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R. Kasthuri Vs. R. Raveendran

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Court : Chennai

Decided On : Mar-03-2003

Reported in : AIR2003Mad302; (2003)1MLJ738

Judge : R. Jayasimha Babu and ;N.V. Balasubramanian, JJ.

Acts : Guardian and Wards Act - Sections 25

Appeal No. : L.P.A. No. 165 of 2000

Appellant : R. Kasthuri

Respondent : R. Raveendran

Advocate for Def. : Ar.L. Sunderesan, Adv.

Advocate for Pet/Ap. : Sundar, Adv.

Disposition : Appeal allowed

Judgement :

N.V. Balasubramanian, J.

1. This Letters Patent appeal is directed against the judgment of the learned Single Judge in C.M.A. No. 517 of 1995. The appellant herein is the wife and the respondent is her husband.

2. The husband filed a petition under section 25 of the Guardian and Wards Act on the file of District Court, Sivaganga against his wife praying for the custody of their child. The petitioner and the respondent were married in the year 1986, and one male child was born on 11.4.1988. It is the case of the husband that at the instigation of the mother and brother of his wife, misunderstanding arose between them and the wife left the matrimonial home on 2.7.1991 taking the child with her. Subsequently, some mediators intervened to resolve the dispute and the dispute was resolved and she came back to the matrimonial home to join her husband on 13.4.1991 and lived with him. She again left the matrimonial home on 2.7.1991 taking the child with her. The husband filed H.M.O.P. No. 8 of 1991 on the file of Subordinate Judge's Court, Devakottai for restitution of conjugal rights. On 14.9.1992, both the parties filed a joint endorsement before the Court and on the basis of the joint endorsement, the H.M.O.P. No. 8 of 1991 was dismissed.

3. According to the husband, the wife is employed in a bank which is situate 15 kilometres away from her mother's house and she used to leave for office at 8 a.m. and return only at 8 p.m. daily and the wife is not physically present all the day to look after the child. According to the husband, the child was subject to ill-treatment and torture at the hands of the mother of the wife and they were not looking after the child properly. Hence, the husband filed the petition for the custody of the child stating that he would take care of the child with the help of his mother.

4. The wife has filed a counter affidavit denying all the averments made in the petition filed by the husband. According to her, the husband has committed breach of the joint endorsement made in H.M.O.P. No. 8 of 1991. According to her, she is employed in a bank drawing a decent salary and she is living along with her mother and brother and his wife and they are all attached to her son. She has stated that she is taking care of the child and giving him education and the child was admitted in a reputed school at Tuticorin and the child is also doing well in education.

5. Learned District Judge, after considering the evidence, held that the respondent father has the right to keep the custody of the child and the interest and future of the child would be safe in the hands of the father and ordered the petition as

prayed for. It is against the order of the District Judge, an appeal was preferred and a learned Single Judge of this Court held that the child is not of tender age to be retained in the custody of the mother and the mother has not complied with the terms of the joint endorsement and she is employed and therefore she cannot take care of the child and there are no special circumstances in favour of the mother than the father to entrust the child with the mother. Learned Single Judge held that there is no denial regarding the injury sustained by the child when the child was in the custody of the mother and the incident reflected badly on the nature of the care bestowed on the child by the mother. In this view of the matter and taking into consideration the overall circumstances, learned single Judge held that the right of the father to look after the child is better than that of the mother and in the better interest of the minor child, the custody of the child should be given to the father. Learned Single Judge upheld the order of the learned District Judge and dismissed the appeal. It is against the judgment, the present appeal has been preferred.

6. We heard Mr. Sundar, learned counsel for the appellant and Mr. AR.L. Sunderesan, learned counsel for the respondent. The law on this topic is well-settled by several decisions of the Supreme Court as well as by this Court. In ROSY JACOB v. JACOB A. CHANDRAMAKKAL (1974) 2 M.L.J. (SC) 31 it was held that

'merely because the father loves his children and is not shown to be otherwise undesirable, it cannot necessarily lead one to the inclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who in addition because of her profession and financial sources, may be in a position to guarantee better health, education and maintenance for them. In this case, we have an affectionate father and also an affectionate mother. But the question is, how far the affection of the father will better promote the welfare of the child. That will be the criterion for considering the custody'.

