



C.M.A(MD)No.885 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : 04.07.2024

CORAM

THE HONOURABLE MRS.JUSTICE G. ILANGO VAN

C.M.A(MD)No.885 of 2021

and

C.M.P(MD)No.8347 of 2021

Karpagam

... Appellant / Respondent

Vs

Alamelu @ Geetha

... Respondent / Petitioner

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 47 of the Guardians and Wards Act, 1890 to set aside the order passed in G.W.O.P.No. 2 of 2018 dated 30.04.2021 passed by the Principal District Court, Sivagangai.

For Appellant : Mr.M.V.Venkatashesan
for Mr.S.Vellaichamy

For Respondent : Mr.L.Shaji Chellan



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JUDGMENT

This Civil Miscellaneous Appeal is filed to set aside the order passed in G.W.O.P.No.2 of 2018 dated 30.04.2021 passed by the Principal District Court, Sivagangai.

2. Brief averments in the petition is that the petitioner by name Giri was married to one Pavithra on 18.03.2013. Out of the wedlock a female child namely Ananya was born on 22.03.2014. On the date of the petition, she was aged about 4 years. Giri was appointed as Manager in Tata Interational DLT, Pvt.Ltd., in Pune. From the date of birth, the child was taken care by the petitioner. Pavithra died in an accident that took place on 06.09.2016 and Giri sustained injuries in the same accident. The petitioner is physically and financially well placed to take care of the minor child. Apart from the Guardianship to the minor, the petitioner and her husband are entitled to the properties left by Giri. So the petition is filed seeking appointment of herself as the legal guardian of the child and to the properties.



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3. That was resisted by the appellant stating that she is the maternal grandmother of the child. In the accident that took place on 06.09.2016, the petitioner also sustained grievous injuries. After the death of Pavithra, the minor was in the care and custody of Giri. Giri also died on 26.07.2017. After that, the minor was under the care and custody of the petitioner for short time. The petitioner is unable to walk and bed ridden because of the accidental injuries. The respondent requested the petitioner to hand over the child for proper care. At that time, she was told that the minor is in the custody of one Sivakumar and one Uma. The respondent approached the above said persons for receiving the custody of the child. They promised to hand over the child after some time. But later, they also refused to hand over the child. For saving the life of the child they filed HCP No.1689 of 2017 before this Court. At that time, the petitioner told the Court that the minor is not in their custody. Later that petition was withdrawn. Since it was told that the child was handed over to one Venkatakrishnan of Tiruvanaikaval, Tiruchy. Later they issued notice demanding the custody of the child on Venkatakrishnan on 20.02.2018. Later she came to know that the child is studying in Akilandeshwari Vidyalaya School, Thiruvanaikaval, Tiruchy. So she filed



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G.W.O.P.No.30 of 2018 before the Principal District Judge, Trichy, which is now pending. A petition in I.A.No.1 of 2019 was filed seeking interim custody of the child. Suppressing all these facts, the present petition is filed. CMA(MD)No.318 of 2020 was filed before this Court. The matter was remanded back directing the trial Court to implead the respondent as a party. She is hale and healthy aged about 60 years. Having sufficient financial capability to look after the child. The child is also very affectionate. Her second daughter is also very affectionate. So they are proper persons to take care of the custody of the child.

4. Apart from that it is also stated that the petition is bad for non joinder of necessary parties. The Principal District Judge, Sivagangai, has no jurisdiction to entertain this petition. A reply counter was filed by the petitioner refuting the allegations made in the counter.

5. Before the enquiry Court, on the side of the petitioner three (3) witnesses were examined and Seventeen (17) documents were marked and on the side of the respondent one (1) witness was examined and Seventeen (17) documents were marked. Finally the Court concluded that the respondent



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herein / petitioner, is the proper person to take care of the custody of the child.

Regarding the guardianship to the property of the minor it was dismissed.

Against which this appeal is preferred.

6. Heard both sides.

7. The paternal grandmother on one side and the maternal grandmother on the other side are seeking custody of the minor namely Ananya. Ananya, unfortunately, lost both her parents in an accident. The respondent herein who is the petitioner in the main petition also sustained injuries in the very same accident. According to the respondent and as well as the petitioner, the respondent is now in wheel chair, suffering from spinal cord injuries. By pointing out her physical disability on the side of the respondent, now the appellant contended that such a person is not a fit person to take care of the custody of the child. So in the probability, the custody of the child ought to have been ordered to be in their custody. According to her, when a person is incapable of taking care of herself on her own, but with a help of a third party, is equally incapable of taking care of the child who is aged about only 4 years at the time of filing the petition and now aged about 11 years as admitted by



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the appellant. So according to the appellant, the welfare of the child is now under severe threat at the hands of the respondent.

8. Per contra, learned counsel for the respondent would submit that mere physical disability does not disentitle her to claim custody of the child since she is capable of taking care of the child with the assistance of her own family members or with the third parties. The physical disability should not be considered as a disqualification.

