



O.P.No.443 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 19.12.2024

Pronounced on: 02.01.2025

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Original Petition No.443 of 2021

V.Anusha,
S-6, Paramount Court,
12th Avenue, Ashok Nagar,
Chennai 600 083.

... Petitioner

/versus/

B.Krishnan
No.1083, 11th Street,
Poombugar Nagar, Kolathur,
Chennai 600 099.,
Presently residing at No.48, Kamala.s Castle,
Flat No.B, Ground Floor, 12th Avenue,
Ashok Nagar, Chennai 600 083.

... Respondents

PRAYER: Original Petition has been filed under Sections 3, 7, 8, 9, 10, 12, 17 & 25 of the Guardian and Wards Act read with Order XXI Rule 2 & 3 of the Original Side Rules, pleased to pass a decree and judgment.

(i). Appointing the petitioner as a fit and proper person to be a guardian of the person of the minors 9 year old Ajithesh K.Iyer and 6 years old Akilesh K.Iyer.

(ii). To grant sole and permanent custody of the 9 year old Ajithesh K.Iyer and 6 year old Akilesh K.Iyer to the petitioner herein and to pass such further orders.

(iii) To pay the costs of this proceedings.

For Petitioner : Mr.V.P.Raman.



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For Respondent : Mr.Belavendran

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ORDER

This petition is for granting guardianship and permanent custody of the two minor boys, namely Ajithesh K.Iyer (D.O.B 23.11.2011) and Akilesh K.Iyer (D.O.B 16.02.2015). The petitioner is the mother of these two minors and the respondent is their father.

2. The marriage between the petitioner and the respondent was solemnised on 12/07/2009. Through the marriage, two sons born to them. The mother/petitioner alleges that she was physically and emotionally abused by the respondent. On 24/10/2019, she was thrown out from the home, forcing her to give a complaint to the police. She was also forced to file a petition for divorce on the ground of cruelty in the Family Court, Chennai. The family members intervened and mediated between them. For the welfare of the children, the petitioner resumed the matrimonial life with the respondent. However, the respondent's attitude never changed. The petitioner was threatened for pursuing her profession and the minor children were taught to use violence against the mother and were poisoned with the impression that the petitioner is unfit to be a mother. On 12/04/2021, she was thrown out from the matrimonial home again.

3. Alleging that the respondent father is attempting to remove the



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children from the jurisdiction of the Court and claiming that she is the fit person to be the guardian of the minor children, the petitioner has filed this petition seeking guardianship.

4. This Court initially granted visitation rights to the petitioner, allowing her to visit the minor children during weekends i.e., Saturday and Sunday from 6.00 a.m to 6.00 p.m. Later, it was modified by subsequent orders. Several petitions regarding interim custody and visitation rights during festival dates were sought and allowed. In one of the application, the respondent was asked to vacate the flat, which was settled to the children by the maternal grandparents, appointing the respondent/father as their guardian. For non-compliance of the court directions, contempt petitions were filed.

5. This Court is of the view that those interim arrangements and directions were passed taking into consideration that the petitioner/mother must not to be deprived of her right to visit her children and other incidental facts. Subsequently, by virtue of the orders of this Court, the custody of the children has shifted to the mother, giving visitation rights to the father. Meanwhile, the petition H.M.O.P.No.4476/2019 for divorce on the ground of cruelty was allowed on 29/11/2023. As a result, the marital relationship has severed.



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6. Several incidents of alleging cruelty and threats are made in the petition and in the counter, the respondent had denied it. Counter-allegations are made to project as if, the petitioner/mother as an ambitious person and self centric who never cared for the toddlers. She left to Singapore for higher studies and even after her unsuccessful return to India from Singapore never cared for the children.

7. While considering the applications for interim custody of the children by the mother and other reliefs, this Court, after interacting with the children and the video clipping produced by the father, containing the talk of the children, felt that temporary custody of the children must be with the mother, without interference of the father, to help the spouse to come to terms and also help the children to enjoy the motherly love.

