitioner was pledged and when it was not sufficient the respondent gave Rs.1,00,000/- out of his PF Settlement. As to the question does he produce any document to support his claim he had admitted that he did not produce any documents. Answers to question Nos.98 to 100 would show that the respondent had a financial fall.

7.The petitioner was employed from February 2010, within 1.2 years of the first child's birth, and the father-in-law owns a manufacturing unit and therefore would claim financial stability. He would further submit that answers to question No.39 of the respondent's deposition would show the financial capability of the petitioner as she had started her own Financial Consultant firm. Further the learned counsel for the petitioner referred to the respondent's deposition particularly on answers to question Nos.37 & 38 & would shows that the respondent has deposed that the petitioner and children were residing at her parents residence.

8.He would further submit that on 31.03.2018, the respondent had lodged a complaint in the Pallavaram station and an FIR vide Cr.No:206 of



WEB COPY

2018 has been registered against the petitioner. The petitioner further submits that she has filed an H.C.P.No.1277 of 2018 before this court for custody of the minor children and the Court has granted visitation rights to the petitioner.

9.He would submit that after the death of respondent's mother in December 2018, the children are residing at the paternal uncle's home of the respondent. The respondent being a proprietor of travels throughout the India frequently and he is not able to take care of the minor children. They are under the care of strangers and the petitioner is concerned about the health and safety of the children. Therefore, the present petition has been filed for custody and guardianship of the minor children.

10.In order to substantiate the case of the petitioner, the petitioner herself was examined as P.W.1 and marked 10 documents as Exs.P1 to P10 and no further witness was examined. The marriage certificate of the petitioner and the respondent is produced and marked as Ex.P7. The birth certificates of the minor children are produced and marked as Exs.P8 and P9, on perusal of Ex.P8 it shows that the female child was born on 14.11.2008, and is aged about 15 years and on perusal of Ex.P9 it shows



that the male child was born on 25.12.2012, and is aged about 11 years.

WEB COPY

11.Countering his arguments, Mr.D.Saikumaran, learned counsel appearing for the respondent would submit that all the allegations levelled against the respondent is false and he denys the same. He would submit that it was the respondent who has had taken care of the family expenses, the educational fees and even the medical expenses of his father-in-law. He would also submit that the respondent never insisted the petitioner for divorce, and he has not stolen any gold jewellery from the petitioner's residence.

12.He would further submit that the petitioner had filed a complaint, and based on the complaint given by the petitioner to the AWPS Muthialpet the Inspector of Police had conducted an enquiry and on the enquiry the children had expressed that they were afraid of the petitioner. He would submit that the respondent has also filed a complaint and the same was registered, in Cr.No.206 of 2018, against the petitioner and one P.S.S.Naveen. After investigation they were charged under Sections 294(b), 506(1) and 120(b) and a charge sheet was filed before the Judicial Magistrate Court, Tambaram.



WEB COPY

13.Learned counsel for the respondent would further submit that the petitioner has filed an H.C.P.No.1277 of 2018 before this Hon'ble Court, and final order was passed on 21.02.2019, wherein this Court has granted visitation rights to the petitioner and the HCP was dismissed. He would further submit that the children were not safe on the hands of the petitioner, and the children were interacted by this Hon'ble Court based on the HCP filed by the petitioner and the children during the sittings in chamber & the children were not even ready to see the petitioner.

14.He would submit that as per the Mohammedan law the father is acknowledged as the natural guardian of his minor child and the right of a father to act as a guardian of a minor is a separate right granted to him by Islamic substantive law and the father is the single and paramount protector of his offspring as long as he is alive. Hence, prayed for dismissal of this petition.

