



C.M.A(MD)No.919 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 02.08.2023

PRONOUNCED ON: 25.08.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.919 of 2017

and

C.M.P.(MD)Nos.9729 and 12037 of 2017

Niranjammal	:	Appellant/Respondent
	Vs.	
1.Rajeswari	:	Respondent/Petitioner
2.Ramprabhu	:	Respondent/Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 47 of Guardians and Wards Act, 1890, against the order dated 10.08.2017, passed in G.W.O.P.No.5 of 2016, on the file of the learned District Judge, Ramanathapuram.

For Appellant : Mr.R.Senthilkumar

For Respondents :Ms.D.Saranya
for R.1
: R2-exparte



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JUDGMENT

This Civil Miscellaneous Appeal is directed against the order passed in G.W.O.P.No.5 of 2016, dated 10.08.2017, on the file of the Principal District Court, Ramanathapuram granting custody of the minor child to the first respondent-mother.

2. It is not in dispute that the marriage between the first respondent and the second respondent was solemnised on 06.03.2011 at Lena Marriage hall, Paramakudi and that due to their wedlock, they were blessed with a female child – Mirunya on 15.12.2011. Admittedly, the appellant/second respondent is the mother of the second respondent/first respondent and the grandmother of the child Mirunya. It is also not in dispute that the marriage between the first respondent and the second respondent was dissolved by a decree of divorce granted in H.M.O.P.No. 755 of 2014, dated 06.12.2014, on the file of the Family Court, Madurai. It is also not in dispute that the first respondent/wife – mother of the minor child is now working as Assistant Section Officer in the Madurai Bench of Madras High Court, whereas the second respondent-father of the minor child is doing business with his father at Malaysia.



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3. For the sake of convenience and brevity, the parties will be referred as per their status and ranking in the trial Court.

4. The case of the petitioner is that as per the permission granted in the divorce order, she visited the school in which her minor daughter was studying, but she was denied permission to see her daughter by the respondents 1 and 2, hence she was subjected to untold misery and mental agony, that the respondents 1 and 2 are making arrangements for the second marriage of the first respondent, that the first respondent, after divorce order, left India for Malaysia leaving the minor child in the custody of his aged mother – second respondent, that the second respondent was then aged 61 years and she was not in a position to meet out the needs and desires of the child, that the petitioner is having necessary educational qualifications and necessary means to take care of her minor daughter, that since the first respondent is in Malaysia, there is no one to take care of the minor child and that therefore, the petitioner being the natural guardian is entitled to get the custody of the minor child.



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5. The defence of the second respondent/grandmother of the minor child is that when her son was working at Malaysia, the petitioner stayed with her at her native place, that during her absence, the petitioner had illegal contact with one Muhi @ Karmuhilan, that despite the advice of the first respondent, she had again seen the petitioner along with the said Karmuhilan in her house during her absence, that the petitioner had immediately left the house leaving the two years old Mirunya with her, that in the enquiry conducted in the All Women Police Station, Paramakudi, on the basis of the complaint lodged, the petitioner expressed her non-willingness to live with the first respondent and subsequently filed a divorce petition, that the petitioner did not take care of the minor child at any point of time, that the petitioner has also given an undertaking before the Family Court, Madurai that she may be permitted to see her minor daughter once in a month and that the petitioner has not taken any efforts to visit the child as agreed before the Family Court, Madurai, but filed G.O.W.O.P., seeking custody of the child.

6. During enquiry, the petitioner has examined herself as P.W.1 and exhibited five documents as Exs.P.1 to P.5. The first respondent had



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remained exparte. The second respondent has examined herself as R.W.1 and adduced no documentary evidence. The learned Principal District Judge, Ramanathapuram, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned order dated 10.08.2017 granting the custody of the minor Mirunya with the petitioner. Aggrieved by the said order of custody, the second respondent has preferred the present appeal.

7. The learned Counsel for the second respondent would submit that the trial Court has failed to consider the submission made by the petitioner before the Family Court in H.M.O.P.No.755 of 2014 that the minor shall be in the custody of the appellant, that the learned trial Judge ought not to have permitted the custody to the petitioner, as the petitioner deserted the matrimonial life due to her illegal affairs and in such circumstances, the welfare of the ward would certainly be protected only by the appellant, that the trial Court has failed to consider that the paramount welfare of the ward would be protected only by the appellant as the petitioner had abandoned the family life and leading an immoral life and the G.W.O.P., filed seeking custody of the child is only to threaten the appellant and that the petitioner has no concern about the



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welfare of the child and the application has been filed only to harass the appellant and make the appellant and his son to heed to the demands of the petitioner.

