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O.P.No.825 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.03.2023

PRONOUNCED ON : 30.03.2023

CORAM

THE HONOURABLE **MR.JUSTICE K.KUMARESH BABU**
O.P.No.825 of 2021

Dr.Mohamed Hyder Sayeed

... Petitioner

Vs

Dr.Rukhsaar Fatima

... Respondent

PRAYER: Original Petition filed under Sections 3, 7 to 10 and 25 of the Guardian and Wards Act, 1890 and Order XXI Rule 1 to 3 of Original Side Rules, prayed that (i)to grant permanent custody of the Minor Mohamed Ali Asghar Sayeed born on 31.05.2017 to the petitioner, (ii)to appoint the petitioner as Guardian of the person of the minor Viz.,Mohamed Ali Asghar Sayeed, (iii)for such other relief as this Court may deem fit and proper and thus render justice.

For Petitioner : Dr.C.K.Syed Shaffi

For Respondent : Mrs.Thenmozhi Annam Nelson

ORDER

The Original Petition has been filed by the father of the child seeking for his permanent custody and also to appoint himself as guardian of the Mohamed Ali Asghar Sayeed, minor child.



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2. Heard Dr.C.K.Syed Shaffi, learned counsel appearing for the petitioner and Mrs.Thenmozhi Annam Nelson, learned counsel appearing for the respondent.

3. Learned counsel for the petitioner would submit that the marriage between the petitioner and the respondent took place on 27.09.2014 as per the religious obligations of Islam. After the marriage, the petitioner and the respondent were residing at Chennai. On 31.05.2017, the petitioner and the respondent were blessed with a male child and was named as Mohamed Ali Asghar Sayeed. The petitioner had been taking care of the respondent and the minor child by providing all the amenities.

4. Learned counsel for the petitioner would submit that the respondent during the delivery of the child and thereafter was with her parents. The respondent, according to him started to behave indifferently. The respondent suddenly planned to go to Australia to visit her sisters. The petitioner acceding to the request of the respondent had resigned from Fortis Malar Hospital and agreed to go with the petitioner and in the process he had spent Rs.15,00,000/- (Rupees Fifteen Lakhs only) from the savings of the petitioner and the retirement amount of the petitioner's father.



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5.He would submit that the petitioner was deceived by the respondent by making false promises by getting him a job in Australia. However, when the petitioner and the respondent reached Australia, the respondent's family cheated the petitioner and was ill-treating him. Without knowing what to do, the petitioner had returned to India. However, the respondent and the child stayed back in Australia under the protection of the respondent's sisters. The petitioner would submit that the respondent had never bothered to inform the petitioner about the well-being of the minor child.

6.Learned counsel for the petitioner would further submit that in the month of May 2019, the respondent called the petitioner and threatened him to give *khula*, which is a divorce from the wife side. She had also sent messages threatening the petitioner and sought divorce from the petitioner so as to settle herself in Australia. During the month of January 2020, the respondent had visited India. But, however, instead of coming to the matrimonial home, she stayed back at Hyderabad with her father. During the said period, the respondent along with her father came to matrimonial home and stayed there for only six days. Thereafter, she left to Australia. On 06.07.2021, the respondent had applied for divorce as per the Islamic laws and the same had been recognised by the



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Chief Shia Kazhi of Tamil Nadu. The respondent is not taking care of the child and even though, he had attained 4 ½ years, he has not been admitted in a school in Australia.

7.He would further submit that as per the holy Kuran, the father of the child is the natural and legal guardian. He would further submit that the mother loses her guardianship of a male minor when the child attains the age of two years. He would submit that the mother cannot move a child to a different place as per the Mohammedan Law.

8.He had examined himself as PW1 and had marked various documents to substantiate his pleading. He would further submit that the respondent, during the cross-examination had not denied the suggestion that under the Shia Law, the child should have been handed over to the father on completion of two years after the divorce. To such a suggestion, the respondent had made untenable statement. He would further submit that the petitioner being the natural legal guardian as per the Muhammedan law, he is entitled for the grant of custody. He would further contend that the respondent is denying the visitation rights of the child as ordered by this Court. He would also rely upon the judgment reported in 2020 (8) MLJ 269 and CDJ 2010 SC 294. He would also submit that the



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petitioner has got the right of meeting the child and spending time with the child.

