Suresh Babu Vs. Madhu

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Court : Chennai

Decided On : Apr-06-1984

Reported in : AIR1984Mad186; (1984)1MLJ381

Judge : Ratnam, J.

Acts : Guardians and Words Act, 1890 - Sections 4(2) and 25; ;Hindu Minority and Guardianship Act, 1956 - Sections 4, 6 and 13; Hindu minority and Guardianship Act, 1950 - Sections 4 and 6

Appeal No. : Civil Misc. Appeal No. 856 of 1983

Appellant : Suresh Babu

Respondent : Madhu

Advocate for Def. : Kusum Kumari, Adv.

Advocate for Pet/Ap. : K.B.K. Vasuki, Adv.

Judgement :

1. This appeal arises out of proceedings initiated by the respondent herein, who is the wife of. the appellant, in P. No. 195 of 1983, District Court, Tim chirappalli, under Sec. 25 of the Guardians the child, the respondent filed the application and Wards Act, (Act VIII of 1890), read with S. P, No. 195 of 1983 before the with S. 6(a) of the Hindu Minority and Guardianship Act (Act 32 of 1956), praying for A

return of the custody of the minor daughter Meera alias Pincky, aged about a year and a half.

2. The circumstances under which the proceedings were instituted by the respondent herein are as under; on 10-12-1980, the respondent was married to the appellant at Tiruchirappalli and thereafter the appellant and the respondent had been living as husband and wife. According to the case of the respondent, their marital life was a long story of grief, distress and sorrow on account of the ill-treatment meted out to her by the appellant right from the very -beginning. The appellant belonged to an affluent family and had also taken to drinking and other vices and any advice tendered or request made by the respondent was turned down and met with even physical torture. The parents-in-law also adopted an unhelpful attitude and on several occasions, the respondent was sent out of the house with a demand for more and more dowry. But in spite of all these, the respondent, as a dutiful wife, tolerated the physical as well as the mental torture and continued to live in the family,

On 14-1-1982, the respondent was blessed with a female child and she was Darned as Meera and that raised hopes in the respondent that there would be sonic change in the way of the life of the appellant and his attitude towards the respondent. But the appellant continued as before and ill-treated the respondent and inflicted cruelty on her.' The respondent was asked to get out of the house and was deprived of all her jewellery and other valuables brought from her parents' place and stripped 'of her right to marital life and the custody of her infant daughter and was sent to her parents' house, at Madras by her father-in-l-aw. The protests raised by the respondent were of no avail and the several attempts made, by bet to bring about some workable arrangement did not bear fruit,

A notice was issued by the respondent to the appellant demanding the restoration of the custody of the infant child, but there was no response. According to the respondent, in law she was entitled to have the custody of the infant child and since the respondent was dared the custody of her 11 years' old infant child and she was unable to bear the pangs of separation from District Court, Tiruchirappalli, praying for the relief's set out earlier, alleging that she is the best fitted person to

have the custody of the infant child and any further retention of the child in the custody of the father would lead to disastrous results as there was no proper person to took after and care for the infant child.

3. In the counter filed by the appellant, while admitting the marriage with the respondent on 10-12,1980, and the birth of a daughter on 14-1-1982, he contended that he is the natural guardian according to law and the respondent was entitled only to the temporary custody in cases where the infant is under the age of five -years. The ill-treatment stated to have been meted out to the respondent by the appellant as well as her payents-in-law was denied. That the appellant was addicted, to drinking and other vices was also disputed. The driving out of the respondent from the matrimonial home was denied and the appellant claimed that his family is a very affluent one publican. Tropically disposed and therefore, the appellant thought fit to marry the respondent coming from a poor family without any demand for dowry. The claim of the respondent that she was stripped of her jewellery and the custody of the infant child was denied.

