

IN THE COURT OF DISTRICT JUDGE, NAGAPATTINAM.

Present: Thiru. A. Kanthakumar, M.L.,
District Judge.

Friday, the 22nd day of December 2023

CNR No.TNNG010013062023

G.W.O.P.No.29/2023

Sivagamasundari

.... Petitioner

-VS-

Madhavan

.... Respondent

This Petition came before me for final hearing on 15.12.2023 in the presence of Thiru. R.Paramanandam, Advocate for the petitioner and the respondent remained absent and set exparte and upon hearing the petitioner's side argument and perusing the records and having stood over till this day for consideration, this court passed the following...

ORDER

This is an application filed by the petitioner U/s 7, 10 & 25 of Guardian and Wards Act 1890 praying to declare the petitioner as guardian of minor, namely, Suman and also custody of the minor child.

2. The brief averments in the petition are as follows:

(i) The Petitioner is working in a private concern at Hosur. The marriage was solemnized between the petitioner and the respondent on 14.09.2009 at Arulmigu Subramaniaswamy Thirukoil, Yettukudi in the presence of elders as per the Hindu Rites and Customs. After the marriage, they were living as husband and wife at Ayakkaranpulam village along with the parents of the respondent as joint family. After few days, due to his work, the respondent is used to leave home in the morning hours and return back to home during late evening hours. After that also, he used to come to home at midnight hours after consuming alcohol and scolded the petitioner in filthy language about her

fidelity. In the mean time, the petitioner became pregnant. At 3 months pregnancy, the respondent left the petitioner in his house and went Dubai. Due to health issues, the petitioner went her parents' house with the concurrence of the parents of the respondent. The petitioner had given birth to a male child, namely, Suman on 13.05.2010 and the same was informed to the parents of the respondent and they had seen the petitioner and her son at hospital. After 2 and half years, the respondent returned India and lived with the petitioner for a month and went Dubai again. After two years the respondent came back to India and lived with the petitioner and his child for a period of 15 days alone and went Dubai again. After that, the respondent had returned to his hometown from Dubai for two times, but he did not see the petitioner and his minor son.

(ii) On January 2020, considering the health condition of her father-in-law and the request of the parents of the respondent, the petitioner sent the minor child with them for a few days. Till date, the parents of the respondent were keeping the minor child with them itself due to the compulsion of the respondent and did not allow the petitioner to see her child. Meanwhile, the respondent had filed a petition in HMOP.NO.59/2021 seeking Divorce before the Sub Court, Nagapattinam stating the reason that the petitioner is having illicit intimacy with one Pasupathi Bala Sankar who is working along with her. Even though initially the petitioner had conducted the case, at request of this respondent, she did not conduct the case continuously and so the respondent obtained an order of divorce by not pressing the allegations against this petitioner. At that time, the petitioner requested the respondent to give back her son and the respondent accepted for the same. But he failed to do so. The respondent is an alcoholic and is residing at Village. There is no facility for Education in the said village. If the child is in his custody and care, the education and future of the child will be affected. Hence, the petitioner is to be appointed as guardian for minor child, namely, Suman and custody of the

minor child.

3) The respondent has left the petition for exparte.

4) Now the point for consideration is whether this petition is to be allowed or not?

5) On the side of the petitioner, PW1 & P.W.2 were examined and Exs.P1 to P3 were marked.

6) **Point:**

The petitioner as the mother of the Minor child had filed the present application to appoint her as the guardian for the Minor child. The respondent is the father of the minor child. Notice in this petition sent by the court was returned as he went abroad. After that paper publication was effected and he was called absent and set exparte. To substantiate the contention of the petitioner, she had examined herself as PW-1 and had filed the proof affidavit in consonance with the petition pleadings to the effect that in the wedlock of the petitioner and the respondent, the minor child, namely, Suman was born and the minor child was sent with the parents of the respondent on January 2020 considering the health condition of her father-in-law and they were keeping the minor child with them itself due to the compulsion of the respondent and did not allow the petitioner to see her child and for the maintenance of the minor child, she as a natural guardian has to be appointed as the guardian for the minor child and also custody of the minor child.

7) On perusal of the Ex.P3 namely, the Adhaar card of the minor, it is seen that the minor child was born on 13.05.2010, denoting the said respondent as his father. As per the contention of the petitioner, the minor child is under the care and custody of the respondent from January 2010. It is the main contention of the petitioner that the respondent is an alcoholic and is residing at Village and there is no facility for education and if the child is in his custody and care, the education and future of the child will be affected and has

sought to be appointed her as the guardian for the minor child and also custody of the minor child. To substantiate the contention of the petitioner/P.W.1, P.W.2 was examined. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. The provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration.

8) It is no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

9) In *Rosy Jacob v. Jacob A. Chakramakkal* a three-Judge Bench of this Court in a rather curt language had observed that: (SCC p.855, para 15)

15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between

the requirements of welfare of the minor children and the rights of their respective parents over them."

22. In Halsburys Laws of England (4th Edn., Vol. 13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

15. Similarly the Supreme Court in Gaurav Nagpal v. Sumedha Nagpal reported in (2009) 1 SCC 42, after surveying into various earlier decisions of the Supreme Court in paragraphs 43 to 48 has held as follows:

"43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

44. The aforesaid statutory provisions came up for consideration before courts in India in several cases. Let us deal

with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

45. In *Saraswatibai Shripad Ved v. Shripad Vasanji Ved*, the High Court of Bombay stated: (AIR p.105) "... It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration...." (emphasis supplied)

46. In *Rosy Jacob v. Jacob A. Chakramakkal* this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of wards health, maintenance and education. The power and duty of the court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

47. Again, in *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, this Court reiterated that the only consideration of the court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the court. Mature thinking is indeed necessary in such a situation to decide what will ensure to the benefit and welfare of the child.

48. Merely because there is no defect in his personal care and his attachment for his children-which every normal parent

has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

10. In this case, no document was produced to prove the contention of the petitioner. As the respondent has not provided due care and attention to the children and not brought them in good atmosphere and considering the welfare of the child, he was constrained to file a petition under the Guardian Wards Act, for custody. The petitioner has further submitted that she is ready and willing to give all her attention, love and affection to the child, education in a good school and provide all the best, for the welfare of the child. Considering the paramount welfare and interest of the minor child and the conduct of the parties, towards the welfare of the child, found that retention of custody and guardianship with the respondent/father of the minor child would be best suited for the child and accordingly, dismissed the guardianship petition.

In the result, this petition is dismissed. No costs.

Dictated to the stenographer by me and directly typed by her, corrected and pronounced by me, in the Open Court, this the 22nd day of December, 2023.

District Judge,
Nagapattinam.

Annexure:

Witness examined on the side of the petitioner:

P.W.1 Tmt. Sivagamasundari (petitioner)

P.W.2 Tr.Paneerselvam

Documents marked on the side of the Petitioner:

1	22-08-2022	Judgment of the Sub Court, Nagapattinam passed in HMOP 59/2021	Certified Copy
2	---	Aadhaar Card of the petitioner	Xerox Copy
3	---	Aadhaar Card of the minor	Xerox Copy

District Judge,
Nagapattinam.