Hence, he prays for the custody of the minor child.

9.Countering his arguments Mrs.Thenmozhi Annam Nelson, learned counsel appearing for the respondent would submit that the petitioner after the marriage was habitually abusing the respondent. He used to blame the respondent even for the incidents that had taken place at the hospital where he was working. The petitioner cannot control his emotions and he has caused serious and grievous injury to the respondent. She would submit that the petitioner and the respondent in seeking of a better livelihood they were trying originally to get a job in Singapore. As it did not materialise, they decided to settle in Australia as the respondent's elder sister and family were living there. She would submit that the petitioner and the respondent enrolled in a course at Melbourne. During the month of April 2019, the petitioner had come to India to attend his cousins marriage. After coming to India, the petitioner's father held him back and thereafter, the petitioner insisted upon the respondent to come back to India, in spite of her repeated request for him to come to Australia and clear the examinations. Since the petitioner was very adamant and was becoming very aggressive, this respondent decided to divorce the petitioner and had taken khula according to the Shia and Shariat Laws on 03.07.2021 which has also been



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accepted by the petitioner. She would further submit that the respondent is profitably employed in Australia and the child has been admitted to a kindergarden at Park Wood Green Kinder Garden School, since January 2022. She would further submit that the petitioner had remarried again and that now he has a family of his own and that, it would not be appropriate to give the custody of the child to the petitioner as he would suffer step-motherly treatment.

10.She had examined herself as RW1 and she had made statements substantiating the allegations stated supra. Learned counsel for the respondent would further submit that he had gone to a Reach Physcotric & Counselling Centre in Bangalore for counselling. But, however, he had claimed that it was not for anger management but for marital counselling. Therefore, she would plead that it was the petitioner who had required counselling even to stay in the marital life. Even before this Court, contrary to his pleading on 07.09.2022, in the cross-examination, he had admitted that he had given consent for khula. But, however, had pleaded that it was under compulsion. She would submit that the petitioner was living in Australia at that time of khula and the petitioner has not substantiated how the respondent had veiled her compulsion on the petitioner. Therefore, she would plead to reject the petition in limine.



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11.I have considered the rival submissions made by the learned counsel appearing on either side and perused the materials available on record before this Court.

12.The minor child is presently under the care and custody of the respondent/ mother at Australia. The petitioner as well as the respondents are qualified Doctors and are profitably employed in their own capacity. During the examination of the respondent, the respondent had categorically stated to a question put in cross as to whether she was willing to handover the child to the father as per the Mohammeden Law. She had answered in negative for the reason that the petitioner is remarried. There has been no suggestion whatsoever to dispute the statement made by the respondent in her cross-examination. Even during the course of the argument, the learned counsel for the respondent had insisted that the petitioner having remarried it would not be in the interest of the child to be in the custody of the petitioner. The learned counsel for the petitioner had also not disputed the said argument by claiming otherwise.

13.As the marriage of the petitioner has not been denied, I am of the view that the custody of the minor Mohamed Ali Asghar Sayeed shall continue with the respondent, since, I fear that the child will suffer step-motherly treatment. I am also not convinced by the reasons assigned by the petitioner that as per



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Mohammeden Law, the custody of the minor son should be with the father. There is no serious pleading either in the petitioner or in his affidavit to substantiate how the child would be more benefitted in his custody rather than in the custody of the respondent/ mother. Hence, I am of the view that the petitioner had not made any substantial case for having custody of the minor child.

14. In fine, the petition is dismissed. However, there shall be no order as to costs.

15. Though, I have declined the custody of the minor child to the petitioner, the petitioner would be entitled for visitation rights as he is the father of the minor child. In that aspect, I am convinced that interim order made on 13.02.2023 in respect of the visitation rights namely clause (i) and (ii) shall be made absolute.

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Index: Yes

Speaking order: Yes

Neutral citation: Yes



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K.KUMARESH BABU,J.

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A Pre-delivery order in
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