Abandonment of the marital home along with the infant child was attributed to the respondent-. ' The further case of the appellant was that the respondent developed an antipathy towards the infant daughter delivered by her and had even suggested that the infant should be got rid of somehow or other. Even breast-feeding was abandoned by the respondent and she d ' id not even sing a lullaby once to the child and the appellant or his parents were obliged to attend on the child during nights. There was total lack of love on the part of the respondent towards the infant child and the child was denied love, care and attention and on certain occasions when there were troubles and bickering between the appellant and the respondent, the respondent even attempted self -immolation, which was averted by the timely intervention of the appellant, his parents and other servants. The appellant also put forth, the plea that the respondent was not affluent and even her parents and brothers did not have any properties at all, while the appellant WU in granter affluent circumstances and this would suffice to negative the claim for custody. The welfare of the infant child. according to the appellant, required that the infant should be allowed to be retained in the custody of the father, the appellant herein. The absence of a reply to the notice dated 15-7-1982 issued by

the respondent was explained by the appellant by stating that as, it was' served during the pendency of the proceedings, no reply was thought necessary. An objection was also raised by the appellant regarding the jurisdiction of the Court at Tiruchirappalli to enquire into the petition. Yet another objection of the appellant was that without seeking the 4ppointment of a guardian, the respondent was not entitled to invoke the jurisdiction under the provisions of the Guardians and Wards Act and the provisions of that Act would bar the application filed by the respondent.

4. Before the Court below, on behalf of the, respondent, Exts. A-I and A-2 were marked and the respondent examined herself as P. W I besides two others as R. Ws. 2 and 3. On a consideration of the oral as well as the documentary evidence, the learned District Judge found that neither the respondent nor the appellant established the various allegations made in the petition and the counter against each other. Proceeding to consider the question as to who is entitled to the legal custody of the infant child, the learned District Judge was of the view that the paramount consideration is the welfare of the infant child and taking that into account, the infant child has to be 'restored to the custody of the respondent, who was also recognised by S. 6(a) of the Hindu Minority and Guardianship Act as the parent normally and ordinarily entitled to.sucb custody and who would also bestow on the infant child the care and affection of the mother during its infancy.

Dealing with the objection that the Proceedings under Section 25 of the Guardians and Wards Act initiated by the respondent were not competent, the learned District Judge found that the respondent would answer the description of a guardian as defined in S. 4(2) if the Guardian.5 and Wards Act and was entitled to file an application under that Act for the restoration ' of the custody of the infant child to her. even though the appellant, as the father, is the natural guardian of the infant child. The objection regarding the jurisdiction of the Court to entertain the proceedings was overruled. Ultimately, the Court below allowed 0. P. No. 195 of 1983, directing the -appellant to produce the infant child Merit alias Pincky before Court on 28-11-1983 to be .delivered to the custody of the respondent. Pursuant to this order, the infant child was delivered by the appellant to the respondent and there is no dispute regarding that now. However, the appellant, challenging the

correctness of the order of the Court below has come up in appeal under S. 47 of the Guardians and Wards Act (VJII of 1890).

5. With a view to restore harmony and happiness in the already troubled matrimonial life of the parties, which has also given rise to an acrimonious fight between the parties before Court relating to the custody of the only child born of the marriage, this Court directed the counsel for the appellant as well as the respondent to ascertain from their respective clients whether there is any possibility of the parties mutually agreeing to repair the damage already done and to start afresh and resume peaceful and happy cohabitation in the matrimonial home having in mind the welfare of the infant child. This evoked a ready and favourable response from the respondent, whose counsel stated before Court that the respondent is ready and willing to join the appellant and live with him as his wife in the matrimonial house with the infant child as if nothing had happened before. On the contrary, the learned counsel for the appellant submitted that the appellant was totally unwilling to take the respondent back into the matrimonial home and live with her. and the child. Thus, the attempt made by this Court to restore pcaci, amity and happiness in the marital home wrecked in bickering and misunderstandings having failed, necessarily the matter had to be dealt with and disposed of on its merits.

6. Before proceeding to a consideration of the merits of the controversy between the parties, it has to be stated that, the objection relating to the jurisdiction of the Court below to try the proceeding5 was given up before this Court. Further, none of the findings recorded by the Court below was challenged or assailed by the learned counsel for the appellant.

7. The learned counsel for, the appellant first contended that under the law, the appellant would be the natural guardian of the infant child and nothing has been stated against him as to how he had become incapacitated to be such natural gu4rdian and in the absence of any disqualification and a prayer for declaring the appellant as a guardian who is unfit otherwise and for the appointment of a fresh guardian, the relief of custody of the infant child prayed for by the respondent cannot be granted. On the other hand, the learned counsel for the respondent

would draw a distinction between guardianship and custody based on the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956 and submit that though the appellant may be the natural guardian, there is a statutory preference of the mother with refer the custody of the infants below five years of age and in the absence of any allegation or proof that the mother had disqualified herself to have such custody, statutorily, the mother has got to be given the custody of the infant less than five years of age, as in this case. and for that purpose, it was unnecessary either to establish that the father had rendered himself unfit to be a natural guardian or to seek a declaration that be was so unfit or even pray for the appointment of a fresh guardian instead.

