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C.M.A.Nos.1083 & 1331 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2024

CORAM:

THE HONOURABLE MRS. JUSTICE J.NISHA BANU
AND
THE HONOURABLE MR. JUSTICE P.DHANABAL

C.M.A.Nos.1083 & 1331 of 2024
and C.M.P.No.11995 of 2024

C.M.A.No.1083/2024

1.Cletus Charles

2. Ajamma Charles

.. Appellants

Vs.

Chacko.K.K.

.. Respondent

Civil Miscellaneous Appeal is filed under Section 47 of Guardian and Wards Act r/w. Section 17 of the Family Courts Act, to set aside the fair and decreetal order passed by the Principal Judge, Family Court, Chennai dated 10.10.2023 in G.W.O.P.No.4877 of 2016.



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C.M.A.No.1331/2024

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1.Cletus Charles

2. Ajamma Charles

.. Appellants

Vs.

Chacko.K.K.

.. Respondent

Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act, 1984 to set aside the fair and decretal order passed by the Principal Judge, Family Court, Chennai dated 10.10.2023 in counter claim in I.A.No.2024/2017 in G.W.O.P.No.4877 of 2016.

For Appellants : Mr.A.K.Sriram

(in both appeals) for Mr.A.S.Kailasam and Associates

For Respondent : Ms.Lita Srinivasan

(in both appeals)



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COMMON JUDGMENT

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(Judgment of this Court was made by the Hon'ble Mr.Justice P.Dhanabal)

These Civil Miscellaneous Appeals have been preferred as against the fair and decreetal order passed by the learned Principal Judge, Family Court, Chennai dated 10.10.2023 in G.W.O.P.No.4877/2016 and counter claim in I.A.No.2024/2020 in G.W.O.P.No.4877/2016 wherein the respondent herein has filed the main petition under Section 7 & 17 of the Guardian and Wards Act to declare and appoint him as the legal guardian of the minor son David and to grant permanent custody of the minor son David to him.

2. In the aforesaid G.W.O.P. the appellants herein have filed counter claim in I.A.No.2024/2017 under Order 8 Rule 6(a) of Civil Procedure Code to declare either both the respondents therein jointly or individually as guardians of the minor child David and to grant permanent custody of the minor child to them.



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3. The trial Court passed the fair and decreetal order by appointing the father of the minor child as guardian and also granted custody of the minor child to him by allowing the main Original Petition and by dismissing the counter claim filed by the respondents therein. Aggrieved over the said orders, the present appeals have been preferred by the respondents, in the main original petition.

4. The brief facts of the petition in G.W.O.P.No.4877 of 2016 before the trial Court are as follows:

The petitioner married one Bessy Charles who is the daughter of the respondents and their marriage was solemnized on 05.01.2008 at Kerala. After marriage both were living at Bangalore. The petitioner is working at 'BOSCH' and is earning a handsome salary and the petitioner's wife worked at 'CTS' as Manager and thereafter the petitioner's wife got conceived and she went for delivery at Chennai in the month of June, 2008. On 26.10.2008 a male child namely 'David' was born to them. After the delivery the wife of the petitioner was advised by the Doctors to do a kidney biopsy but she refused to undergo the same. Thereafter, when the petitioner's wife along with the child was at Chennai, the petitioner had



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frequently visited them at Chennai. During the month of January, 2010, the petitioner's wife and son joined with him at Bangalore. Since the petitioner's wife's health condition was seriously affected, after taking treatment from the hospital at Bangalore, the respondents and their son took the petitioner's wife and child to Chennai against the wish of the petitioner. Thereafter, the petitioner's wife died on 03.07.2013. Due to continuous request made by the respondents, the petitioner decided to leave his son with the respondents to get through his difficult period.