8. The petitioner is living separately in a service apartment. The respondent was living with the children in a flat settled in the name of the children by their maternal grandparents i.e., father and mother of the petitioner. In the same apartment, the grandparents of the children were also residing in another flat. So, this Court in its order dated 16/09/2022, while granting



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temporary custody to the petitioner/mother, directed the petitioner to stay with her parents atleast for one month and thereafter to stay elsewhere, without disturbing the schooling of the children. However, this direction was not convenient for the petitioner, hence she sought for review of the order dated 16/09/2022 apprehending the said direction not workable, since the children will get distracted due to the presence of their father/respondent, who is living in the neighbouring flat. This Court, after considering the reasons stated modified the order, directing the respondent to hand over the custody of the children to the petitioner by 11/11/2022 and the interim custody with the petitioner shall continue till the disposal of the main Original Petition.

9. This Court is of the view that, at this juncture, it is appropriate to take note of the fact that when the review petition was heard, the grand parents of the minor children, who are none other than the parents of the petitioner had filed a joint affidavit opposing the request of the petitioner to uproot the minor children from their existing place of residence. They were ready to accommodate their daughter to stay with them along with the grandchildren.

10. This Court in its order dated 16/09/2022, removed the custody of the children from the respondent/father and ordered interim custody to the



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mother, with liberty to the father to seek visitation right after two months.

However, when the respondent moved his application for visitation right after two months, this Court first had relegated the parties for mediation and later to adduce evidence and continue the existing arrangement of visitation.

11. The petitioner has graced the witness box, filed a proof affidavit filed and marked 20 documents. She had been cross-examined by the respondent/father. No witness was examined on the side of the respondent. Following the direction of this Court, the respondent/father had filed an affidavit and statement of accounts to show that, till recently, he had been paying the school fees for the minor children.

12. The dispute between the spouse had put the entire family at peril. Earlier, this Court observed that the spouse are at war and the children were caught in the crossfire. Despite all efforts taken by the parents of the petitioner as well as mediator and this Court to see that the spouse arrive at some solution which will provide the children to hold the hands of their parents together with their two, hands had failed after the dissolution of the marriage and the order of permanent alimony of Rs.12 lakhs payable to the wife by the husband.



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13. The admitted case of the petitioner is that she is living in a rented premises and have no vehicle and enough income as that of the respondent. Although the petitioner has filed the school fees and receipt of the year 2020-2021 to show that she paid the school fees for the children, the affidavit with statement of accounts submitted by the respondent, it is obvious that he had been taking care of the educational and other expenses of the minor children till the temporary custody handed over to the mother on 06/08/2023.

14. The petitioner had not made out a case that the respondent has failed in his duty as a father of the minor children. On the Contrary, her own parents, even after the separation and the initiation of custody petition, have affirmed that the son-in-law will be the better guardian of the children. They appointing him as the guardian of the minor grandchildren to take care of the property settled on them till they attain majority. In the pending proceedings, they have also filed joint affidavit in support of the respondent.

15. The oral and documentary evidence of the petitioner or the



omission to deny specifically certain allegations made against the respondent, *ipso facto* cannot be sufficient to appoint the petitioner/mother exclusively as guardian of the minor children. Disputes arising out of matrimonial discord cannot be treated par with property or money disputes. The respondent's silence not to be construed as consent or admission. Enough been said by the respondent in the interlocutory applications, the Court has also given findings at length, those facts are taken into consideration to decide the best interest of the minor children.

16. In the case of guardianship and custody, the best interest of the child is predominant. To grant exclusive guardianship and custody to one of the spouse, the Court must be convinced on facts and evidence that the other spouse is unfit to be a guardian. In the instant case, the petitioner has failed to prove that the respondent is unfit to be the guardian of the minor children or to have custody of them.