8. There is no dispute that the parties in this case 'are Hindus and they would be governed by the provisions of Guardians and Wards Act, VIII of 1890 along with the provisions of the Hindu Minority and Guardianship Act, 32 of 1956. Under S. 2 of the Hindu Minority and Guardianship Act, the provisions of that Act have been declared to operate in addition to and not, except as expressly provided, in derogation of the provisions of the Guardians and Wards Act. Section 4(b) of the Hindu Minority and Guardianship Act defines a '.guardian' as meaning a person having the care of the person of a minor or of his property or of both this person and property and includes (i) a natural guardian, (ii) a guardian appointed by the Will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and Q~) a person empowered to act as such by or under any enactment relating to any Court of Wards. Section 4(c) defines a natural guardian' as meaning any of the guardians mentioned in S. 6.

Section 5(a) provides that except as provided under the Hindu Minority and Guardianship Act, 1'956, any text, rule or interpretation of Hindu Law or any custody, or usage as part of the law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in the Act. Section 5(b) provide-, that any other law in force immediately before the commencement of this Act shall ceasc to have effect in so far as it is inconsistent with any of the provisions contained in this Act. Section 5(a) thus provides for the overriding effect of the provisions of the Act over Hindu Law, custom or usage as part of Hindu Law and S. 5(b) further provides that

any other law inconsistent with The provisions of the Hindu Minority and Guardianship Act, 1956 shall cease- to have effect. Section 5(a) and (b) were thus intended to make provision. for the over riding effect of the provisions of the Hindu Minority and Guardianship Act, 1956.

Section 6 proceeds to enumerate who the natural guardians of Hindu minor in respect of minor's person or property (excluding his or her undivided interest in joint family property) are. In the case of a boy or an unmarried girl, the father, and after him, the mother would be the natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act. The proviso to Section 6(a) states that the custody of a minor who has not completed the age of five years, shall ordinarily be with the mother. Section 6(b) and (c) are not relevant for purposes of this case. It is thus seen that even Section 6 which purports to specify who the natural guardians of a Hindu minor with reference to his person or property are, makes a distinction between 'guardianship and custody. The father is first declared to be the natural guardian in the case of a boy or an unmarried girl. Only thereafter, the claim of the mother as a guardian is provided for. In other words, the father so long as he 'is alive will be the natural guardian in the case of a, boy or an unmarried girl and only after his death, the mother would step in.

This is with reference to guardianship, which. in its ordinary connotation, would take in custody and care of the minor which could be equated to guardianship of the person and custody and control of the pro. party which is really guardianship 'with reference to the property of the minor. in so far as the father who is declared as the natural guardian under Section 6 is concerned. Ordinarily he would be entitled to the guardianship of the person as well as the property of a minor. Only after the lifetime of the father, the mother becomes so entitled to the guardianship of the person as well as the property of the minor as it natural guardian. But the proviso carves out a special right relating to custody in favor of the mother in cases where the infant child has not completed the age of five years. In such oases, a preferential claim for custody is conferred statutorily on the mother and that would moan that the father, though he would still be the natural guardian of the infant under S. 6, would not be as of right entitled to the custody of the infant, if the infant child has not completed the age of five years subject of cours-. to the

paramount consideration of the Welfare of the child.

It is thus seen from S. 6(a) and the proviso hereunder that even that provision in the statute contemplates the father being the natural guardian of the infant, who has completed the age of five years, while the mother is entitled ordinarily to have the custody of such a minor. Obviously, therefore, in such a case, the father would still be for all practical . purposes the natural guardian as defined in S. 4(c) of the Hindu Minority and Guardianship Act. with reference to the custody of the infant, who has not completed the age of five years, for which the mother is ordinarily entitled to under the proviso to S. 6(a) of the Hindu Minority and Guardianship, Act, inasmuch as she is one who is statutorily entrusted with the care and custody of an infant, who has not completed the age of five years, she would also fulfil the requirements of. a 'guardian' under the first part of Sec. 4(b) of the Hindu Minority and Guardianship Act as a person having the care of a person of an infant. This difference made even in the statute in -S, 6 (a) is important.

