Karuppannan Vs. Sudhamathi

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Court : Chennai

Decided On : Jul-06-1993

Reported in : II(1993)DMC457; (1993)IIMLJ293

Judge : Thangamani, J.

Acts : Guardian and Wards Act, 1890 - Sections 7, 24 and 25; Hindu Minority and Guardianship Act, 1955 - Sections 4, 5 and 6(1)

Appeal No. : A.A.O. 437 of 1991

Appellant : Karuppannan

Respondent : Sudhamathi

Advocate for Def. : S. Senthilnathan, S. Ravi and C. Paranthaman

Advocate for Pet/Ap. : V. Subramanyan, T. Thiageswaran and C.V. Karthikeyan

Disposition : Appeal dismissed

Judgement :

Thangamani, J.

1. The appellant herein married the respondent in 1986 and a male child was born to them on 14-6-1987. The respondent-wife instituted O.P.No. 5 of 1990 in the Court of District Judge, Salem against the appellant alleging that soon after the

birth of the child, her husband developed aversion towards her and drove her way from his house. Some two weeks later, he came to her residence and forcibly snatched away the child. All mediations failed and the husband refused to hand over the child. And considering the welfare of the child which is 21/2 years old, the husband must be directed to give the custody to the mother.

2. The husband resisted the application contending that the wife chose to live with him only for a short time. Thereafter she was practically residing in her mother's house. She treated him with contempt. After delivery, the mother and child were taken to her mother's place at Namakkal. There was nobody to look after the child or mother. His mother-in-law is employed as a teacher in Namakkal High School and so she could not attend on the child. When the child attained the age of 3 months, he brought his wife and son to his house at Varguarempatti and wanted his wife to stay there. But the respondent did not like to live with him in the village. His mother-in-law brought a car from Namakkal and took away his wife and infant son even without informing him. He longs for the company of his wife. He is prepared to take her back and lead a happy marital ,life. He undertakes to provide his wife with all comforts. The child also cannot be brought up in congenial atmosphere in his mother-in-law's place at Namakkal. The mother and brother's widow of the appellant are affectionate towards the child and bestowing attention on him. In the interest of the child and harmony of the family life, the custody of the child is to be with him only.

3. The Trial Court found that admittedly on the date of the application the child was in the custody of the fattier of Varguarempatti Village and that the mother was residing with her mother in Namakkal. Considering the welfare of the child it is proper that the child is in the custody of the mother. Accordingly, it passed a decree directing the appellant to entrust the child to his wife on or before 28-2-1991. And this appeal is directed against the said order.

4. Though the respondent wife examined herself as P.W. 1 in the Trial Court, she did not speak anything about her husband taking away the child forcibly from her as mentioned in her application. The appellant also as R.W. 1 is silent as to how the child came into his custody after his wife left him. It has been elicited in his

cross examination that the wife left the child in his house of her own accord whereas the allegation in his counter is to the effect that one day the relatives of his wife came in a car and took away his wife and infant son from his house at Varguarempatti. Had this claim in his counter been true, it is not known how the child in Namakkal came to his custody. The appellant in the witness-box offers no explanation on this aspect. His stand during trial that his wife left the child in his house is quite contrary to the averment in his counter. So as it has been rightly pointed out by learned District Judge, it is evident that the appellant had forcibly taken away the child from the mother's custody as stated in the petition.

5. Though the child was 2-1/2 years old at the time of filing of the application, there is no dispute that now it is 6 years old having been born on 14-6-1987. Learned Counsel for the appellant argued on the basis of Section 6(a) of the Hindu Minority and Guardianship Act that the custody of the child must be entrusted to the father since the child has completed the age of five years. He also contended that this subsequent event should be taken into consideration by the Court in passing orders in this appeal. In support of his contention he relied on the decision in Yousuf v. Sowramma, : AIR1971 Ker261 wherein Iyer, Krishna J.(as he then was) has held that precedents are legion that a Court must have due regard to subsequent developments which fundamentally alter the jural relations or make the relief originally sought altogether unworkable or unjust. But, such pragmatic considerations are permitted only in a limited category of events, there could be no doubt that the Courts can take note of subsequent events and grant relief accordingly in exceptional circumstances. It depends on the facts and circumstances of each case as to when a Court of appeal should take notice of subsequent events. In the present case, evidently that the child is now 6 years old is a factor to be born in mind in granting the appropriate relief.

6. Admittedly, the mother-in-law of the appellant/husband is working as a teacher in a High School at Namakkal. His wife has also undergone training in a Teacher Training School. So the appellant submitted that there is noboby to a look after the child if it left in the custody of the mother. Further according to him, his mother and brother's widow are residing in the same house with him in the village. They were affectionately attending on the needs of the child when it was in his house in the

village. Besides, his wife and mother-in-law do not have any resources except the salary income to spend on the child. They cannot give the boy a proper education commensurate with his status in life. Whereas he is in affluent circumstances getting an annual income of Rs. 25,000/- from his land. His evidence is that while the child was in his custody, he got him admitted in the Mohanur Sugar Mills School. He was spending Rs. 250/- per month for the education of the child. However, in view of the fact that the mother-in-law of the appellant is working as a teacher in the High School in Namakkal and his wife is also a Teacher Training Certificate holder and she can get employment at any time it cannot be said that the father alone could afford to spend to give proper education to the child. Instead, considering the fact that all along, except for a short while, the child was residing with the mother and the respondent and her mother themselves are teachers and the child is the only object of their care and affection and the child is still of tender age, it cannot be gainsaid that the environment available in the place where the respondent resides alone will be the most suitable one for the welfare of the child.

