



C.M.A.(MD).No.938 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 05.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.938 of 2017

and

C.M.P(MD) No.9896 of 2017

A.Abitha Rahman

.....Appellant/Respondent

-vs-

A.Shiek Mujibur Rahman

.... Respondent/ Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 47 of Guardian Wardship Act, 1890, against the fair and decretal order dated 13.09.2017 made in G.W.O.P.No.193 of 2014 on the file of Principal District Court, Tuticorin.

For Appellant : Mr.M.Mohammed Ibram Saibu
For M/s.Ajmal Associates

For Respondent : Mr.M.P.Senthil

J U D G M E N T

The present Civil Miscellaneous Appeal has been filed by the mother/appellant challenging the order of the Principal District Court,



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Tuticorin, passed in G.W.O.P.No.193 of 2014, wherein, the guardianship of two minor sons was handed over to the father.

2. The respondent herein had filed G.W.O.P.No.193 of 2014, before the Principal District Court, Tuticorin, seeking custody of two minor sons from the mother viz., appellant herein. At the time of filing of G.W.O.P.No.193 of 2014, the elder son was aged about 10 years and the younger son was aged about 9 years. According to the father, he is Imam in a Mosque and he seeks the custody of both the minor sons from the mother.

3. The mother had filed a detailed counter contending that the father is not properly taking care of the sons and they are residing separately. The sons being very tender in age, they should be with the mother and she is taking care of the minor sons properly. She had also made some allegations that the father had married another lady in the year 2009 and therefore, the custody of the minor sons should not be handed over to the father.



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4. The learned Principal District Judge, Tuticorin, had arrived at the following findings:

(i) The mother had already given a Kula and she had remarried one Sulthan and she had got three children through her second husband. Therefore, the mother is taking care of five children along with the two minor sons whose custody is in dispute in the present appeal.

(ii) Though the husband has taken a stand that unilaterally, the wife had given Kula (Divorce), the husband has not initiated any further proceedings for the cancellation of the said Kula.

(iii) The husband/father is residing at Chennai and he is an Imam in a Pallivasal and he has also got remarried to one Fathima Beevi. Though it is alleged by the wife that it is an illicit intimacy, according to the husband, he entered into the second marriage only with the permission of his first wife.

(iv) Both the minor sons were produced before the Court and the Court enquired them on 15.03.2017. Both the minors have expressed that they are not willing to go with their father and they expressed their willingness to continue in the custody of their mother.

(v) The Court had again called them in the Chamber and they have expressed their intention to reside with their mother. However, the trial Court felt that they have been tutored by the mother.



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(vi) The trial Court relied upon Section 352 of the Mohammedan Law to arrive at a conclusion that the mother is entitled to have the custody of the child up to seven years old.

(vii) The trial Court further found that when the dispute is between the father and the mother, only the welfare of the minor should be predominant and the rights of father and mother cannot be considered.

(viii) The trial Court further found that the mother is already having the custody of five children and she has not established her financial background in order to take care of all the five children.

(ix) However, the father being an Imam in a Pallivasal, he will have a better opportunity to maintain the two minor sons.

(x) Though the wife had contended that she had received a sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) from her family properties, she has not established the said income.

(xi) Just because the father has entered into the second marriage, it is not a bar for granting custody of the minor children to him when it is proved that he is having a proper financial background to maintain both his sons.



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(xii) The trial Court further found that both the sons are teenagers. It is better to be under the custody of the father. Based upon the above said findings, the trial Court allowed G.W.O.P.No.193 of 2014 and granted the custody of both the minor sons in favour of the father. This order is under challenge in the present appeal filed by the mother.

5. According to the learned counsel appearing for the Mother, right from the beginning, both the minor sons are in her custody. They have not been taken care of by the father at any point of time. At this length of time, if the minor children are taken away from the custody of the mother, that would cause great mental disturbance to both the minor sons.

6. The learned counsel appearing for the appellant had further contended that the father is a permanent resident of Chennai. Now, both the sons are studying in Tuticorin. If the custody of the children is transferred to the father, their education would get affected. He further contended that the minor sons are aged about 11 and 14 years. At the time, the Court enquired them, the minor sons have categorically informed the Court that they would like to continue in the custody of their mother and they did not want to be transferred to the custody of the father. The wishes of sons of such maturity



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and age, ought to have been properly appreciated by the Trial Court before ordering the transfer of custody in favour of the father.

7. The learned counsel appearing for the appellant had further contended that the father being an Imam is likely to be transferred from one Pallivasal to another Pallaivasal and therefore, the education of the minor sons would be affected.

8. The learned counsel appearing for the appellant further contended that the father had developed illicit intimacy with one Fathima Beevi and he claims that he had remarried her. In such circumstances, leaving the two minor sons in the custody of the second wife would not be in the welfare of the sons.

9. The learned counsel appearing for the appellant had further contended that the elder son viz., Ahamad Masuthpilal had already attained majority on 23.12.2021. The younger son viz., Mohamed Aloudeen Kilje will be attaining majority in March 2024. At this relevant point of time, the custody of the children may not be disturbed.



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10. Per contra, the learned counsel appearing for the respondent/father, on instructions, submits that the younger boy is about to attain majority in March 2024. Therefore, considering the fact that they have been in the custody of the mother for such a longer period, the said custody may be retained by the mother till the younger son attains majority.

11. However, the learned counsel appearing for the respondent contends that the mother is continuously refusing to permit the father for visitation rights of both the sons and he seeks for having visitation rights of the minor sons.

12. Considering the above said facts, this Court is inclined to pass the following order:

(i) The elder son, viz., Ahamad Masuthpilas had attained a majority on 23.12.2021 and therefore, no further orders are called for relating to the custody of the said elder son.

(ii) As far as the younger son viz., Mohamed Aloudeen Kilje is concerned, his custody shall remain with the appellant/mother.



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(iii) The respondent/father shall have visitation rights to meet his younger son viz., Mohamed Aloudeen Kilje on third Sunday of every month at Rajaji Park, Madurai, between 10.00 a.m to 01.00 p.m.

(iv) The appellant/ mother is directed to comply with this order in letter and spirit. The order shall take effect from May 2023 onwards.

13. With the above said observations, this Civil Miscellaneous Appeal stands partly allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

05.04.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

1. The Principal District Court,
Tuticorin.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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