4.1 On 18.03.2014 the petitioner received an e-mail from the respondents informing that the employers of the deceased wife contacted them and informed that she had company shares and other assets worth about Rs.1 Crore and only her legal heir can claim for it on or before 31.03.2014 and asked the petitioner to do the needful before the expiry period. After some time the petitioner requested the respondents to hand over his son but the petitioner was completely denied access to the child. On 11.10.2014 the petitioner went to the respondent's house to see the child but he was physically abused by the respondent's son. Thereafter, the petitioner issued legal notice dated 23.12.2014 to the son of the



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respondents calling upon him to stop making derogatory marks on the social media.

4.2 The petitioner being the father is the natural guardian of the minor child and the minor child is presently under the custody of his grandparents and his brother-in-law who is unmarried. The child was already heavily tutored and is acting on the instructions of the respondents. Since the date of birth of the child till the death of the petitioner's wife, the petitioner had been taking care of all his needs. The child was left with the respondents to get over his difficult period. The petitioner has always been a very considerate, loving, caring and dutiful father towards his only son. The respondents and his family are greedy people and they will go to any extent to fulfil their desire in grabbing money. It is unsafe to leave his son to continue to live with the family of the respondents as the growth and development of the child will be very badly affected. Hence, the petitioner is entitled for permanent custody of the minor child David.



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5. The brief averments of the counter and counter claim filed by the respondents are as follows:

The averments made in the petition are denied as false. The petitioner's father was working in the Defense Department and after his retirement he kept aloof from his family. The petitioner's mother exhibited peculiar behaviour whenever the respondents visited her and was hard of hearing. The petitioner's sister is unmarried and has suffered from mental illness since her teens. The petitioner visited his wife only once in every two months between July, 2008 and February, 2010. The petitioner never showed any concern for his wife and he did not take her for health check up in order to avoid the medical expenses. The petitioner allowed the respondent to take care of their ailing daughter and the minor grandson only in order to shirk his responsibility towards his wife and son. The petitioner was never inclined to take custody of his minor son. Even after the death of his wife, he did not take any steps to seek permanent custody of his minor son. After the demise of the mother of the minor son, the petitioner visited the son only once and has not taken any steps to take his son back along with him to Bangalore. Thereafter, the petitioner began seeking custody of the child once he came to know about



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the money that would be inherited by him and the minor son in their capacity as the legal heirs of his wife Blessy Charles.

5.1 The respondent's son made numerous request to the petitioner to sign the paper for creation of the Trust fund in the name of his minor son but the petitioner deliberately avoided to give his consent to such a Trust fund. In the alternate, the respondents wanted the money to be deposited in the bank account of the first respondent in his capacity as maternal grandfather, local guardian and the person taking care of all the monetary and allied needs of the minor child. The petitioner insisted that the minor child should be handed over to him so that he could open a bank account in Bangalore and control the money that would be inherited by his minor son. The petitioner was unwilling to give his consent for the money to be deposited in the entirety in the name of his minor son.

5.2 The respondents are incurring expenses to the minor child from his birth till date. The respondents are also taking care of all the educational expenses of their minor child and the petitioner offered to pay the same only when he wanted to use the reimbursement as barter in



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exchange for the permanent custody of the minor child and complete control over the inheritance of his minor son. Under these circumstances the petitioner is now seeking custody and guardianship of his minor son. The minor grandson has been in the custody of the respondents since his birth and they have taken care of him. The respondents are very affectionate towards their minor grandson and he is also very comfortable with them. On the other hand, the petitioner has never taken care of any of the needs of his minor child and the child is now studying in Chennai and he is residing at an apartment complex with 24 hours security and he is very intelligent and very comfortable in his present home. Therefore, the claim of the petitioner is liable to be dismissed and the respondents may be declared as guardians of the minor child David and permanent custody of the minor child David shall be granted to them.

6. The brief averments in the reply to the counter claim filed by the respondents are as follows:

The averments made in the counter claim are all false. The petitioner is the only natural guardian after the death of his wife. The respondents are age old persons and they ought not to have the custody of the minor



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child. The respondents are harassing the petitioner by posting false information in Internet by the respondent's son. All assets of the petitioner's wife will only go to their only son. The second respondent had not allowed her daughter to visit the petitioner's parents home frequently. The petitioner provided for all other expenses to the entire respondent's family including their son's stay for more than one year. However, the respondents hated the petitioner visiting them at Chennai.

