



C.M.A.(MD).No.550 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.03.2024

CORAM:

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
and
THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

C.M.A.(MD).No.550 of 2023
and
C.M.P.(MD).Nos.7138 and 7139 of 2023

Ravisankar

... Appellant/Petitioner

Vs.

Saranyadevi

... Respondent/Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 19 of the Family Court Act, 1984, against the order passed in G.W.O.P.No.278 of 2021, dated 30.08.2022 on the file of the Family Court, Sivagangai and allow the above Civil Miscellaneous Appeal.

For Appellant : Mr.J.Jeyakumaran

For Respondent : No Appearance



C.M.A.(MD).No.550 of 2023

WEB COPY

J U D G M E N T

(Judgment of the Court was delivered by **V.BHAVANI SUBBAROYAN, J.**)

This Civil Miscellaneous Appeal is filed by the appellant challenging the order passed in G.W.O.P.No.278 of 2021, dated 30.08.2022 on the file of the Family Court, Sivagangai.

2. The brief facts of the case are as follows:

The marriage between the appellant and the respondent was solemnized on 01.11.2009. Out of the wedlock, two female children were born to them on 07.08.2010, 26.04.2014. Subsequently, misunderstanding arose between them. In the year 2020, the respondent filed a maintenance petition in M.C.No.29 of 2020 before the Family Court, Sivagangai, wherein, the Family Court has passed an order awarding monthly maintenance and the said order was subsequently, modified by this Court in Crl.RC(MD)No.408 of 2022. Subsequently, the appellant filed G.W.O.P.No.278 of 2021, seeking permission to meet his children weekly once.



C.M.A.(MD).No.550 of 2023

WEB COPY

3. Before the family Court, the appellant examined himself as P.W.1 and marked six documents Exs.P1 to P6. On the side of the respondent, the respondent examined herself as R.W.1 and marked Ex.R1.

4. The Family Court after considering the facts and circumstances, has partly allowed the petition, permitting the appellant to meet his children on third Saturday of Every month before the Mediation Centre, Sivagangai between 10.30 a.m., and 11.30 a.m., in the presence of the Advocate Commissioner. Aggrieved by the said order, the appellant has filed this appeal.

5. The learned counsel appearing for the appellant would submit that the appellant took effective steps for reunion. However, the respondent deserted him and refused to live with the appellant. The appellant is having right to see his children. However, the Family Court without considering the plight of the appellant has partly allowed the petition filed by the appellant seeking to visit his children weekly once and therefore, the said order is liable to be set aside.



C.M.A.(MD).No.550 of 2023

WEB COPY

6. We have heard the submissions of the learned counsel appearing for the appellant and perused the materials placed before us.

7.This Court framed the following points for determination:-

(i).Whether the Court below rightly declined to appoint the appellant as guardian of two female children?;

(ii)Whether the Court below is correct in not permitting the appellant to see his two female children in every week?.

8. From 2020 onwards the petitioner has not taken any steps to live with the respondent and his children. The Court below found that the children deposed before the Court that the appellant had drinking habit and he is habituated to drinking and under to bear their mother. Apart from that, he also attempted to misbehave with her mother-in-law. He also does not pay any school fees and van fees. Apart from that, the learned trial judge called the children and enquired about their wishes. One of the daughter Kanisha refused to go with her father. Another daughter Riya was inclined to go with her sister Kanishka. Therefore, the



C.M.A.(MD).No.550 of 2023

learned trial Judge, dismissed the Guardian Original petition filed by the appellant.

9.Following precedents on the custody of child are required to be seen to decide this appeal necessary to extract below:

“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 of humanity. Mankind has to best hold of itself. The parents themselves like for them. The embody of 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.⁽¹⁾ 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



C.M.A.(MD).No.550 of 2023

WEB COPY

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.⁽²⁾ The children are not mere chattles: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their 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 member of the society...”⁽³⁾ The principles in relation to the custody of a minor child are well settled. In 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 the time being in force.⁽⁴⁾ The Courts in exercise of parens patriae jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also.^(4a) “---The welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral



C.M.A.(MD).No.550 of 2023

and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”⁽⁵⁾ “Welfare is an all encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents”.⁽⁶⁾ The Court is entrusted with the judicial discretion to order return of the Ward to the custody of this guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words “ward” and “guardian” leave little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law.⁽⁷⁾

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- 1 2017 (3) SCC 231
 - 2 2009 (1) SCC 42
 - 3 2019 (7) SCC 42
 - 4 2017 (3) SCC 726
 - 5 2017 (3) SCC 726



C.M.A.(MD).No.550 of 2023

WEB COPY

10. Section 17(3) & (5) of the Guardians and Wards Act, 1890 and ratified Universal declaration convention on the Rights of the Child dated 02.09.1990, demands to get the views and desired of the child. The relevant portions are as follows:

Section 17(3) of the Guardians and Wards Act, 1890:	Section 17(5) of the Guardians and Wards Act, 1890:	Article 12: Universal declaration convention on the rights of the child
If minor is old enough to form an intelligent preference, the Court may consider that preference.	The Court shall not appoint or declare any person to be a guardian against his will.	1.States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2.Fro this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

11.1. In this aspect the Division Bench of this Court has held as follows: (I) 2003 4-L.W. 101 (D.B):

“While appointing a guardian, the paramount consideration is that his appointment shall **not be against the will of the minor**”.