9. Since the main issue is only with regard to the physical disability of the respondent herein, we can concentrate that point alone. We will go to the finding of the trial Court on that aspect. Paragraphs 11,12 and 13 are relevant for extraction:

" 11. The petitioner has to establish the facts that she is capable of taking care of minor Child Ananya. In this aspect, the respondent contended that the petitioner is not a physically and financially fit person to take care of minor child Ananya and the petitioner tried to hand over the custody of minor child to third persons. It is the duty of the respondent to prove that the petitioner is not capable of taking care of minor child Ananya. The respondent has not establish the above facts by producing sufficient



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evidence. In this aspect, this Court relied on the decision of Hon'ble Delhi High Court in 2015 - 3 - CCJD - 115 - SN. It is held that the allegations levelled against the petitioner as she is not physically fit, is no relevant until and unless it is proved by the respondent to the satisfaction of the Court.

12) Further more, the petitioner herself admits that she suffered injuries due to the accident. PW1 in her cross examination deposed that

" என் மகனுக்கு நேர்ந்த அதே வாகன விபத்தில் தான் எனக்கும் காயம் ஏற்பட்டது என்றால் சரிதான். எனக்கு முதுகு தண்டில் காயம் ஏற்பட்டது. நான் தற்பொழுது சிகிச்சை எடுத்து வருகிறேனா என்றால் இல்லை. நான் என்னுடைய அடிப்படை வேலைகளுக்கு மற்றொருவரை சார்ந்திருக்கிறேன் என்றால் சரியல்ல. "

On considering the above evidence of P.W.1, she is a physically fit person though sustained injuries in the accident.

13) Moreover, this Court observed the activities of the petitioner during the course of trial. In the entire proceedings, the petitioner is observing the proceedings conducted in this petition, even sitting in the wheel chair. From the above, this Court decides that the petitioner is the capable person to look after the minor child Ananya. The allegations levelled against the petitioner as physically unfit to look after the child and with some ulterior motive that petitioner's close relatives are alone looking after the child is not established by the respondent's side. Likewise, the allegations levelled such as rude behavior of the respondent's husband and aggressive character of the respondent's another married daughter



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also not proved on the side of the petitioner. Further, this Court found those allegations are irrelevant for determining the question of guardianship of minor Ananya's person who is at present with her paternal grandmother / petitioner herein."

10. Reading of the above said observation and finding made by the trial Court, it is seen that even though the respondent suffered physical disability because of the accidental injuries, but took keen interest in observing the court proceedings, also has been taken into account. So this observation made by the trial Court in the course of the proceedings, must be given proper weightage. So the physical discomfort and the disability on the part of the respondent need not be taken as a disadvantage. But as stated by her that they are living in a joint family, not only the respondent but joint family members can also take care of the day to day activities of the minor. So this contention on the part of the appellant that physical disability must be taken into account and has no relevancy at all.

11. The respondent would submit that right from the birth, the child was in the care and custody of the respondent family. The appellant also regularly visiting the child. So there is no necessity for handing over the custody of the child to the appellant.



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12. We will go to the other aspect of whether the minor was in the care and custody of the respondent right from her birth. To find out whether the minor's interest was taken into consideration by the trial Court, the paramount consideration is the welfare and wishes of the child. It is sated in the petition that right from the birth, the respondent was taking care of the child. But there is no evidence on record to show that right from the date of birth, the child was in the custody and care of the respondent. After getting job in Pune, Giri was living in Pune with Pavithra. At the time of the accident, the child was left in the custody of one relative who is the husband of one Puvana. Puvana also sustained injuries in the very same accident. So her husband also did not take care of her and abandoned her. The respondent was also in the hospital during that troublesome days. The appellant and her relative left the child in the custody of her relatives. After the treatment was over, they returned to Karaikudi on 10.10.2016. At that time, Giri left the child in the custody of the appellant. Giri used to visit the child frequently. Because of the treatment, the appellant was staying for some time in her brother's house. Later, Giri became sick and he was admitted in the Trichy Apollo hospital on 28.06.2017 but died on 26.07.2017. Neither the appellant nor her relative visited Giri. Because of the issue over the property left by



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Giri, the appellants are making trouble. So this portion of her evidence, shows that after the accident, the minor is in her care and custody. So the sequence of events also indicate that the appellant is not showing any interest in the welfare of the minor child after the death of Pavithra even after the death of Giri.

13. This was also taken into account by the trial Court and recorded a finding that if the custody of the child is handed over to the appellant herein, it may cause serious physical, mental, trauma upon the child. So the welfare of the child was taken into account by the trial Court which in the opinion of this Court, the above said order is perfectly legal and proper which requires no interference at the hands of this Court. As already noted, visiting rights was given to the appellant. The appellant shall also regularly visit. The age of the child is 11 years as stated above. Being the female child, she requires proper care and custody in the tender age. So taking the custody of the child out of the hands of the respondent may not be in the interest of the child's future also. The right of the appellant has been protected by the trial Court by granting visiting right. That will make the ends of justice. Nothing more is required.



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WEB COPY 14. In view of the above, this Civil Miscellaneous Appeal is dismissed.

No costs. Consequently connected miscellaneous petition stands closed.

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

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To

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



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G. ILANGO VAN, J

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