6.1 The petitioner was with his minor son after he returned from office and also spent the entire weekend and holidays with his son and wife. The petitioner used to buy costly toys for the child during his every visit from Bangalore. The petitioner also spent huge efforts in arranging necessary documents for clearing the funds from the employer of his wife. The petitioner's paramount interest was to first resolve the matter of gaining access to his child, but instead of discussing about the child the respondent's main interest was in gaining access to the funds. The respondent's son is dangerous and if the petitioner's son continues to stay with him, it will cause damage to the child's mind and will lead to the child to go against his father.



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6.2 The Hon'ble Supreme Court has directed the petitioner to provide details of investments which could be made in favour of his son, but they never directed any Trust to be formed. The respondents who are aged people are using their minor son to threaten and grab the assets of their deceased daughter for their unmarried son. The respondents are not interested in the future and welfare of the minor child. Therefore, the counter claim is liable to be dismissed.

7. Before the trial Court on the side of the petitioner, P.W.1 and P.W.2 were examined and Exs. P1 to P30 were marked, through P.W.1 and Ex.X1 was marked by P.W.2. On the side of the respondents R.W.1 was examined and Exs.R1 to R17 were marked. After hearing both sides, the trial Court allowed the Original Petition and dismissed the counter claim made by the respondents.

8. The learned counsel appearing for the appellants would contend that the respondent is the son-in-law of the appellants and the marriage between their daughter and the respondent was solemnized in the year 2008. From their wedlock, the minor son David was born to them on



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26.10.2008. Since the date of birth of child, he has been under the care and custody of the appellants. After giving birth to the child, the daughter of the appellants died on 03.07.2013 due to some ailment. Even during treatment period of appellant's daughter, the minor child was in their custody. The respondents used to visit occasionally to see his wife.

8.1 The minor child David is under the care and custody of the appellants and he is comfortable with them. After the demise of his wife, the petitioner occasionally come to see his son. In the meantime, the employer of the deceased daughter of the appellants sent a letter that she had some assets worth about Rs.1 Crore and thereby it has to be claimed on or before 31.03.2014. Hence, there was some misunderstanding between the appellants and the respondents in respect of possession of the said amount. Therefore, the respondent has filed the main petition for declaration to declare him as guardian for the minor son David and hand over the custody of the minor to him.

8.2 The appellants have filed counter along with counter claim to declare them as guardians for the minor David and to dismiss the petition



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filed by the respondent / petitioner. The trial Court allowed the main petition and declared the respondent / father as guardian for the minor David and directed to handover the custody of the minor to him. The counter claim filed by the appellants / grandparents was dismissed. Therefore these appeals have been preferred by the grandparents of the minor David. In fact the minor David is under the care and custody of the appellants since his birth till date. The respondent being the father never had taken care of his studies. The appellants are taking care of minor David and he is comfortable with them and he is now studying in a good and reputed school but the respondent being the father of the minor David has not taken any steps after the death of his wife and only after the letter received from the company in respect of shares and assets, he filed this petition.

8.3 Before the trial Court, R.W.1 was examined and Exs. R1 to R17 were marked and they categorically deposed about the custody of the minor and the minor is comfortable with the appellants. But the trial Court appointed the respondent father as guardian as per the Guardian and Wards Act. It is well settled law that the welfare of the child is the



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paramount consideration and the minor is being with the respondents from his date of birth and thereby the custody has to be continued with the appellants. But the trial Court failed to consider the same and erroneously allowed the petition filed by the respondent and dismissed the counter claim filed by the appellants. Therefore the appeals filed by the appellants are liable to be allowed by setting aside the order passed by the trial Court in the Original Petition as well as the counter claim.