15.On the side of the respondent, the respondent has examined himself as R.W.1 and marked 6 documents as Exs.P1 to P6 and no further witness was examined. The photocopy of the registered first information report on the file of Pallavaram Police station, registered as FIR No.206 of



WEB COPY

2018 is produced and marked as Ex.R2. The copy of the order passed in H.C.P.No.1277 of 2018, passed by this Court dated 08.01.2019, is produced as Ex.R5 and the final Order passed in H.C.P.No.1277 of 2018, dated 21.02.2019 is produced and marked as Ex.R6. On a perusal of Ex.R6 this Court has granted visitation rights to the petitioner and has stated in the Order that the issue relating to the custody of the children, can be done through appropriate proceedings as to the Guardianship of the children before the competent civil forum, and the HCP was dismissed.

16.I have heard the arguments of the respective counsel appearing on either side and perused the materials available on record.

17.The present Original Petition had been filed seeking for guardianship and custody of the two minor children by their mother.

18.It is the claim of the mother that the minor children were snatched away by the respondent from her custody, which made her to approach this Court by filing a Habeas Corpus Petition, in which she had been granted the visitation rights with an observation that the guardianship and permanent custody of the children should be decided in an appropriate proceedings.

19.The petitioner/ mother had contended that she being a degree



holder, is carrying on her own business of providing financial assistance and therefore, she is financially stable. Apart from that her father owns a manufacturing unit which would also add to her financial stability.

20.Her case is that the respondent/ father, even though owns a proprietorship concern does not take care of the children due to his avocation and it is only other relatives, who are in custody of the minors and they do not get either the love and affection of their father and if they are in the custody of the petitioner/ mother they would have better facilities apart from the love and affection of herself.

21.She would further submit that even the visitation rights granted by the Division Bench of this Court in the Habeas Corpus Petition proceedings or the visitation rights that has been affirmed by the learned Single Judge at the interlocutory stage have not been complied with by the respondent herein, which would only suggest that he is bent upon to create a rift between the petitioner/ mother and the minor children. This has been opposed by the respondent/ father contending various allegations as against the petitioner/ mother including the grounds of infidelity.



22.The further case of the respondent/ father is that the children have been abused both mentally and physically and only for that reason they do not wish to meet their mother who is the petitioner. In support of his contentions he had also placed materials to sustain to his financial capacity. He had also denied various suggestions that he is failing to give not only his love and affection to the children, but also the financial support for the children in their studies. He would submit that the children are well groomed and well taken care by himself, his sister and sister-in-law who are also living with him.

23.The main ground on which the respondent/ father would unsuit the petitioner/ mother is his allegation of infidelity. Even though during the cross-examination, he had made serious statements of the petitioner/ mother's infidelity, he had not produced any independent evidence to substantiate his claim. Be that as it may, even the petitioner/ mother in her cross-examination had denied the suggestion of infidelity. In order to substantiate her denial, she had not either made any statement assailing the claim of the respondent. She had also neither produced any documents nor independent evidence to assail such allegations.



24.A Division Bench of this Court, while allowing a Habeas Corpus Petition filed by the petitioner/ mother, had recorded the fact that on a complaint made by the respondent/ father, an FIR had been launched, which has also been culminated into a charge sheet. She had not produced any documents to assail the same. On filing of charge sheet after the investigation by the concerned Police, *prima- facie*, In the mind of this Court arises an suspicion on the fidelity of the petitioner/ mother.

25.Even though, the petitioner had claimed that the children have been removed forcefully from her custody, she had made attempts to secure the custody of the children in the H.C.P. filed by her. The Division Bench of this Court in the said order had also referred to an interaction with the children, who have refused to go with the petitioner/ mother. After the arguments were over, I have directed the children to be produced before me. There seems to be no change in the attitude of the children even now.

26.It is also brought to my notice that the elder minor is studying in X standard and the younger minor son is in VIth standard. I do not propose to go into the question of custody as claimed by the respondent/ father based on the Mohammedan Law. The elder minor is in her X standard & presently



staying at Mannadi and the school which she studies is near to their present residence, admittedly, the mother stays in Pallavaram and if at this stage her custody is disturbed, even otherwise, it would affect the interest of the minor as she is to take her Board exams for the next three years.