7. Learned Counsel for the respondent also contended that there was illicit relationship between the appellant and his sister-in-law, and hence it would not be conducive for the welfare of the child to remain in the custody of the father. 1 can at once state that except the statement of the wife in the witness box as P.W. 1, there is no material to substantiate this wild allegation. Her petition is conspicuously silent on this aspect. There was not even a suggestion to this etfect during the cross-examination of the appellant as R.W. 1. I have no hesitation m rejecting the argument of learned Counsel for the respondent that this factor disentitles the father to have the custody of the child.

8. Section 6(a) of the Hindu Minority and Guardianship Act reads that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property, are, in the case of a boy or an unmarried girl the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. On the basis of this provision learned ' Counsel for the appellant submitted that since the boy has completed the age of five years, his custody must be entrusted with the father.

This application by the father is one under Section 25 of the Guardians and Wards Act, 1890. Section 24 of this Act provides that a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject, requires. Under Section 25 if a ward is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return. However, Section 5 of the Hindu Minority and Guardianship Act, 32 of 1956 provides that save as otherwise expressly provided in this Act, any other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act. As per Sec. 2, the provisions of that Act shall be in additional to, and not, save as expressly provided, in derogation of, the Guardians and Wards Act, 1890. Sees. 24 and 25(1) referred to above are the only provisions in Guardians and Wards Act, 8 of 1890 regarding the custody of the ward. Section 12 deals with the power of the Court to make order for the temporary custody of the minor. A conjoint reading of the provisions in both the Acts would indicate that the custody of infant who has not completed the age of five years shall ordinarily be with the mother. And the paramount consideration in deciding the custody of a child is its welfare. The provisions of the earlier Act which are inconsistent with the later enactment shall be deemed to have been repealed. Andit is significant to note that Act 32 of 1956 nowhere mentions that the custody of a boy who has completed five years must necessarily be with the father. So considering the welfare of the child, the Court must use its discretion and arrive at the conclusion.

9. Learned Counsel for the appellant argued that under the law the father would be the natural guardian of the infant child and nothing has been stated against the appellant herein as to how he has become incapacited to be such natural guardian and in the absence of disqualification, the custody of the infant child must only be with him. On the other hand, as rightly pointed out by learned Counsel for the respondent, it is pertinent to note that there is a distinction between guardianship and custody based on the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1959. The above said Section which purports to specify who is the natural guardian of a Hindu Minor with reference to his person or property,

makes a distinction between guardianship and custody. The father is first declared to be the natural guardian in the case of a boy of an unmarried girl. Only thereafter the claim of the mother as a guardian is provided for. This is with reference to guardianship which in its ordinary connotation would take in custody and care of the minor which could be equivated to guardianship of a person and custody and control of the property which is really guardianship with reference to the property of the minor. The proviso to the Section carves out a special right relating to custody in favour of a mother in cases where the infant child has not completed the age of five years. In such a case a preferential claim for custody is conferred statutorily on the mother and that would mean that the father, though he would still be the natural guardian of an infant under Section 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. It is thus seen from Section 6(a) and the proviso thereunder that the statute contemplates the father being the natural guardian of an infant who has not completed the age of five years while the mother is entitled ordinarily to have the custody of such a minor. Obviously, in such a case the father would still be for all practical purposes the natural guardian as defined in Section 4(c) of the Hindu Minority and Guardianship Act. Indeed, there are many decisions including that of Ratnam, J. in Suresh Babu v. Madhu, : AIR1984 Mad186 which have recognised the distinction between guardianship and custody. This difference made even in the statute in Section 6(a) makes it clear that it is not necessary in every case where the boy has completed five years, his custody must pass on to the father. So the provisions of Act 32 of 1956 are no bar to entrust the custody of a six years old child with the mother.

10. The only question in this case is whether it is for the welfare of the minor that his custody should be entrusted with his mother. It is unfortunate that owing to the differences between the father and mother it has become necessary to consider this question. The endeavour made by this Court with the assistance of Counsel on both sides to pursuade the father and mother to live together in the interest of the welfare of the infant child proved futile. But, it is still possible that in future these differences may be made up and that the interest of the minor may be advanced by the cooperation of both the spouses. The boy has just completed six years and all along he has been under the care of his mother. As we have already

seen, both the mother and maternal grandmother who is residing with the mother are educated persons residing in Namakkal Town. Even though the child has crossed five years of age, it still requires motherly care and affection. It is impossible in the case of a young child to find any adequate substitute for the love and care of the natural 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. Be it also noted that the paramount consideration is the interest of the child rather than the rights of the parents. The expression 'Welfare of the minor' though has not been denned, yet undoubtedly has to be given a very wide meaning. It ought not to be measured in money only or by physical comfort alone. It has many facets, such as financial, educational, physical, moral and religious welfare. It would not be right to snatch this child of tender age from his mother and force it to make a new start with his father. In my view, so long a child is young enough to need the day to day care of his mother, it is better to leave the child with the mother, unless mother is entirely unsuitable person. If mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years. The mother's lap is God's own cradle for a child of this age, and that as between father and mother, other thing being equal, a child of such tender age should remain with mother. It is the mother who would have the interest of the minor most at heart, the tender years of the child needing the care, protection and guidance of the most, interested person viz., the mother, who has come to be preferred to others. The affection, love and sympathy which the children require cannot be given by the father in the same measure as can be given by the mother.