8. The learned Counsel for the petitioner would submit that though the first respondent/husband had stated no objections before the Family Court for the petitioner to see her minor child in the school, subsequently the petitioner was denied permission by the respondents 1 and 2, that the petitioner was constrained to take the police help to see her minor daughter, that the first respondent after getting orders for divorce and for custody of the minor child with him, left India by allowing the minor child to remain in the custody of his mother – second respondent, that the second respondent was aged 61 years at that time and was not in a position to take care of the minor child properly and effectively, that the first respondent, after entering into second marriage, is in Malaysia and that the trial Court, upon considering the evidence available on records, has rightly granted the custody of the minor child to the petitioner.

9. Now, it is time to consider the legal position. It is necessary to refer two material provisions of law under the Guardians and Wards Act,



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1980 and the Hindu Minority and Guardianship Act, 1956. Section 17 of the Guardians and Wards Act reads as follows:

“17. Matters to be considered by the Court in appointing guardian.—

(1)In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2)In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3)If minor is old enough to form an intelligent preference, the Court may consider that preference.

*(4)[***]*

(5)The Court shall not appoint or declare any person to be a guardian against his will.”

10. Section 13 of the Hindu Minority and Guardianship Act reads as follows:



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“13. Welfare of minor to be paramount consideration.—

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

Both the above provisions deal with the welfare of a minor.

11. It is settled law that while determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for time being in force. No doubt, when the father and mother are alive, the natural guardian would be the father. Section 6 of the Hindu Minority and Guardianship Act specifically constitutes Father as a natural guardian of a minor child. The Hon'ble Supreme Court in ***Smt.Surindar Kaur Sandhu Vs. Harbax Singh Sandhu and another*** reported in ***(1984)3 SCC 698*** has held that [Section 6](#) of the Hindu Minority and [Guardianship Act](#), 1956 cannot supersede the paramount consideration as



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to what is conducive to the welfare of the minor. In ***Mausami Moitra Ganguli Vs. Jayant Ganguli*** reported in ***JT (2008)6 SC 634***, the Hon'ble Supreme Court has held that the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute and the relevant passage is extracted hereunder:

“14.The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is



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presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”

12. In ***Gaytri Bajaj Vs. Jiten Bhalla*** reported in (2012)12 SCC 471, the Hon'ble Apex Court has held as follows:

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and [Wards Act](#), 1890 or Hindu Minority and [Guardianship Act](#), 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability



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of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

13. In ***Nil Ratan Kundu and another Vs. Abhijit Kundu*** reported in **(2008)9 SCC 452**, the Hon'ble Apex Court has specifically observed that in selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child and in that process, the Court is exercising parens patriae jurisdiction and the relevant passage is extracted hereunder:

“56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is



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required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

14. In ***Mamta alias Anju Vs. Ashok Jagannath Bharuka*** reported in **(2005)12 SCC 452**, the Hon'ble Apex Court has held that before deciding the issue as to whether the custody should be given to the mother or the father or partially to one and partially to the other, the High Court must (a) take into account the wishes of the child concerned and (b) assess the psychological impact, if any on the change in custody after



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obtaining the opinion of a child psychiatrist or a child welfare worker and all this must be done in addition to ascertaining the comparative material welfare that the child may enjoy with either parent.

15. Children are not mere chattles nor they are toys for their parents. A child is not an article of personal property to be shared in equal parts. Considering and deciding the matter relating to custody of a child is a very sensitive issue and the Court is required not only to look at the issue on legalistic basis, but to approach with humanness. It is pertinent to note that a heavy-duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

16. Bearing the above legal position in mind, let us consider the case on hand. At the outset, it is pertinent to note that the first respondent – father, after obtaining divorce order, has left for Malaysia by leaving the minor child in the custody of his aged mother. It is also not in dispute that even before the divorce, the first respondent – father used to stay in India for six months and used to work in Malaysia for six



17. No doubt, in Ex.P.5 – divorce order, it has been stated that the petitioner has no objection for the child to be with her husband, but she reserved her right to see the child and that the respondent/husband has stated no objection for the petitioner to see the child in the school.