8.4 In support of his above contention, the learned counsel for the appellant has relied on the following judgments:

- i) Judgment of the Hon'ble Supreme Court in **Anjali Kapoor Vs. Rajiv Baijal reported in (2009) 7 SCC 322;**
- ii) Judgment of the Hon'ble Supreme Court in **Rosy Jacob Vs. Jacob A.Chakramakkal reported in 1973(1) SCC 840;**
- iii) Judgment of the Hon'ble Supreme Court in **Gaurav Nagpal Vs. Sumedha Nagpal reported in (2009) 1 SCC 42;**
- iv) Judgment of the Hon'ble Supreme Court in **Mausami Moitra Ganguli Vs. Jayanti Ganguli reported in (2008) 7 SCC 673;**



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v) Judgment of the Hon'ble Supreme Court in **Nil Natan Kundu & another Vs. Abhijit Kundu reported in (2008) 9 SCC 413;**

vi) Judgment of the Hon'ble Supreme Court in **Sheoli Hati Vs. Somnath Das reported in (2019) 7 SCC 490;**

vii) Judgment of the Hon'ble Supreme Court in **Lekha Vs. P.Anil Kumar reported in (2006) 13 SCC 555;**

9. The learned counsel for the respondent would contend that the respondent is the father of minor David and he is the natural guardian. As per the Guardians and Wards Act while the natural guardian is alive the custody of the minor child should be with the natural guardian. In fact the minor child was under the custody of the respondent along with his wife and thereafter his wife suffered from illness and thereby for taking treatment she was taken by the appellants to Chennai along with child and thereafter the child was under the custody of the appellants. The appellants are aged persons and they are unable to maintain themselves. Therefore, if the custody is continued with the appellants the future of the minor child will be spoiled. The son of the appellants is unmarried and unemployed. Therefore the custody of the minor child has to be entrusted



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with the respondent father. The trial Court after elaborately discussing about the legal position, rightly directed the appellants to hand over the custody of the minor child to the respondent father and he was also declared as natural guardian to his minor son David. Therefore the present appeals are liable to be dismissed.

9.1 In support of his above contention, the learned counsel for the respondent relied on the following judgments:

- i) The judgment of the Hon'ble Supreme Court in **Mohammad Shafi Vs. Shamim Banoo reported in 1978 SCC Online Bom 51;**
- ii) The judgment of the Hon'ble Supreme Court in **Reginall Danies Vs. Sarojum and another reported in 1968 SCC Online Mad 148;**
- iii) The judgment of the Hon'ble Supreme Court in **Re: Appointment of Guardians .. Vs. Unknown on 30, November, 2004 reported in 2005 (2) Bom CR 655.**

10. This Court heard both sides and perused the records. Upon hearing both sides and perusing the records, the points for determination in these appeals are as follows:



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C.M.A.No.1083/2024:

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- i) Whether the petitioner / father of the minor child in G.W.O.P. can be declared as guardian for the minor child David ?
- ii) Whether the petitioner / father of the minor child in G.W.O.P. is entitled to custody of the minor child David ?
- iii) Whether the appeal has to be allowed or not ?

C.M.A.No.1331/2024:

- i) Whether the grandparents of minor child David can be declared as guardian of minor child David ?
- ii) Whether they are entitled to custody of the minor child David ?
- iii) Whether the appeal has to be allowed or not ?

11. For the sake of convenience and brevity the parties hereinafter will be referred to as per their original status / ranking before the trial Court.

12. Point No.1 in both the appeals:

The respondent in these appeals being the father of the minor child has filed the main petition for the relief of declaration declaring him



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as guardian for minor child David and entrust the custody of the minor child to him. In the said petition these appellants herein have filed a counter claim to declare them as guardian of the minor child David and entrust the custody of minor to them. The petitioner in the main G.W.O.P. i.e. the respondent in these appeals is none other than the father of minor David and the appellants herein are the maternal grandparents of minor David. Both the parties are claiming guardianship of minor and the custody. Both the trial Court On the side of the petitioner, P.W.1 and P.W.2 were examined and Exs.P1 to P30 were marked and on the side of the respondents R.W1 was examined and Exs.R1 to R17 were marked. Both the parties adduced evidences based on their pleadings.

