



C.M.A. No. 1976 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.10.2023

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. No. 1976 of 2021

and

C.M.P. No.10677 of 2021

A. Subramani

... Appellant / Petitioner

Vs.

P. Akila

... Respondent / Respondent

Civil Miscellaneous Appeal filed under Section 47 of Guardian and Wards Act, 1890 against the Order and Decreetal order dated 14.08.2019 passed in G.W.O.P. No. 121 of 2017 on the file of the Principal District Judge, Thiruvallur.

For Appellant : M/s. A.S. Narasimhan

For Respondent : M/s. D. Manimaran



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JUDGMENT

This appeal filed by the Father of the ward herein, seeking to set aside the Order and Decreetal Order passed in G.W.O.P. No.121/2017 dated 14.08.2019 on the file of Principal District Judge, Thiruvallur and consequently, handover the custody of the minor child namely S.A. Hassan Prabu, to him.

2. For the sake of convenience, the parties are referred herein according to their litigative status before the Tribunal.

3. The petitioner is the father and respondent is the mother of the minor child S.A. Hassan Prabu, the marriage between them taken place on 17.02.2012 and the minor child was born on 15.05.2013. Subsequently, the couple have developed misunderstanding, their relationship was broken and it was gone to the extent of divorce. However the petitioner did not agree for the same. The minor child was under custody of the mother from birth and minor child to be in care of mother till the age of 5 years. Hence, father has not come forward to file any petition seeking custody of the child. But, for



the past one year, father was unable to see his son since the mother did not allow him to visit her residence. He filed petition under Section 7 of the Guardian and Wards Act, 1890, before the Principal District Court, seeking custody of the ward minor S.A Hassan Prabu. It is also stated by the petitioner that, if the child is handed over to his custody, he would take care and welfare of the child, would be well taken care of.

4. The mother had filed counter before the lower court stating that, after the marriage, her husband / appellant herein has developed illegal intimacy with one of the neighbour and it resulted in rift between them. The petitioner had also started to ill-treat her and not showing love and affection towards the family and demanded her to agree for divorce by mutual consent. In the meanwhile, the respondent got conceived, went to her parent's house and gave birth to a male child on 15.05.2013. The petitioner has not cared to visit and see neither the child nor the respondent. During the naming ceremony of the child, the petitioner visited the respondent but neither blessed the child nor brought any gift to the child. Now, the child is aged about 4 years and the mother is looking after him in all aspects by providing all the needs of her son, including the Education. Now in order to



get the divorce from the respondent, the petitioner has filed the above unwarranted and untrue petition against the respondent. The minor child is well taken care of by his mother with love and affection and she is working in a temporary job, maintaining and looking after her son, prayed to dismiss the petition.

5. Based on the pleadings, the Principal District Court has framed issue that, Whether the petitioner is entitled to the relief as prayed for in the petition? To prove the case, the petitioner examined himself as P.W.1 and Exs.P.1 to P.13 were marked. On the side of the respondent, mother of the child was examined as R.W.1 and Exs.R.1 to R.5 were marked.

6. After considering the evidence placed on record and taken note of various factual aspects, the Lower Court has held that, it is deemed and fit to continue the custody of the child with the mother and refused to hand over the custody of the child with the father.

7. Aggrieved over the above Order, the father has come forward with this appeal. It is submitted the learned counsel representing the father



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that, since the child is now aged about more than 5 years and as a natural guardian, the child must be handed over him. It is also stated that, now the father is having good avocation and he his having capacity to maintain and take care of welfare of the child and prays to hand over the custody of the child.

8. Per contra, the learned counsel for the respondent/ mother of the child submitted that from the birth of the child, the father has never shown love and affection to the family and more particularly never shown any interest in the welfare of the child. The petitioner, father has not even spent a single rupee for the welfare of the son and not participated in any of the activities more particularly, educational activities of the child, hence prays to confirm the award of the Trial Court.