In the case of an infant who has not completed the age of five years. in the absence of any disqualification, the mother will be ordinarily entitled to the custody of the infant, while the father, in respect of the infant's property, would be such a natural guardian. It is not. therefore, necessary in every case where the statutory recognition of the preferential claim of the mother to the custody of an infant child who has not completed the age of five years is sought to be enforced, that the father should be found to be disqualified or that there should be a prayer for the removal of the father as the natural guardian and for the appointment of some other person as a suitable guardian. In cases of infants who had not completed the age, of five years, the application made by the mother in regard to the custody of such infants is only to recognize, give effect to and enforce the statutory right conferred upon the mother in such cases and there is no need to say that the father had disqualified himself from being the natural guardian of the infant or that he should be removed from his capacity as the natural guardian or some other suitable per. son should be appointed instead.

Looked at from this point of view, the right asserted by the respondent, in this case is only that right provided in favour of the mother as a preferential right to the

custody of an infant, who has not completed the age of five years and no more. That is not tube mixed up with the guardianship of the infant as a whole. 'Indeed, there are many decisions which have recognized the distinction between guardianship and custody. In Bai Tara v. Mobanial Lallubbaii AIR 1922 Bom 405, the mother was given the custody of a boy seven years' old as against the father, while not disturbing the rather's guardianship, as it was in his interests, and for his welfare that he should have his mother's care. Macleod, C. I., has observed in that case.

'The petitioner has married again and it is obvious that the boy, who was only 7 years' old at the time this application was made, will be much better off living with his mother than with his father. That, of course, will not prevent the father from making a further application at any later date when're may be, able to satisfy the' Court that it. will then be to the interests and welfare of the minor that he should leave his mother's care and live- with his father.'

Shah, J., has observed:

On that footing the only question is whether it is for the welfare of the minor that the existing custody of the mother should be disturbed. It is unfortunate that owing to the differences between the father and the- mother it has' become necessary to consider this question and it is still possible that in future these differences may be made up and that the interests of the minor may be advanced by the cooperation' of the father and the, mother in that respect.... .... The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration.'

To similar effect is the decision in Saraswathibai Ved v. Shripad Ved : AIR1941 Bom103 where the custody of a minor child was given to the mother as against the father, while not disturbing the father's guardianship.

Beaumont, C. 1. remarked:

'I think the law on question of this sort is the same in this country as in England, though, of course, social habits may be different. The modern view of Judges in England is that it is impossible, in the case of a young child, to find any adequate

substitute for the love and care of the natural mother.. If the natural mother is a suitable person, the Courts in England will as a general rule handover the custody of a child of tender years to the mother.

The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in England. but at the same time, the right of the mother to the custody of her young children is undoubtedly recognised in this country

However, the paramount consideration is the interest of the child, rather than The rights of the parents. Human nature is much the same all the world over, and, in my opinion, if the mother is a suitable person to take charge of the child, it is quite impossible to find any adequate substitute for her for the custody of a child of tender years.'

9. A Division Bench in Kaliappa v. Valliammal (: (1949)1MLJ248) directed that custody of a minor girl should be handed over to the mother as against the father, while not disturbing his guardianship' and holding that it is impossible to find an adequate substitute for the mother for the custody of a child of tender years, and that it is in the interests of the child, whose interest should be the paramount consideration with, the Courts, that the mother should have the custody. In Kumaraswami v. Rajammal : AIR1957 Mad563 , the distinction pointed out between the guardianship of the father and the custody of the infant with the mother for the welfare of 'the infant was reiterate ;A and given effect to with reference to two minors, whose mother was appointed as the guardian, but it was modified into one of merely giving the custody of the two minors to the mother, while retaining the guardian ship of the father.