12.1 It is an admitted fact that the minor child is under the care and custody of his maternal grandparents since from his birth till date and he is studying in a reputed school and the grandparents are taking care of him. The father of the minor child also not denied the said facts. As per the Guardian and Wards Act, the father of the minor child is the natural guardian and thereby, he has to be appointed as guardian of the minor child and his custody has to be given to his father. According to the



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maternal grandparents of the minor child, the minor child is under their custody since his birth till date and he is very comfortable with them.

12.2 It is a well settled law that as far as the custody of the minor child is concerned, the welfare of the minor is a paramount consideration and both the parties admitted that the minor is with the custody of the maternal grandparents since his date of birth. But the trial Court by referring to the legal provisions as per Section 19 of the Guardian and Wards Act, held that the father is the natural guardian and appointed him as guardian to the minor child. The trial Court failed to consider the welfare of the minor child and the healthy atmosphere. The child is aged about 15 years and his willingness should also be taken into account to decide the custody. The trial Court failed to examine the minor child as to his willingness and without examining him, passed an order directly to hand over the custody of the minor child David to his father. In the trial Court order it is nowhere stated about the examination of minor child to ascertain his willingness.



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12.3 This Court directed the parties to produce the minor child David and also examined the minor child in Chamber. The minor child categorically stated that he is comfortable with his grandparents and his maternal uncle and they are very well taking care of him and he refused to go with his father. He also expressed his willingness that if his father is willing to see him, he has no objection. Further, there is no adverse remarks against the grandparents of the minor child except that they are aged persons. However, the minor child is very affectionate towards his grandparents and he is comfortable with them and thereby against the will of minor child it is not appropriate to hand over his custody to his father. Moreover the grandparents of the minor David also never acted as against the interest of the minor.

12.4 The trial Court failed to examine the minor child as to his willingness. The minor child has been under the custody of the maternal grandparents from his date of birth. Though the father is the natural guardian of the minor child, he cannot be appointed as guardian and the custody of the minor David cannot be granted to him since the minor is under the custody of appellants from his date of birth. Further no



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evidence is adduced by the father that he had taken care of his minor child and his maintenance. Even as per Section 19 (b) of the Guardian and Wards Act, if the Court is of the opinion that the parents of the minor child are unfit to be guardian of the minor, then the Court can appoint court guardian. Therefore the welfare of the minor child is on paramount consideration.

12.5 The learned counsel for the appellant has relied on the following judgments:

i) Judgment of the Hon'ble Supreme Court in **Anjali Kapoor Vs. Rajiv Baijal reported in (2009) 7 SCC 322;**

ii) Judgment of the Hon'ble Supreme Court in **Rosy Jacob Vs. Jacob A.Chakramakkal reported in 1973(1) SCC 840;**

iii) Judgment of the Hon'ble Supreme Court in **Gaurav Nagpal Vs. Sumedha Nagpal reported in (2009) 1 SCC 42;**

iv) Judgment of the Hon'ble Supreme Court in **Mausami Moitra Ganguli Vs. Jayanti Ganguli reported in (2008) 7 SCC 673;**

v) Judgment of the Hon'ble Supreme Court in **Nil Natan Kundu & another Vs. Abhijit Kundu reported in (2008) 9 SCC 413;**



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vi) Judgment of the Hon'ble Supreme Court in **Sheoli Hati Vs. Somnath Das reported in (2019) 7 SCC 490;**

vii) Judgment of the Hon'ble Supreme Court in **Lekha Vs. P.Anil Kumar reported in (2006) 13 SCC 555;**

12.6 On a careful perusal of the aforesaid judgments, it is clear that the paramount welfare of the minor child is the only consideration and the rights of the parties have no bearing in issues relating to guardianship and custody. The paramount welfare of the minor is the only consideration to be considered while deciding the issue of the guardianship and custody. In the case on hand also the minor child was under the custody of the appellants who are the grandparents from his date of birth to till date and he is growing well in all respects.

