

(1999) 08 MAD CK 0151

In the Madras High Court

Case No : Original Petition No. 338 of 99

Mary Sumathi, No. 128/5 Emerald Flats, Anna Nagar West,
Chennai-40

APPELLANT

Vs

Charles Asirvatham No.36 Anna Street, Taramani
Chennai-113

RESPONDENT

Date of Decision : 16-08-1999

Acts Referred:

Guardians and Wards Act, 1890 — Section 10, 2, 3, 7, 8

Citation : (1999) 3 CTC 643 : (2000) 2 RCR(Civil) 313

Hon'ble Judges : I. David Christian, J

Bench : Single Bench

Advocate : M/s C.A. Theagarajan and K.G. Sarojini, for the Appellant; R. Selvakumar and G. Periyaperumal, for the Respondent

Judgement

Judgement Pronounced by I. David Christian, J.—In the matter of minor Swetha Beulah. Petition filed under sections 2 & 7 to 10 of the Guardians and Wards Act, 1890.

This petition is filed by Mary sumathi mother of the minor alleges that she was given in marriage to the respondent on 4.2.1989, that the marriage was held in Maranadha Church at Thiruninvavur in Thiruvallar District, that after the marriage they were living together as husband and wife, that the petitioner is a Doctor holding M.B.B.S. degree, that she has also obtained a Post Graduate Diploma, that after the marriage in 1989 they were residing together in Bhuvaneshwar in Orissa. Where the respondent in General Insurance Corporation, that even from the initial period, the petitioner was subjected to cruelty and ill-treatment at the hands of her husband, namely the respondent, that the petitioner came to Hyderabad in 1990 and joined Post Graduate Course and was residing with tier parents in Hyderabad for sometime, that the respondent transferred to Hyderabad and both of them were living together at Hyderabad for sometime, that ill-treatment become so untenable and therefore

the petitioner was forced to leave the matrimonial home, that the minor Swetha Beulah was born on 10.9.1990, that when she left her husband she also took the minor child with her, that she had earlier filed a petition for divorce which was allowed to be dismissed because the elders prevailed upon her to withdraw the petition, that the petitioner again joined the respondent in Hyderabad in 1993 but the ill-treatment still continued, that the petitioner was forced to leave the matrimonial home in September, 1993, that thereafter the petitioner has come with the child and settled at Madras along with her parents, that she was previously employed as a Doctor in C.S.I. Kalyani Hospital, Chennai, that now the petitioner has started her private practice, that she is liking for the child and the child is being brought up nicely, that minor is studying in a good school, that the respondent has married a second wife in 1995, that he has also got a female child born to her, that he has deserted his second wife also, that ever since the birth of the child she has been only brought up by this petitioner with her own resources, that the respondent has never evinced any interest in the welfare of the minor so far, that in fact the respondent has given a written undertaking that the child shall be only in the custody of the petitioner, that the respondent is recently threatening the petitioner to take away the child forcibly from the school, that therefore she is constrained to file this petition praying for appointment of herself as guardian for the minor and allowing her to have the custody of the minor.

2. Respondent filed a counter contesting the claim of the petitioner by contending that it is true that he married the petitioner on 4.2.1989 and the marriage was solemnised according to personal law governing the parties, that they were residing in Bhuvaneshwar after the marriage where the respondent was working, that at the instigation of the parents, the petitioner left the respondent and went to Hyderabad, that the respondent also got transfer and went to Hyderabad with the only desire to resume normal married life with the petitioner, that the petitioner was adamant in taking her Post Graduate course, that even though she had completed the degree course in 1982 she has chosen to join Post Graduate Course in 1989 only to leave the respondent and to live with her parents in Hyderabad, that the minor was born on 30.9.90 at Secundarabad, that they were living together at Hyderabad, that the petitioner parents were not giving proper treatment to this respondent as a member of the family, that the petitioner's parents wanted this respondent to come and live with them in their house, that they tried to dominate the life of the petitioner and the respondent, that the respondent has served eight years in Indian Air Force from 1978 to 1986, that the respondent has acquired qualification for his further promotional activities, that he has got adequate resources to look after the Welfare of the minor, that it is he who admitted the minor in Kotwal's Montessori and Primary School, Secundarabad that he has nominated the minor for receipt in case of his death or retirement, that the petitioner left the matrimonial home without any reason or justification, that the petitioner wanted to marry a wealthy man, that she is not having a balanced mind that she used to cause physical

injuries on the respondent, that it is false to state that he is ill-treating her, that the petitioner has falsely alleged illicit intimacy between this respondent and a co-worker, that the petitioner after finishing her D.G.O. in Hyderabad in 1992 left conjugal home without informing the respondent, that the elders and relations in the family tried to giving reconciliation between the petitioner and the respondent, that actually compromise has been arrived at in 1992, that the petitioner lived with him for sometime and thereafter left the matrimonial home without any just cause, that the petitioner has left for Gulf countries for one year leaving the child in the custody of her parents, that the respondent filed O.P.No.1 of 1995 before the District Judge, Madurai for divorce but the same was dismissed, that even thorough the respondent has alleged in the petition that a male child was born out of Wedlock to the petitioner with another person he has not stated that the minor Swetha Beulah was born out of that relationship, that a written settlement deed was executed between the petitioner and the respondent, that the respondent returned all the jewels to the petitioner, that he has also agreed to leave the minor child in the custody of the petitioner, that now he has decided to revoke the permission, that he has not disqualified himself in any manner to be unfit to be the guardian of the minor, that since the petitioner is employed as a Doctor she will not have sufficient time to bestow love and affection on the child or to look after the minor, that it will be only in the interest and welfare of the minor that the child must be in custody of the respondent and he may be recognised as lawful guardian, that he is possessed of sufficient resources, that therefore the petition may be dismissed and the custody of the child may be restored to him.