C.M.A.(MD).No.550 of 2023

WEB COPY

“If the minor is capable of understanding what is happening in and around, his education, future prospects etc., undoubtedly their views and desire have to be given weight and it is the responsibility of the Court to ascertain their desire in person”.

(2) Similarly in C.M.A.No.2245/15 (DB)-Dr.V.Sridevi Vs. Dr.C.S.Mani:

“Family Court ought to have seen that the Hon'ble Supreme Court and this Hon'ble Court, have clearly and consistently held that it is the welfare of the minor child which is of paramount importance in granting custody or in changing the custody already granted. Family Court ought to have appreciated the fact that a boy of nearly 12 years who has all along been living with the mother, cannot be forced to live with his biological father, **against his wishes**. Such an arrangement would go against the interest of the minor”.

11.2.The right of children to choose their environment is their fundamental right under Article 21 of the Constitution of India. Further, the above provision and the convention also reiterated the same. Hence, the learned trial Judge rightly called the children and their wishes were



C.M.A.(MD).No.550 of 2023

also heard. The children appear to be more matured than their age and they appeared before the Hon'ble Trial Court and expressed their unwillingness to go with their Father and stated that they are living with their mother and Grandparents in a comfortable environment with proper education, proper motherly care etc. The mother of the children, namely, the respondent also pursuing P.hd Course and she and her family members are providing all comforts and the children are leading a peaceful life.

1.(xi) 2011 UKSC 4

ZH(Tanzania) FC (Appellant)

Vs.

Secretary of State for the Home Department (Respondent)

The Hon'ble Supreme Court of UK also emphasized the best interest of the child as well as the choosing of their right and also the hearing of the child regarding their comfort ability and the adherence to the child wishes considering all the universal convention.

1(xii).The Hon'ble Supreme Court of Canada in Young

Vs.

Young(1993 SCR 4)

Consider the scope of the best interest of the child.



C.M.A.(MD).No.550 of 2023

1(xiii).Even Juvenile Justice (Care and Protection of Children)

Act 2015 also provides best interest of child in Section 2(9) “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

1(xiv).Therefore, the learned trial Judge considered the best interest of the children and dismissed the petition and this Court finds no merit in the contention of the appellant to set aside the well considered judgment of the Court below.

The learned trial Judge also considered the comparative atmosphere suitable to the children and refused to grant the custody to the appellant.

17 (1) of the guardians and Wards Act	17(2) of the guardians and Wards Act:
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.	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.



C.M.A.(MD).No.550 of 2023

WEB COPY

2(ii). In this case the learned trial Judge has considered the above said provisions in entirety and correctly dismissed the petition.

2012 (5) SCC 355 (Para 17)

“Normally, grandparents can spare more time with their grand children and especially company of well educated grandparents would not only help the children in their studies but would also help them to imbibe cultural and moral values and good manners”

12.The learned trial Judge also considered trauma that child is likely to experience in the event of change if such atmosphere. The Hon'ble Supreme Court in **2000 (9) SCC 745**.*The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction, will have to be borne in mind.*

13.The learned trial Judge, called the two girl children before the Court. One child, namely, Kanishka, refused to go with her father and another child, namely, Riya, expressed her wish to go with her mother and her sister. The learned trial Judge after evaluating the entire



C.M.A.(MD).No.550 of 2023

WEB COPY

evidence, dismissed the custody petition and granted permission to the petitioner to see his children in the presence of the Advocate Commissioner on the third Saturday of every month at 10.00 am., before the Conciliation Centre attached with Sivagangai Court and allowed to converse with his children. The learned trial Judge directed to pay a sum of Rs.750/- Advocate fee to the Advocate Commissioner for each hearing and Rs.500/- to the respondent/wife for the expenditure to bring the children to Court. On the basis of the said order, the respondent should allow the petitioner to meet children. In order to connect the bond between the father and daughter, the said direction was issued. But, the respondent/wife is not allowing the petitioner. The petitioner would further submit that he may be allowed to see the children in the presence of the Advocate Commissioner atleast every second Saturday of month.

14. We are of the view that the Family Court has passed a well-merited order and the same does not warrant interference at the hands of this Court. However, considering the submissions made by the learned counsel appearing for the appellant, we are inclined to modify the same, to the extent mentioned below.



C.M.A.(MD).No.550 of 2023

(i) *The appellant is permitted to meet his children on second Saturday of every English Calendar month between 10.00 a.m., and 03.00 p.m., in the District Mediation Centre, Sivagangai, in the presence of Advocate Commissioner. The respondent/mother should leave the children and stay away from the Mediation Centre;*

(ii) *The appellant is permitted to bring any gifts and eatables to the children.*

15. In the result, this Civil Miscellaneous Appeal, is partly allowed and the order passed in G.W.O.P.No.278 of 2021, dated 30.08.2022, on the file of the Family Court, Sivagangai, is modified to the extent indicated above. No costs. Consequently, connected Miscellaneous Petitions are closed.

[V.B.S.,J.] [K.K.R.K.,J.]
15.03.2024

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
PM/sbn



C.M.A.(MD).No.550 of 2023

To
WEB COPY

- 1.The Judge,
Family Court, Sivagangai.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A.(MD).No.550 of 2023

V.BHAVANI SUBBAROYAN,J.
and
K.K.RAMAKRISHNAN,J.

PM/sbn

C.M.A.(MD).No.550 of 2023

15.03.2024