



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.06.2023

Delivered on: 10.07.2023

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

O.P.No.433 of 2021
& O.A.Nos.296 of 2021
& A.No.1967 of 2021

Ferose Khan

...Petitioner

VS.

Hina Kauser

...Respondent

Prayer: Original Petition filed under Sections 3, 7 to 10, 12 & 25 of Guardian and Wards Act, 1890 R/W Order XXI Rule 2 and 3 of Original Side Rules Read with Clause 17 of Letters Patent, the petitioner therefore prays:

(a) to declare the petitioner as guardian of the person of the minors viz.

Minor Sara Kulsum and Minor Ruqayya Kaukab



(b) grant custody of the Minor Sara Kulsum and Minor Ruqayya Kaukab to the petitioner.

(c) for such other reliefs as this Court may deem fit and proper and thus render justice.

For Petitioner : Mr.N.A.Nissar Ahmed, Senior Counsel
for Mr.N.A.Nassir Hussain

For Respondent : Mr.P.Sankaranarayanan

ORDER

This application has been filed seeking to declare the petitioner as the guardian of the minor children to the petitioner.

2.Heard Mr.N.A.Nissar Ahmed, learned Senior Counsel appearing for Mr.N.A.Nassir Hussain, learned counsel for the petitioner and Mr.P.Sankaranarayanan, learned counsel for the respondent.



WEB COPY

3.Mr.N.A.Nissar Ahmed, learned Senior Counsel appearing for the petitioner would submit that the petitioner and the respondent were married as per the Islamic laws on 31.05.2013 and they had begotten two daughters. On 17.12.2016, the respondent had dissolved the marriage by Khula. Thereafter, the petitioner remarried. According to him, the petitioner has been maintaining the minor children till date and the respondent however is not permitting the petitioner to see them. It had come to the knowledge that the respondent is intending to remarry and take the minor children abroad. He would further submit that being the father he is a natural guardian and therefore, the petitioner seeks himself to be declared as guardian and to have custody of the minor children. He would further submit that the respondent cannot deny the petitioner his right to meet the minor children.

4.He would rely upon the cross-examination of the respondent and state that the petitioner is paying the maintenance apart from the Educational & Medical expenses. He would further submit that the respondent had disagreed with the



petitioner and his parents of having custody of the minor children on Saturdays & Sundays or any extended weekend holidays either outside of the respondent's place or at Chennai. He would also rely upon the evidence of the respondent during the cross-examination, where she would deny the minor children to be with the grandparents at Trichy during School vacation and also where she had refused to agree for custody during alternative festival for the minor children to be with the petitioner and his parents at Trichy.

5. He would further draw the attention of this Court to the cross-examination wherein, the respondent had agreed that she does not have the means to support the minor children. He would further submit that a proposal had been given by him to the respondent seeking to have custody of the minor children during the weekends and extended holidays and also 50% of the holidays during vacation and alternative custody of the minor children during festivals. He would submit that the respondent has not acceded to such a proposal. Therefore, he would



submit that the petitioner be granted guardianship and custody of the minor children.

6.Countering his arguments, Mr.P.Sankaranarayanan, learned counsel appearing for the respondent would submit that the petitioner and his parents were very upset after the birth of the second child, because it was a girl child. He would submit that the petitioner and his family members were only expecting a boy child and since thereafter they have pressurized & traumatized the respondent to give Khula so that the reputation of the petitioner does not fall. He would further submit that the petitioner had remarried again and a girl child was born in the marriage. He would further submit that the second wife has also been sent out of the matrimonial house as she did not give birth to a boy child and a criminal case has been initiated by the second wife as against the petitioner and his parents and the same is still pending. He would submit that on that ground alone, the petitioner had conducted himself in such a way that he could not be entitled to either the guardianship or the custody of the minor children.



WEB.COM

7.He would further submit that the petitioner is beneficially employed in Saudi Arabia and is residing there. He would also refer to the cross-examination wherein, the petitioner had made a categorical statement that he only seeks an interim custody of the minor children during his children's vacation. He would further submit that the petitioner whenever comes from Saudi Arabia to Chennai, he would be permitted to meet the minor children and it is a false claim that the respondent is denying the visitation rights of the minor children. Therefore, he would submit that the application filed by the petitioner be dismissed in limine and seek declaration of the respondent as guardian of the minor children and permitted to have custody of the minor children.

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

9.The petitioner being the father had approached this Court for the grant of guardianship and custody of the minor children. From the exhibits P3 & P4, it



could be seen that the minor children were born on 24.03.2014 and 21.06.2015 respectively, which would put the age of the minor children at 9 years & 8 years respectively. As per Mahomedan Law, the mother is entitled to have custody of the minor girl children till they attain puberty.

10.Be that as it may, on the facts of the case, it remains after the Khula pronounced by the respondent, the petitioner had remarried in the year 2018 and has also begotten a girl child through that marriage which has been admitted to by him in his cross-examination. It is an admitted fact even the second marriage did not subsist. It is also an admitted fact that the petitioner is beneficially employed in Saudi Arabia and is residing there. From the cross-examination of the petitioner who had examined himself as PW1, it is seen that he had admitted the aforesaid facts. It would be relevant to extract certain portions of the cross-examination of the petitioner which has been recorded in the question & answer format.

Question: The respondent has got the educational qualification and means to take care of the minor children and as



WEB COPY



such she is entitled for the custody of the minor children?

Answer: I deny that as the natural guardian. Witness adds: I pray to the Hon'ble Court to grant custody of the minor children.

Question: *Even if the children are given to your custody you will have to bring them in Saudi Arabia where you are currently employed?*

Answer: Yes. Witness adds: The petition seeking interim custody of the children during his and children vacation.

Question: Your answer to the previous question suggest's that you have no intention of permanently having custody and taking care of the children?

Answer: I deny the suggestion.

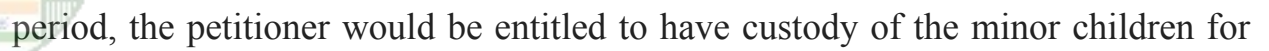
11. Apart from the above and reading of his entire deposition, I am of the view that the petitioner wants to have an interim custody of the minor children whenever he visits India during his vacation. Further a thorough reading of the deposition given by the respondent, it could be seen that the respondent did not allow the interim custody of the minor children to the petitioner even during weekends or vacation.



WEB COPY

12.It is an admitted fact that the minor children were born to the petitioner and the respondent and by implication of law, both of them are the natural guardians of the minor children. But, however, considering the fact the petitioner is beneficially employed in Saudi Arabia and on analysis of his deposition, it could be seen that he is more interested only in having an interim custody during his visits to India and his parents having the custody of the minor children during weekends and alternative festivals and also of the law relating to Mahomedan Law in regard to the custody of the minor girl children, I declare the respondent as guardian of the minor children as they same do not impinge upon the interest of the minor children and also grant custody of the minor children to the respondent. However, the petitioner would be entitled to have custody of the minor children whenever he visits India.

13.The said custody is restricted only to usual holidays but when it comes to an extended holiday or summer vacation or any other vacation, during the said



14. In view of the above, the Original Petition is disposed of on the aforesaid terms. However, there shall be no order as to costs. Consequently, connected applications are closed.

10.07.2023

Index: yes/no
Speaking order: yes/no
pam



WEB COPY



K.KUMARESH BABU, J.

Pam

Pre-delivery Order in
O.P.No.433 of 2021
& O.A.Nos.296 of 2021
& A.No.1967 of 2021

10.07.2023