11. In Mary Vanitha v. Babu Royan, 1991 II M.L.J. 231 cited by learned Counsel for respondent the minors concerned were 5 years and 3 years respectively. The father and mother were Christians married under the Special Marriage Act. When the father forcibly removed the children from the custody of the mother, the mother came forward with a petition under Section 7 the Guardians and Wards Act for appointing herself as guardian. On the facts and circumstances of that case, holding that the mother had a steady income, out of which she was in a position to meet all the expenses of her children, Lakshmanan. J. took the view that the best way to serve the welfare and interest of the minors was to entrust the custody of

the children to the mother. He also held that the father's right to the custody of his minor child is not absolute nor is it indefeasible in law. It is circumscribed by the consideration of the beneficial welfare of the minor. The legal rights of the natural guardian may only be secondary consideration, the principal factor being the interest and welfare of the child. I am in respectful agreement with the view expressed by the learned Judge.

12. , However, learned Counsel for the appellant cited two other decisions of Lakshmanan, J. in support of his claim that the father alone will be the fit and proper person to have the child's custody. The first decision is that in Velan v. Muthu, : (1990)2MLJ417 . It has been held in that case that under Section 6 of the Hindu Minority and Guardianship Act in the case of an unmarried Hindu minor girl, the father and after him, the mother, shall be the natural guardian. In that case, the mother had gone out of the picture by her demise. Even before the petitioner could complete all the ceremonies for his wife, respondents therein, mother-in-law and sister-in-law of the petitioner, without the permission or consent of the petitioner stealthily removed the child when the petitioner was away. In the back drop of this case this Court held that there was absolutely no circumstance which warranted deprivation of parental right of the father. And the Court directed the respondents to deliver the child to the petitioner. In the next case Ettiappa v. Subramanian, 1993 1 M.L.J. 333 it has been laid down that in the absence of any positive proof that the father has suffered any disqualification from being the guardian and custody of the minor child, the father alone will be the fit and proper person to have the child's custody. There the father of a male child aged about 41/2 years filed an application under Section 25(1) of the Guardians and Wards Act, read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956, to direct the maternal grandparents of the child to hand over its custody to him. Evidently, the facts of these two decisions have no bearing upon the present case and they cannot help the appellant in any manner.

13. The next decision cited by learned Counsel for the appellant is that in Ramachandra v. Annapurni Ammal, : AIR1964 Ker269 where an application under Section 25 of the Guardians and Wards Act for the custody of a seven years old female child against the father was held to be not maintainable in law unless the

mother had been appointed guardian of the child by the Court, in asmuchas a mother is not a natural guardian of such child while the father is. There a single judge of the Kerala High Court took the view that after the enactment of the Hindu Minority and Guardianship Act, 1956, no one can be found to be a guardian of a Hindu minor, unless one satisfies the definition in that Act. In enumerating the natural guardians of a Hindu minor, Section 5 of that Act specifies that the father is the natural guardian of a child and it is only after him, that is to say, after his death or removal by Court, can the mother be its natural or guardian. It then follows that the applicant mother in that case is not the guardian of the minor concerned. She cannot without being appointed guardian by the District Court obtain custody of the child. If she wants custody of the child the proper procedure for her would be to apply to the Court of the District Judge for certificate of guardianship. If only she does obtain a certificate she will then be entitled to claim the custody under Section 25. In a proceeding under Section 25 of the Guardians and Wards Act to restore the custody the fitness or unfitness of the respondent to be guardian does not arise. Learned single Judge negatived the claim of the mother on the ground that she has wrongly assumed that she was a natural guardian of the minor contrary to the provisions of Section 6 of the Hindu Minority and Guardianship Act. A careful reading of this decision would indicate that the distinction between guardianship and custody as pointed out by Ratnam, J. in Suresh Babu v. Madhu, : AIR1984 Mad186 was not born in mind in that case. So this decision cannot advance the case of the appellant any far.

14. In the circumstances, it is evident that the Trial Court has rightly directed the appellant to hand over the custody of the child to the mother. Needless to add that this order of entrustment will not disturb the father's guardianship. The child has been directed to be put in the care of the mother only in his interest and for his welfare. This, of course, will not prevent the father from making a further application at any later date when he may be able to satisfy the Court that it will then be in the interests and welfare of the minor that he should leave his mother's care and live with his father. With these, observations the appeal is dismissed. No costs.