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CMP No. 8308 / 2023

C.M.P. No. 8308 of 2023
in
C.M.A. No. SR44459 of 2023

SUNDER MOHAN, J

The petition is to condone the delay of 1837 days in filing the above appeal.

2.The appeal challenges the order passed by the learned III Additional District Judge, Salem in G.O.P. No. 18 of 2017 dated 18.12.2017. Admittedly, the marriage between the appellant and the respondent was dissolved in 25.11.2015 by the order of the Family Court, Salem in F.C.O.P. No. 192 of 2015 dated 25.11.2015. Thereafter, the appellant had filed a petition seeking custody of the minor child. The learned Judge had dismissed the said petition and observed that the appellant is entitled to have interim custody during holidays and granted visitation rights to the appellant. Admittedly, this arrangement continued for sometime. Thereafter, it appears that the appellant had left for U.S.A., to pursue his job and he was in touch with the minor child only through phone. It is also admitted that the respondent re-married in the year 2021.



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3.The learned counsel for the appellant submitted that the appellant was not aware of the respondent's re-marriage. While so, in the month of February 2023, the appellant received several calls from the minor child to take him away from the respondent's home. The appellant had therefore resigned his job in U.S.A., and returned to India and with the help of the Child Welfare Officer and the local police, he took custody of the child in the month of March 2023. The learned counsel further submitted that since the custody was taken by him as per the wish of the child, the same is legal. However, since the impugned order had rejected his prayer for custody, the same has to be set aside in the interest of the welfare of the child. Hence, he had preferred the above appeal with this petition to condone the delay.

4.The learned counsel for the respondent, per contra, submitted that the custody of the minor child was taken by force. The child was living happily with her though she got re-married in the year 2021. The interest of the minor child demands that he continues his studies at Chennai. The child was illegally taken at the time of examinations. Hence, she had filed a Habeas Corpus



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Petition in H.C.P. No. 682 of 2023 and this Court had passed certain directions in the said petition and had also observed that as a temporary measure, the child shall be with the custody of the appellant. The learned counsel further submitted that the appellant has not shown sufficient cause for condonation of delay and that the above petition is vexatious.

5.This Court on perusal of the affidavit and the counter finds that admittedly, the appellant and the respondent have been living separately since 2015. The custody was handed over to the respondent. Admittedly, the child is in the custody of the appellant since March 2023. There is an order by the Division Bench of this Court in H.C.P.No. 682 of 2023 wherein this Court had observed as follows;

“(c)From the interaction with the absentee, we find that the absentee for the present prefers to be in the third respondent-s home. This runs contrary to the GAWA Court order and therefore, we make it clear that absentee being in the third respondent-s house will be purely a temporary measure till 15.06.2023 by which time, the GAWA Court has to be moved by the third respondent and parties will stand bound by orders of learned GAWA Court. If the GAWA Court is moved, we



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request GAWA Court to decide the matter as expeditiously as its business would permit but by 15.06.2023;

(d)As regards appeal against existing GAWA Court order dated 18.02.2017 which is said to have been presented now more than six years later with a delay of over six years and with a petition for condonation of delay of six years, it is open to the third respondent and petitioner to pursue and resist respectively on its own merits and in accordance with law;”

6.The Division Bench had directed the appellant to move the Guardians and Wards Act Court for custody at the earliest and had also directed the said Court to decide the matter expeditiously and conclude it on or before 15.06.2023. However, it is stated by the learned counsel for the appellant that they are yet to file the application before the said Court. The Division Bench has also observed that the appeal against the earlier order passed by Guardians and Wards Act Court and the petition for condonation of delay shall be decided on its own merits. The Division Bench had also noted that the child on interaction had preferred to be in the appellant's home.



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7. Though this was a petition for condonation of delay, this Court had also interacted with the child and found that the child reiterated his preference to be with the appellant. Therefore, this Court is of the view that for the above reason and the reasons stated in the affidavit filed in support of this petition, the delay in filing the appeal against the order could be condoned in the interest of justice. However this order should not be construed as expressing any opinion on the merits of the appeal.

8. Hence, the delay is condoned and this petition is allowed.

10.07.2023

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*Note: Registry is directed to issue order copy
on 12.07.2023.*



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Dated : 10.07.2023