In view of the a foresaid decisions, it is clear that in cases like this, where the paramount consideration is the welfare of the infant and the statute has also enacted a Deference in matters relating to custody in favour bf the mobs, there is really no question of appointing the mother as the guardian or removing the father from guardianship with reference to an infant who had not completed the age of

five years, but the Court is merely called upon to recognise and give effect to the statutory provision taking into account the welfare of the infant. In this case, the learned counsel for the. appellant was repeatedly manner disqualified herself from having the custody of the infant, who has not completed the age of five years and the lifted counsel submitted that the respondent has not suffered any disqualification whatever with reference to the custody of the infant child.

There is. therefore absolutely no ground whatever to negative her claim which the . respondent, by means of an application filed before the Court below, was drawing the attention of the Court to her preferential claim to the custody of the infant, who had not completed the age of five years and had asked the Court to recognise that and give effect to the same and under those circumstances. there is no need whatever for the appellant to be removed from his guardianship or for the respondent to be appointed as the guardian of the 'person of the infant. The first contention learned counsel for the appellant therefore, be accepted.

10. The learned counsel for the appellant next contended that the Court below did not take into consideration the welfare of the infant. Elaborating this, the leaned counsel submitted that the appellant is a member of an affluent and aristocratic family' and can command any comfort or convenience-, and would therefore, be best fitted person even for the purpose of having the custody of the infant. On the other hand. the learned counsel for the respondent submitted that. the kindness, care and the affection-of a mother towards her child can not admit of any substitute and that the, respondent and her mother and brothers also command facilities, comforts and conveniences sufficient to provide a comfortable, happy and congenial upbringing for the infant, and, therefore, the custody of the infant child should be entrusted only to the respondent. As pointed out earlier, it is not merely the rights of parties with reference to custody that has to be considered and adjudicated upon, but what is most - essential is that any such adjudication should be for the welfare of the infant child. The ex1pression 'welfare' must be read in its widest amplitude as meaning and including every circumstance which must be taken into consideration. The welfare of the child. particularly of an infant of about two years of case, as in this case, cannot merely be measured on the scales of yard,. tick of money or by physical comfort only. The physical well-being

of the infant is no doubt important, but that is not all. The questions are with whom is the infant likely to be happy By whom is the health and comfort of the infant likely to be looked after? Who is likely to contribute to its well-being? Who is likely to bring up the infant and give education in a manner in which it deserved to be brought up and given education ?

The answer to all these questions clearly and unmistakably in this case would point out only to the mother, the respondent herein. The claim of the appellant 11hat he is very well-to-do may be well funded ' He may be in a position, as is seen from his evidence, to employ any nurnber of servants to look after the child. It is also in his evidence and indeed that was the submission made by the learned counsel for the appellant that the appellant is a busy businessman which takes him (sic) native place very frequently. This indicates that there is every probability of the infant child being consigned to the mercy of the servants at home. The appellant is most likely to be absent and the infant child is likely to have an affectionate pat or endearing word from the father as even according to his counsel he is away from Tiruchirappalli for most of the time.

The only other persons who stay with the appellant are his parents and the evidence does not disclose anything about their attitude towards this infant child. On the contrary, the evidence of the respondent incticates at least to some extent that the parents of the appellant were also in a manner responsible for the respondent and hex infant child being separated from each other. In such situation, the Welfare of the infant undoubtedly demands that the custody of the infant should be only with the mother. It may be that the respondent or her 'parents or her brothers are not so rich or affluent as the appellant, but the money or physical comforts are not the only methods or means by which the welfare of the infant child can, be measured.

There is really no substitute for The mother's love, affection and care for bet infant which the infant is most unlikely to get if its custody is to be entrusted to the appellant. The evident also discloses that the respondent and her mother and brothers are also fairly well-to-do and can command comforts and conveniences necessary to bring up an infant of two years of age. It has been pointed out by the

Supreme Court in Rosy Jacob v. J. A. Chakramakkal, : [1973]3SCR918 , that in case of a dispute between the mother and the father, the Court is expected to strike a just and proper' balance between the requirements of welfare of the minor child and the rights of the parents over the minor child. In this view, a consideration of the question of the welfare of the infant child also points out that the custody should've only with the mother and not with the father. Thus, even , considering the welfare of tile infant which, had. no doubt not been dealt with at length by the Court below, on the fact$ and in the circumstances of this case, the custody of the infant should be given only to the respondent and not to the appellant.