17. In the given facts and circumstances, it is appropriate to dismiss the prayer for exclusive guardianship. Consequentially, the Petitioner as well as the Respondent will be the joint guardians of the minor children. The interim custody vested with the petitioner/mother by order of this Court is made



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absolute on the following terms:-

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a) The Petitioner/Mother shall continue to have the custody of the children, without prejudice to the right of guardianship of the respondent as father of the minor children.

b) The Respondent/Father shall have the right of visitation of the children for three hours during day time, twice a month, preferable on school holidays.

c) The respondent/father shall have custody of the children for two days a month continuously, with an overnight stay, preferable during the second Saturday and Sunday of every English calendar month.

d) The Respondent /Father to pay the school fees and other incidental academic expenses of the minor children in full.

e) The petitioner/Mother shall permit the Respondent/Father to exercise the rights mentioned in (b) & (c) without any resistance or hindrance.

f) During vacation leave exceeding 5 days, the period of vacation should be divided into two as far as



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possible and shared between the Petitioner and Respondent.

g) On festival days like Pongal, Deepavali etc., preferable the parents to spend the day jointly with the children. If that is not possible, they shall share the day between them as per the convenience.

h) In case of any minor adjustments between the parties while exercising the above rights, the parties need not approach the Court but can workout among themselves without damaging the spirit of the order.

18. Accordingly, the Original Petition is disposed. No order as to costs.

02.01.2025

Index : Yes/No.

bsm

Petitioner's witness:

P.W.1 – Ms.V.Anusha

Documents marked:

<i>Exhibits</i>	<i>Documents</i>
Ex.P.1	Photocopy of my family card.
Ex.P.2	Photocopy of my Aadhaar Card (Compared with the original)



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Exhibits	Documents
Ex.P.3	Photocopy of the extract of certificate of my marriage held with the respondent on 13.08.2013 given by marriage registrar, Sembium.
Ex.P.4	Computer generated birth certificate of my minor son Ajithesh K.Iyer
Ex.P.5	Computer generated birth certificate of my minor son Akilesh K Iyer.
Ex.P.6	Online school fees receipt dated 05.11.2019 of my minor son Ajithesh K Iyer paid to Sri Chaitanya School for the academic year 2019- 2020.
Ex.P.7	Online school fees receipt dated 05.11.2019 of my minor son Akilesh K Iyer paid to Sri Chaitanya School for the academic year 2019- 2020.
Ex.P.8	Online school fees receipt dated 07.12.2020 of my minor son Ajithesh K Iyer paid to Sri Chaitanya School for the academic year 2020- 2021.
Ex.P.9	Online school fees receipt dated 07.12.2020 of my minor son Akilesh K Iyer paid to Sri Chaitanya School for the academic year 2020- 2021.
Ex.P.10	Photocopy of the CSR receipt No.242/2019 dated 25.10.2019 given by All Women Police Station, Saidapet.
Ex.P.11	Computer generated letter dated 23.11.2018 given by Bajaj Finserv Limited for settlement of loan.
Ex.P.12	Computer generated printout of my savings account statement in Karur Vysya Bank for the period 10.11.2018 to 24.11.2018 bearing A/c.No.1278177000003680.
Ex.P.13	Photo of my minor son Ajithesh winning Abacus competition in Dubai
Ex.P.14	Photos with my minor son Akilesh K Iyer taken on his birthday celebration.
Ex.P.15	(Series 2 Nos) are the computer generated account statements of Karur Vysya Bank held by me in A/c.No.1278177000003680 for the period 01.02.2020 to 29.02.2020.
Ex.P.16	My photo with my minor son Akilesh K Iyer taken on his birthday celebration.
Ex.P.17	Online school fees receipt dated 11.06.2021 of my minor son Akilesh K Iyer paid to Sri Chaitanya School for the academic year 2021- 2022.
Ex.P.18	(Series 22 Nos) are the E-mail communications between me and the respondent from 04.09.2021 to 19.06.2022
Ex.P.19	Copy of school fee receipt for the minor son Ajithesh K Iyer paid to The Indian Public School on 02.01.2023 for the academic year 2022- 2023.
Ex.P.20	Ex.P.20 is the certificate under Section 65B of the Indian Evidence Act, 1872.



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Dr.G.JAYACHANDRAN,J.

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Pre-delivery order made in
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