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O.P.No.518 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2023

CORAM

THE HONOURABLE MS.JUSTICE R.N.MANJULA

O.P.No. 518 of 2022

and

A.No.4036 of 2022

Mir Zamin Ali.H

...

Petitioner

Vs.

Rubaidha Fathima.G

...

Respondent

PRAYER: Original Petition filed for Succession Certificate under Section 3, 7 to 10 & 25 of Guardian and Wards Act, 1890 r/w order XXI Rule 2 and 3 of Original Side Rules, prays to declare the petitioner as guardian of the person of the minors viz., Minor Z.Haaniya and Minor.Dihya and grant custody of the Minor Z.Haaniya and Minor.Dihya to the petitioner.

For Petitioner : Mr.N.A.Hassir Hussain

For Respondent : Mr.T.Sundar Babu

ORDER

This petition has been filed to declare the petitioner as guardian of the minors, viz., Minor Z. Haaniya and Minor Dihya, and grant custody of Minors Z. Haaniya and Dihya to the petitioner.



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2. The petitioner is the father and the respondent is the mother of the minors, Z. Haaniay and Dihya. The marriage between the petitioner and the respondent took place on August 5, 2017 in Chennai. They are blessed with two children out of wedlock. Due to some misunderstanding between the petitioner and the respondent, they got separated. The minor children are under the custody of the respondent. The respondent also got an *ex-parte* decree for divorce on November 29, 2021, in OS No. 122 of 2020 on the file of the VII Additional Judge Family Court in Chennai. The petitioner is taking steps to set aside the same. The petitioner is the natural guardian of the minor children. It will be more suitable to appoint the petitioner as guardian of the minor children by giving their custody to him. The petitioner could bring up the children in a better environment and provide good shelter, education, etc. The respondent is dependent on her parents and she is not interested in taking care of the children. Considering the minors interests and welfare, the petitioner should be appointed as their guardian by having their custody with him.

3. The respondent and the minor children were sent out of the matrimonial home by the petitioner to satisfy the ego of his mother. Neither the petitioner nor his parents visited the minor children at any time. The



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petitioner's behaviour was totally changed due to the evil influence of the petitioner's parents and relatives, and further, the petitioner's mother does not want the respondent to come back to the matrimonial home; so that the petitioner can get remarried according to her wish. The petitioner had chosen not to appear before the court when the respondent had initiated proceedings to get a decree for divorce and that resulted in the *ex-parte* decree.

3.1. The respondent is the mother, and she is the natural guardian of the minor children, so she can have their custody. The petitioner never maintained the minor children and did not even care to know about their whereabouts. The respondent was able to raise the children even when the petitioner did not support her financially for all these days, with the help of her parents. The petitioner is in the habit of consuming alcohol, which is used to cause physical abuse upon the respondent. The respondent had also filed a maintenance petition against the petitioner in M.C.No. 506/2022 before the VII Additional Family Court, Chennai and this is coming up for hearing. Hence, the petition should be dismissed.

4. On the side of the petitioner, the petitioner examined himself as



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PW.1 and Ex.P1 to Ex.P4 were marked. On the side of the respondent, the respondent examined as RW.1 and Ex.R1 to Ex.R3 were marked.

5. The petitioner has stated that he was refused entry into the house of the respondent when he tried to visit the kids. The petitioner seems to work as a team leader in HCL and he was earning Rs.40,000/- per month. The petitioner is said to be living in a joint family comprised of his mother, uncle and sisters and he is capable of taking care of the children with their help. But it was alleged by the respondent that the petitioner attempted to see the children only at 12 o'clock in the middle of the night and in this regard, a police complaint has also been lodged.

6. It is the allegation of the respondent that the petitioner has an extramarital affair, and that was also the reason for his indifference and quarrel with the respondent. The respondent has produced some photographs that has been marked as Ex.R3 and that would show that the petitioner is seen to be in the company of some other woman. On the face of Ex.P3, it appears the photographs have been taken from some cell phone and it requires Sec. 65(B) certificate.



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7. Even though the petitioner had objected to the marking of the photographs, he did not offer any explanation as to the allegations that he had engaged himself intimately with some other woman. Even during the cross examination no suggestions were made to her as to the allegations of the petitioner's different attitude, especially the allegations that he had physically assaulted the respondent. The respondent seems to have made a police complaint by alleging that the petitioner had a relationship with some other woman and was harassing her along with his parents.

8. It is to be noted that the petitioner did not show any gesture of maintaining the minor children by sending any amount towards their maintenance to the respondent. During the course of the argument, it is offered from the side of the petitioner that he is willing to rejoin the respondent. But the respondent had obtained an order of divorce by not choosing to rejoin the petitioner.

9. There are some materials available on record that would show that the petitioner had exhibited some conduct that would spoil his own matrimonial life with the respondent. When deciding about the custody of the minor children, the court has considered several facts apart from



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monitoring the capabilities of the parents. It might be true that the petitioner has engaged as a team leader in HCL and is earning Rs. 40,000 per month, but the respondent is not employed. But the children can still be left under the custody of the respondent. Considering the tender age of the children, the petitioner can be directed to support them by sending money towards their maintenance. In this regard, the respondent has already filed a petition in M.C.No. 506/2022 before the VII Additional Family Court, Chennai.

10. Since the minor children have been under the custody of their mother all along, it may not be in their best interest to separate them from their mother and hand over to the petitioner all of a sudden. The minor children's comfort and wellbeing will not be affected in any manner if they are allowed to continue to live with their mother by appointing the mother as guardian. The petitioner did not produce any material to show his bona fide and seek custody of his minor children. Since the wellbeing of the minor children should be the paramount consideration while deciding the petition filed for appointing the guardian and seeking custody, I feel in the existing circumstances custody of the children should be given to their mother by appointing herself as guardian and by granting visitation rights to the petitioner.



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11. Hence, the original petition is **disposed of** by granting only visitation rights only to the petitioner. The petitioner shall have the right to visit the children on every 2nd and 4th Sunday between 10 a.m. and 1 p.m. at any common place nearby the respondent's residence. Such visitation rights shall be continued until further orders. Since the children are very small, the respondent shall be allowed to be present but she shall not disturb the meeting between the petitioner and the minor children. However, if the children are not comfortable and visitation is traumatic for the children, the respondent is at liberty to seek any further modification of this order and the petitioner should also understand the difficulty by not compelling the children. Consequently, connected application in A.No.4036/2022 is closed.

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jrs

Index :Yes/No
Speaking: Non-Speaking
Neutral: Yes/No



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APPENDIX

Petitioner's witness:

P.W.1 –H.Mir Zamin Ali

Documents exhibited by the petitioner:

<i>Exhibi ts</i>	<i>Documents</i>
Ex.P1	The photocopy of the petitioner's marriage certificate with the respondent dated 06.09.2017 (compared with original)
Ex.P2	The computer generated birth certificate of the petitioner's son Dihya
Ex.P3	The computer generated birth certificate of the petitioner's minor daughter Z.Haaniya.
Ex.P4	The photocopy of the petitioner's Aadhaar card (compared with the original)

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R.N.MANJULA, J.

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