18. The learned Counsel for the second respondent would submit that since the petitioner has agreed and consented for the minor child to remain with the first respondent, the first respondent has given no objection for granting divorce and that the petitioner, after getting divorce, has taken a “U” turn and claimed the custody of the child.



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contrary to the submission made by her before the Family Court and that therefore, the petitioner is not entitled to get the custody of the child.

19. When the above matter was heard in part, the learned Counsel for the appellant has produced the copies of the depositions given by the petitioner and the first respondent before the Family Court, in H.M.O.P.No.755 of 2014, wherein the petitioner has specifically stated that she will take necessary separate proceedings with regard to the custody of the minor child and that the first respondent has also stated that the petitioner has reserved her right to take action for child custody.

20. Considering the above, it is evident that when the petitioner and the first respondent were appearing before the Family Court for the final disposal of the divorce petition, they were clear that subject to the separate proceedings to be initiated by the petitioner for the child custody, the minor child should remain in the custody of the first respondent for time being. Hence, the contention of the appellant's side that since the petitioner has no right or locus standi to seek the custody of the minor child, as she had already agreed and consented to leave the minor child in the custody of her husband, cannot be accepted.



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Moreover, the custody orders are always considered interim orders and by nature of such proceedings, the custody orders cannot be made rigid and final and that they are capable of being altered and moulded keeping in mind the needs of the child.

21. A Division Bench of the Hyderabad High Court in ***Ahmed Mohiuddin Vs. Shabana Yasmeen*** reported in ***AIR 2018 Hyderabad 150*** has held that the custody orders are only temporary in nature capable of being modified at any time and the relevant passage is extracted hereunder:

“15. We have no doubt that custody orders are only temporary in nature, capable of being modified at any time. But there is a procedure to be followed for modification. Whenever a petition under the Guardians and Wards Act is disposed of finally, the same puts a seal on all questions that arose up to that date. But if there are subsequent developments or changes, which made one party eligible and the other ineligible for custody or guardianship, a fresh main petition may be maintainable. In such an event, the final order passed in the first main petition cannot be treated as res judicata, since the question relating to the interest and welfare of the children is always in a state of flux, depending upon the variation in parameters. Let us take a hypothetical



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case. If after the disposal of a petition under the Guardians and Wards Act, one of the parents had suffered a disqualification or had undergone some kind of a change in his or her financial or family or mental status, the same would give rise to a fresh cause of action for filing a fresh Original Petition. But it will not give a right to one of the parties to seek a modification of the order passed in the main petition by filing an interlocutory application in the disposed of case.”

22. As per the directions of this Court, the child was produced before me. The child Mirunya is now studying .7th std., at Annamalaiyar Higher Secondary School, Pandikoil, Ring Road, Madurai. According to her, she had attained puberty recently. After talking to the minor Mirunya and assessing her state of mind, this Court is of the view that it would not to be in the interest and welfare of the child to change the custody, as she is very much comfortable with her mother and that she has also stated that she is very happy with her mother and likes to continue to stay with her mother. Moreover, the first respondent – father has not claimed the custody. As already pointed out, he remained exparte before the trial Court and before this Court also. It is pertinent to note that the child has been in the care and custody of the petitioner-mother for the past six



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years. As already pointed out, the petitioner is now working as Assistant Section Officer in the Madurai Bench of Madras High Court and is receiving good salary.

23. Considering the entire facts and circumstances and also taking note of the wishes of the minor child, this Court has no hesitation to hold that the impugned order granting custody of the minor child to the petitioner cannot be found fault with and consequently, this Court concludes that the Civil Miscellaneous Appeal is devoid of merits and the same is liable to be dismissed.

24. In the result, the Civil Miscellaneous Appeal is dismissed. The parties are directed to bear their own costs. Consequently, the connected Miscellaneous Petitions are also dismissed.

25.08.2023

NCC : Yes : No
Index : Yes : No
Internet : Yes : No

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- To
1. The District Court, Ramanathapuram.
 2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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25.08.2023