12.7 the learned counsel for the respondent relied on the following judgments:

i) The judgment of the Hon'ble Supreme Court in **Mohammad Shafi Vs. Shamim Banoo reported in 1978 SCC Online Bom 51;**

ii) The judgment of the Hon'ble Supreme Court in **Reginall Danies**



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Vs. Sarojum and another reported in 1968 SCC Online Mad 148;

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iii) The judgment of the Hon'ble Supreme Court in Re: Appointment of Guardians .. Vs. Unknown on 30, November, 2004 reported in 2005 (2) Bom CR 655.

12.8 On a careful perusal of the above judgments it is clear that only when the father of the minor child is an unfit person to be appointed as guardian, the other person has to be appointed as guardian. In the case on hand, the father of the minor child has not even taken care of the expenses of the minor child and as per the available evidence, it is seen that the grandparents only meet out the expenses of the minor child. Further the minor child is also not willing to go with his father and he is willing to be with his grandparents only. Therefore, the above judgments relied upon by the respondent are no way helpful to decide the case in his favour.

12.9 In the case on hand, considering the welfare of the minor child, it is not appropriate to disturb the custody of the minor child David and thereby the grand parents of minor child David i.e. appellants herein have



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to be appointed as guardian for the minor David and the custody of the minor child David to be continued with them. Thus the point No. (i) in both the appeals are answered.

13. Point No. (ii) in both appeals:

This Court in the previous point considering the welfare of the minor child, already declared the grandparents of the minor child i.e. appellants as guardian for the minor child David and thereby the grandparents of the minor child are entitled to the custody of the minor child David and the father of the minor child is not entitled to the custody of the minor child David. Thus the point No.(ii) in both appeals are answered.

14. Point No. (iii) in both appeals:

Before the trial Court, the father of the minor child David has filed a G.W.O.P. to declare him as guardian to the minor child and to have the custody of the minor child. The counter claim was filed by the grandparents of the minor child for declaration declaring them as guardian of the minor child. The trial Court, after elaborate discussion, held that the grandparents are aged and they are depending upon their



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son and the father of the minor child is the natural guardian and thereby declared the father of the minor child as guardian and directed the grandparents to hand over the custody of the minor child to his father. The trial Court failed to examine the minor child in respect of his willingness since he is aged about 15 years and he has been growing with his grandparents. Without examining the minor child the trial Court had come to a conclusion that the father of the minor has to be declared as guardian to the minor child David and directed the appellants / grandparents to hand over the custody of the child. Therefore, the orders passed by the trial Court is unsustainable and the same are liable to be set aside. Thus point No.(iii) in both the appeals are answered.

15. In the result, C.M.A. No.1083 of 2024 is allowed and the fair and decreetal order passed by the learned Principal Judge, Family Court, Chennai in G.W.O.P.No.4877 of 2016 is hereby set aside and the petition is dismissed. However the petitioner being the father of the minor child is at liberty to visit the minor son on every Sunday subject to the desire of the minor child.



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In the result, the C.M.A. No.1331 of 2024 is allowed and the order passed by the learned Principal Judge, Family Court, Chennai in counter claim in I.A.No.2024/2017 in G.W.O.P.No.4877/2016 is set aside and the counter claim is allowed and the appellants are jointly declared as guardian for the minor child David for his person and property until his attaining the age of majority and they are entitled to have the custody of the minor child David. No costs. Connected miscellaneous petition is closed.

(J.N.B. J.,)

(P.D.B. J.,)

24.06.2024

Index: Yes / No

Speaking order / Non speaking order

Neutral Citation : Yes / No

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The Principal Judge,
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**J.NISHA BANU, J.,
and
P.DHANABAL, J.,**

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