

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31-8-2009

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

AND

THE HONOURABLE MR.JUSTICE R.SUBBIAH

OSA No.273 of 2009

G.Eva Mary Elezabeth ... Appellant

vs

K.Jayaraj ... Respondent

Original Side Appeal preferred under Order XXXVI Rule 1 of O.S. Rules read with Clause 15 of Letters Patent against the order of this Court made in O.P.No.180 of 2006 dated 27.7.2009.

For Appellant : Mrs.Bhawatharini

JUDGMENT

(Judgment of the Court was delivered by M.CHOCKALINGAM, J.)
The Court heard the learned Counsel for the appellant.

2.This appeal challenges an order of the learned Single Judge of this Court made in O.P.No.180 of 2006 filed by the respondent, the father of the minor child Samuel Raily Macon, under Sec.25 of the Guardians and Wards Act, 1890, for a permanent custody of the minor child.

3.The appeal came to be filed by the respondent in the O.P. under the following circumstances:

(a) The child was born to the respondent/petitioner and one Malliga on 10.8.2002, pursuant to the marriage that took place on 25.5.1998. Within a short period of two months, she committed suicide. The respondent abandoned one month old baby in a Church premises. One Vasanthi took care of the child for about 15 days, and thereafter, the child was handed over to the Pastor of the Church, who in turn handed over the child to the appellant's mother who was a member of the same Church. The child was put in a nursery school by the appellant. The child is in her custody. When the respondent father attempted to take the child, a complaint was given to the police. On their intervention, the child was handed over to the appellant.

(b) The respondent father got married to one Maria on 20.9.2004. After the marriage, on 4.1.2005, the respondent again took custody of the child by force. This has necessitated the appellant filing a

habeas corpus petition in HCP No.187 of 2005 before this Court, whereby the Division Bench made a final order on 6.7.2005 holding that the interim custody of the child should be with the appellant; but, it would not stand in the way of the appropriate forum deciding the issue. In view of the permission granted, the respondent father filed the O.P.

(c) On receipt of notice, the appellant appeared. The respondent father examined himself as P.W.1, and the appellant was also examined as R.W.1. After scrutiny of the materials available, the learned Single Judge took the view that the respondent father should be given permanent custody of the child which is the subject matter of challenge before this Court.

4. Advancing arguments on behalf of the appellant, the learned Counsel would submit that the learned Single Judge has failed to consider that the child was abandoned by the respondent herein in the Church premises, and the same was handed over to the Pastor and the father of the Church, who handed over the child to the appellant's mother since there was no one to take care of the child; that the paramount interest of the child has not been considered by the Court; but it has directed the child to be handed over to the respondent herein; that the child was brought up by the appellant from the time when the child was 1 ½ months old; that the child was adopted and has taken the appellant and her husband as his real parents; that though the respondent was a biological father, he has not taken any interest to know the welfare of the child all along these years, and he has not sponsored any amount for the welfare of the child; that if the child is handed over to the respondent, the mental frame of the child would be totally disturbed, and there was all possibility of the child running away from the respondent; that even it may endanger the life of the child; that the respondent has married again and claimed that his wife would take care of the child which was abandoned by him immediately after the demise of his wife; that the Court has not even taken an undertaking from the respondent that he would not give the child in adoption to anybody before passing the orders of handing over the child to the respondent; that the observations made by the Division Bench of this Court in the habeas corpus petition filed by the appellant would clearly prove that the child was very much attached to the appellant; that it has to be taken into consideration that the child is studying in a decent school; that if the school is changed, it would lead to mental disturbance because of the change in circumstances in the life, and in such circumstances, the order of the learned Single Judge has got to be set aside.

5. After hearing the learned Counsel for the appellant and also looking into the materials available and in particular, the order under challenge, this Court is of the considered opinion that it is not a fit case where the order of the learned Single Judge could be interfered with.

6. It is not in controversy that the child was born through his wife Malliga on 10.8.2002. Thus, he is the natural guardian. It is an admitted position that he has also contracted a second marriage and is living with his second wife. Merely he has contracted the

second marriage, it cannot be inferred that he has got any adverse interest against the minor. On the contrary, it is in his evidence that pursuant to the advice of the Pastor of the Church to marry second time in order to take care of the child, he has married. It remains to be stated that the appellant is only a third party. Originally, the child was handed over to the mother of the appellant herein, and in turn she has also handed over the custody of the child to the appellant. The only contention put forth by the appellant's side before the learned Single Judge and equally here also was that the respondent father has abandoned the child when it was 1 ½ months old, and the abandonment itself would indicate that he will not exercise any care over the child. Even assuming that there was an abandonment of the child, the child should have been handed over to the Child Welfare Committee under the Juvenile Justice (Care & Protection of Children) Act, 2000.

7. Apart from the above, the learned Single Judge has pointed out that though it was contended that it was a case of suicide, no proof was forthcoming. The Pastor has pointed out in Ex.R1 that his involvement was only for the child's placement on a volunteer, and he did not have any authority in such placement matters. The learned Single Judge has also pointed out that under Sec.19, the Courts are prohibited to appoint any other person regarding the property of minor if the minor's father is living. The question of appointment of any other person as guardian would arise only if, in the considered opinion of the Court, the father was found to be unfit. In the case on hand, this Court is unable to notice any disqualification except the only allegation of abandonment of the child immediately after the death of his first wife. When such a claim for custody of the child is made by the lawful guardian namely the father, the appellant who is the third party, should not be allowed to have the custody of the child, and that too without any interest or entrustment legally.

8. The Apex Court had an occasion to consider such a situation in a case reported in 2006 (13) SCC 555 (LEKHA V. P. ANIL KUMAR), wherein it has been held as follows:

"19. The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be

really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court in *S. Soora Reddi v. S. Chenna Reddi*⁴ where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no ground whatever for depriving him of his parental right of custody.

20. A man in his social capacity may be reckless or eccentric in certain respects and others may even develop a considerable distaste for his company with some justification but all that is a far cry from unfitness to have the natural solace of the company of one's own children or for the duty of bringing them up in proper manner. Needless to say the respondent husband, in this case, seems to be anxious to have the minor child with him as early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between the respondent and the appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this Court is not called upon to find that the respondent husband has been entirely blameless in his conduct and few occasions referred to in this case and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the respondent is a responsible and good citizen and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their children."

9. In the case on hand, taking into consideration the relevant facts that the respondent is the father and the natural guardian of the child, and he has got nothing adverse to the interest of the child, and his intention of getting married for the second time was only to bring up the child, the view taken by the learned Single Judge that the respondent father was entitled to have the custody of the minor child was correct, and hence the order has got to be sustained. Accordingly, it is confirmed.

10.In the result, this original side appeal fails, and the same is dismissed leaving the parties to bear their costs. Consequently, connected MP is also dismissed.

nsv

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub.Asst. Registrar Original side
High Court, Madras.

+ 1 CC to Mr. J.Bhawatharini Advocate SR.No.43232

OSA No.273 of 2009

AKR (CO)
VC (11.09.2009)



WEB COPY