27. Similarly, it would also not be in the interest of the younger minor to put in custody of the mother which would only separate him from his elder sibling which will definitely create mental agony and hardship. Further, the petitioner had not assailed the allegations not only of her fidelity, but also the allegation of mental and physical abuse of the children except by simply denying the suggestions put to her in the cross-examination. In such circumstances also I am of the view that the present petition is without any merits and is liable to be dismissed. The respondent/father shall continue to have the custody and the guardianship of the minor children.

28. At this juncture, it is also pertinent to note that the petitioner being the biological mother is entitled to have a visitation rights over the children. This is required for the simple reason that the relationship of the mother and the children should not be whittled down. It would also help the children to



understand the mother better. Even, if it is assumed that the allegation is true, it does not mean that the mother will turn a new leaf and the children would also understand her and to be more comfortable with her.

29.Considering the various allegations made against the petitioner/mother and also taking into consideration that the visitation rights ordered by this Court have not fully fructified, I am of the view that the petitioner/mother can be given a visitation rights on the first and third Saturdays of every month before the Child Care Center Family Court. Such visitation shall be monitored by a Counselor attached to the Family Court, Chennai, who shall be deputed by the Principal Family Judge, Chennai. He shall file a periodical report to this Original Petition. If the report of the Counselor finds any betterment in the relationship of the petitioner and the minor's, it is always open to the petitioner to approach this Court for modification of such visitation rights.

30.In fine, with the aforesaid observation, the above captioned original petition is dismissed. However, there shall be no order as to costs. Consequently, connected application is closed.



O.P.No.229 of 2017

WEB COPY

gba

Index: Yes/No

Neutral Citation: Yes/No

Speaking Order: Non-Speaking Order

17.07.2023



O.P.No.229 of 2017

Petitioner's witness

P.W.1- A.Sabiha Begum

Documents exhibited by the petitioner

<i>Exhibits</i>	<i>Documents</i>
Ex.P1	The xerox copy of driving license of the petitioner as address proof.
Ex.P2	The xerox copy of ID cards of minor children namely 1.Z.Fardeen Ahamed, 2.Z.Safaa Tamanna.
Ex.P3	The xerox copy of the Achievement record of Z.Fardeen Ahmed.
Ex.P4	The xerox copy of the Achievement record of Z.Safaa Thamana.
Ex.P5	(12 series) The xerox copy of the school fees receipts of minor children.
Ex.P6	The certificate of convocation of the petitioner.
Ex.P7	Copy of the marriage certificate.
Ex.P8	The computer generated birth certificate of Z.Safaa Tamana.
Ex.P9	The computer generated birth certificate of Z.Fardeen Ahmed.
Ex.P10	The copy of Aadhaar as address proof of respondent.



O.P.No.229 of 2017

Respondent's witness

R.W.1- K.Zubair Ahamed

Documents exhibited by the Respondent

<i>Exhibits</i>	<i>Documents</i>
Ex.R1	The photocopy of school fees receipt.
Ex.R2	The photocopy of first information report FIR 206 of 2018 on the file of Pallavaram Police Station.
Ex.R3	The online print out copy of relieving cum experience letter dated 09.05.2016.
Ex.R4	The photocopy of registration certificate issued by Ministry of Micro, Small and Medium Enterprises to respondent in the month, of March, 2017.
Ex.R5	The webcopy of order passed on H.C.P.NO.1277 of 2018 on the file of Hon'ble High Court Madras dated 08.01.2019.
Ex.R6	The webcopy of final order passed in H.C.P.No.1277 of 2018 on the file of Hon'ble High Court Madras dated 22.02.2019.

17.07.2023

gba



WEB COPY



O.P.No.229 of 2019

K.KUMARESH BABU, J.

gba

Pre-delivery judgment in
O.P.No.229 of 2019
and A.No.8579 of 2019

17.07.2023