9. I have considered the submissions made on both sides and perused the materials available on record.

10. The Hon'ble Apex Court in *Vivek Singh vs. Ramoni Singh* [2017 (3) SCC 231], has reiterated the settled principle of law that the



welfare of the child is paramount importance in granting the custody or changing the custody. It is observed in paragraph no.11 to 15 as follows:

“11. This Court in the case of Gaurav Nagpal v. Sumedha Nagpal MANU/SC/8279/2008 : (2009) 1 SCC 42 stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens Patriae'. The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner:

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

52. The trump card in the Appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the Appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The



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High Court has referred to these aspects in detail in the impugned judgments.

12. *We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.*

13. *Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time and again, following observations in *Bandhua Mukti Morcha v. Union of India* and*



Ors. MANU/SC/0552/1997 : (1997) 10 SCC 549:

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4 . The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood--socially, economically, physically and mentally--the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development.

14 . Same sentiments were earlier expressed in Rosy Jacob v. Jacob A. Chakramakkal MANU/SC/0260/1973 : (1973) 1 SCC 840 in the following words:

15....The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their



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children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...

15. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building.”

11. In this case, the father has not shown any interest or showered love and affection to the child and who suddenly entered from somewhere seeking custody of the child. Admittedly, from the date of the child's birth, he has not shown any bonafideness on his part, and he has approached the Court for seeking custody only in the year 2017, i.e., after four years from the birth of child. Before the Trial Court, it is the evidence of P.W.1 – father



of the child that, he has narrated various incidents taken place between the husband and wife and participation of various family functions by the husband more particularly in the naming ceremony of the child. Whereas all these evidence have been rejected by the District Judge, since there was no iota of pleadings made by the petitioner regarding the factual aspects to support his evidence.

12. Admittedly, till the child attain the age of 5 years, the father has not made any attempt to do any welfare measures for the child. It is also admitted by him that he was waiting for the child to reach five years to take further steps and this stand itself is sufficient to show that till the age of five years, the petitioner has not shown any love and affection and participated in any welfare activities of the child. Even though, he has produced various exhibits to level accusations against the mother of the child, he has not able to establish any fact that he was interested in the welfare of the child.

13. The father of the child in the cross examination admitted that the child was in the custody of the respondent from the birth and he has not made any financial assistance in the favour of the child. It is also admitted



by him that in the pleadings, he has not narrated any of the activities carried on by him for the welfare of the child. The pleadings of petitioner is also very vague and it is pleaded on the assumptions that, if the child is aged about 5 years, the custody of the child shall be shifted in favour of the father. This assumption is not in terms with the welfare requirements in favour of child.

14. The Trial Court has recorded in the Order that the Trial Judge has personally met the child and received the opinion of the child with regard to the custody. It is also recorded that the father is not entitled to get custody since, the child is already in better custody and all his requirements are being well taken care by the mother. As held by the Apex Court in the judgment cited supra, that Psychological theory that the mother is center of the infant's small world, his psychological social base, and that she must continue to be so far some years to come, and this presumption in favour of maternal custody as saved child welfare policy, is rebuttable by the father that, he is better suited to have custody of child.

15. Now, the child is aged about 10 years and shifting of the



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custody of the child from mother to father requires strong reasons and the father has failed to establish any strong reasons. This Court is also of the view that shifting of custody of a child after ten years from the mother, who taken care of the child from the birth, is a bad exercise to harass the respondent herein, hence this appeal is liable to be dismissed.

16. In the result, this Civil Miscellaneous Appeal is dismissed.

Consequently, connected civil miscellaneous petitions stands closed. No cost.

31.10.2023

stn

Index:Yes/No

Speaking Order:Yes/No

Neutral Citation Case: Yes/No

To:

1. The Principal District Judge,
Thiruvallur.
2. The Section Officer,
V.R.Section,
High Court, Chennai.



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K. RAJASEKAR, J.

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