7. The Supreme Court in KIRTIKUMAR MAHASHANKAR JOSHI v. PRADIPKUMAR KARUNASHANKER JOSHE : has held that the interest of the children is of paramount importance and in that case, taking into account the welfare of the children, the Court declined to hand over the custody of the children to the father even though the father is the natural guardian. The Supreme Court in the case of M/s. GITHA HARIHARAN AND ANOTHER v. RESERVE BANK OF INDIA AND ANOTHER 1999 2 L.W. 723 reiterated that the welfare of the children is of paramount importance. In CHANDRAKALA MENON v. VIPIN MENON : the same view was taken by the Supreme Court. This Court in INDIRA KUMARI v. RAMAKRISHNAN,B. 1995 1 L.W. 671 has also taken the same view.

8. We directed both the parties to be present in the Court and the child was also directed to be produced before the Court, and on the basis of the directions, the parties were present and the child was produced in the Court. We interviewed the child separately and the father separately. The boy is now aged about 14 years. He is now a grown up boy. We interviewed him very closely and we find that from the way he answered our questions, we have not gained the impression that he was tutored to give the answers. The boy is studying in a school and he is stated to be getting high marks in the school. The boy is living with his mother and her relations for more than 12 years. It is seen from his statement that the father is not taking care of him and the mother is taking care of his education and he is looked after well by the mother. He has also stated that the father is living alone.

9. We also examined the father. He has stated that he is employed as an Assistant Professor in a college and he would take care of the boy. He has stated that the boy have to be admitted to higher course and he will take care of the educational needs of the boy by admitting him in a proper educational institution and shape him well. He has also stated that he is living alone and he would take the assistance of his sister to take care of the boy.

10. It is axiomatic that the welfare of the child is of paramount consideration. The way in which the boy answered the questions shows that he is an intelligent boy and he knows his preference. He has been living with his mother for the past 12 years and his educational needs have been taken care of by his mother. There is

absolutely no evidence of ill-treatment by her, but on the other hand, the boy's statement shows that his care has been taken very well by his mother and her relatives. His statement also shows that he is doing well in the class and if the boy is uprooted now and placed in the custody of the father, we are of the view that that will unsettle his educational career and his future prospects also. Though the mother is employed, in her absence, the boy is taken care of by her mother and her brother's wife and there is nothing to disbelieve her evidence that they will not take care of the boy when the mother leaves the house for office. Further, during the time when the mother leaves the house for office, the boy will be away from the house as he has to attend the school.

11. Though both the parents are affectionate to the child, it is clear that the child has been brought up by the mother all along from the childhood. We are of the view that if the child is taken away from the custody of the mother, it would affect his personal and educational career and we therefore hold that the custody of the child should continue to be with the mother.

12. We are not inclined to go into the question who was at fault in committing the breach of the undertaking given in the joint endorsement filed in H.M.O.P. No. 8 of 1991. However, several years have since rolled by and the child has also grown to a young boy and he is nearly 14 years old. It is in the circumstances, the events that had occurred several years ago at the time of filing H.M.O.P. No. 8 of 1991 do not assume much importance. We are of the view that in the present circumstances, the custody of the child should be with the mother.

13. This Court in INDIRA KUMARI v. RAMAKRISHNAN,B. 1995 1 L.W.639 while holding that the custody of the child should be with the mother, also gave certain directions taking into account the fact that the father is the natural guardian and has some obligations towards the child and the father should discharge the same in spite of the fact that the father has not been given the custody of the child. Accordingly, the respondent/father will have the custody of the boy, if there are holidays during Dussehra and Christmas for a period of three days each and during summer vacation for a period of 10 days. The father is entitled to the custody of the boy from the mother during those periods and we direct the

appellant/mother accordingly. On the expiry of the stipulated period, the father shall hand over the custody of the boy back to the mother. If the father requires custody of the boy on any other specified date, it is open to him to move the District Judge concerned and the District Judge is directed to consider the same on merits. Though the permanent custody is not given to the father, there is no doubt that the father should discharge his obligations towards his son by taking care of his educational needs and he should help the boy in securing admission in educational institutions for a proper course of study, if any help is needed.

14. In the result, we set aside the order of the learned Single Judge subject to the above directions. The appeal stands allowed. The parties are directed to suffer their own costs.

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