11. The learned counsel for the appellant next contended that the conditions for maintaining an application under Section 25 of the Guardians and Wards Act had not been fulfilled and, therefore, the respondent was not entitled to any relief. In support of this, the learned counsel for the appellant relied upon the decision in Md. Shafi v. Shamin Banoo : AIR1979 Bom156 . On the other hand, the learned counsel for the respondent submitted the in this case the respondent would-fall under the definition of a 'guardian' in S. 4(2) of the Guardians and Wards Act. VIII of 1890, and S. 4(b) of the Hindu Minority and 'Guardianship Act, 32 of 1956 and there being no inconsistency between the provisions of theft two Acts, the respondent was entitled to maintain an application under S. 25 of the Guardians and Wards Act on the ground that the ward was removed from the custody of the mother.

Under Section 25 of the Guardians and Ward-, Act, in order to enable an application to be maintained, such an application must be made by a guardian of the person of a minor who had the custody of the manor and such a minor must have been removed from the custody of the guardian and in the opinion of the Court it must be in the interest and welfare of the minor That the minor should be returned to the custody of the guardian. It is went from the definition of the expression 'guardian' occurring in S. 4(2) of the, Guardians and Wards Act, VIII of 1890 and S. 4(b) of the Hindu Minority and Guardianship Act, 32 of 1956 'that a person having the care of the person of a minor would be a guardian. for purposes of the Acts.

It would suffice, therefore, for purposes of attracting the applicability of Section 25 of the Guardians and Wards Act that such a guardian -is one who has the care of the person of a minor. The legal guardian, as normally understood is not contemplated under Section 25 of the 'Guardians and Wards Act and there is no indication in Section 25 of the Guardians and' Wards Act to show that it would not be enough or sufficient if. the person has merely the care of a minor, but that he must also be the legal guardian. - If persons who are not legal guardians were intended to be excluded from invoking S. 25 of the Guardians and Wards Act, it would have been very easy by incorporating such a limitation into Section 25 or even under S. 4(2) of the Guardians and Wards Act or under S. 4(b) of the Hindu Minority and Guardianship Act.

Indeed the Supreme Court has pointed out in Rosy Jacob v. J. A. Chakramakkal, : [1973]3SCR918 , that the 'guardian' contemplated by Section 25 of the Guardians and Wards Act, VIII of 1890 includes every kind of guardian -known to 'law and that not only actual physical custody but also constructive custody of the guardian is' also contemplated by that section. Though the father in this case is the natural guardian and also legal guardian, having regard to the expression guardian' as defined in the Guardians and Wards Act and the Hindu Minority and Guardianship Act, which really employs a wider definition of a greater amplitude and width to include ot4ex persons who have The care of a minor, it appears that, the respondent, who is such it person, is also entitled to invoke Sec. 25 of - the Guardians and Wards Act and seek the custody of the infant taken away from her. Having regard to the wider definition of the expression Guardian' in the guardians and Wards Act as well the Hindu: Minority and Guardianship Act, the respondent should also be deemed to be such a guardian and as she had indisputably the custody care of the infant, she would be a guardian for purposes of the Acts. There is no dispute before this Court that -the infant was removed from the custody of the respondent.

The removal of the infant child from the custody of the respondent had been in this case effected by forcibly sending the respondent to her parents' house from her matrimonial house where she was having the care and custody of the infant. Though the present case the ward did not leave the custody of the guardian, the

ward had been removed from the custody of the respondent in that the respondent 'and the infant child were separated and as a result of such separation, the infant was also removed from the custody of the respondent. It has already been seen that* the welfare of the infant requires that the custody should be entrusted to the respondent. All that requirements, therefore under S. 25 of the Guardians and Wards Act read with S. 6(a) of the Hindu Minority and Guardianship Act have been fully satisfied in this case. Under those circumstances, the objection raised by the appellant that the requirements of an application under S. 25 of the Guardians and Wards Act read with Section 6(a) of the Hindu Minority and Guardianship Act have not been fulfilled and, therefore, the application is not maintainable, is without substance. The decision relied on by the learned counsel for the appellant does not in any manner assist - in advancing the case of the appellant. No other point was urged. Therefore, the order of the Court below directing the restoration of the custody of the infant child to the mother, the respondent herein, cannot be taken exception to Consequently, the Civil Miscellaneous Appeal fails and is dismissed with costs.

12. Appeal dismissed.