3. The petitioner examined herself as P.W.1 besides examining one Roseline Prabha as P.W.2. The petitioner has filed Exs.P-1, to P-5 documents. Respondent did not even get into the box but contented by marking Exs.R-1 to R-5 documents.

4. The point for consideration is as to whether the appointment of the petitioner as guardian will be in furtherance of the welfare and interest of minor Swetha Beulah ?.

5. The Point:-

It is an unfortunate case where the mother and father of the minor child are fighting for the custody and guardianship of the minor because of the break-up of marriage which took place in the year 1989. The fact that the petitioner married the, respondent is not disputed. It seems that the petitioner and the respondent were able to live happily only for few months after the marriage and misunderstanding started thereafter and even though they were residing together for some years and finally separation has occurred in 1993. Both are Christians by faith and their marriage was solemnised as per the Christian Law. The petitioner is a medical Graduate and has also obtained Post Graduate Diploma D.G.O. the petitioner is presently doing Private Practice in Madras and the minor has been living with her ever since her birth from 1990. Minor was born

on 10.9.1990 at Secundarabad where at that time the petitioner was residing with her parents and the respondent was also working as Assistant General Manager in General Insurance Corporation of India at Secunadarbad. Minor is now nine years old. Atleast for the past six years" the minor is only living with her mother, namely the petitioner and when the minor was brought to the court she looks happy, cheerful and comfortable in the company of the petitioner. She is put in a nice school and all her needs are being looked after by the petitioner. It cannot be also disputed that eversince the birth of the child it was the petitioner who has been maintaining the minor and providing her with all necessities and comforts.

6. The respondent admittedly has not visited the minor child atleast after the petitioner and the child have come to Madras in 1994. Even previously the child was only with the mother and she was never in the company of the respondent alone. The marriage life of the petitioner and the respondent has got a chequered history and I have got nothing to disbelieve the evidence of P.W1 when she stated the soon after the marriage she was being ill-treated and humiliated at the hands of the respondent arid she was never kept happy in the matrimonial home. The respondent is not able to find out any fault in the character of the petitioner. In the counter also he would try to say that the petitioner was more interested in her carrier, that she was adamant in pursuing her higher studies and wanted to resided with her parents rather than her partner, namely the respondent. But this respondent who was suddenly developed love and affection for the child has not hesitated even to disown the child as seen from Ex.P-1, a copy of the petition filed by the respondent against the petitioner praying the divorce. This petition was filed by the respondent in the year 1995 in the District Court, Madurai wherein the respondent has made some reckless allegations against the petitioner and even went to the extent of denying the parentage of the minor child. He has stated that the child has been conceived to another person with whom the petitioner was alleged to have been loading an adulterous life. But strangely the respondent was not able to identify or name alleged adulterer. The respondent had definitely stated in the petition that he has not fathered the child and it was born to the petitioner and another man even through the marriage allegation made in Ex.P-1 petition would throw light on the character of the respondent. Here is a man who will not hesitate to say anything against the woman who he married and from who he prayed for divorce before the court. The wife did not even contest Ex.P-1 petition and are common be sure that any notice was properly served on her. But inspite of her absence the learned District Judge after going through the reckless allegations made by the respondent in the petition has dismissed the petition filed by the respondent for divorce. After being unsuccessfully in getting a decree of divorce, the respondent has entered into an agreement with petitioner on 25.11.1996 and Ex.P-2 was admitted an executed by the petitioner and the respondent. The petitioner has been made to sign this document because she did not want any connections with this respondent and she was even willing to have the document

styled as a deed of divorce. No doubt Ex.P-2 document has no legal basis or force but nevertheless it shows the mind of the petitioner and the respondent at the time when they entered into that agreement. Petitioner was happy to be left alone and wanted to put an end to the marital status. The respondent was also anxious to get separated from the petitioner and was satisfied with deed of divorce to which petitioner has subscribed her signature and he had no hesitation in granting permanent custody of the child to his wife, namely the petitioner. This will be sufficient proof to show that the respondent has never cared for the interest of the child and this is further proved by the wild allegations made in Ex.P-1 petition wherein he has disowned the parentage of the child. This type of person does not want to impress upon the court with recently developed love and affection from the child which obviously must be only a pretense.

7. P.W.2 Roseline Prabha is a young woman who also comes from same community of the petitioner and the respondent and who professes Christian faith. She has sworn to the fact that the respondent married her on 29.5.1995 at Madurai and the marriage was solemnised by a priest who was the head of an independent church. P.W.2 has also stated that she knew about the marriage between the petitioner and the respondent but she was persuaded to marry the respondent because the latter was given out that he was obtained divorce from the petitioner. Hopes of P.W.2 also were dashed in due time and she lived only for few months with the respondent and thereafter had to leave because of ill-treatment and cruelty. But she did not remain passive like the petitioner and she was managed to get compensation of Rs.1,10,000/- in consideration of which she has executed Ex.P-5 divorce deed dated 19.12.1996. Even though the deed is not valid the fact remains that P.W.2 was able to purchase peace from the respondent by putting an end to their joint life and getting a sum as compensation. It is also stated therein that for the child born to the respondent and P.W.2, the former made a fixed deposit of Rs.50,000/- and fixed deposit receipt was handed over to P.W.2. So, the respondent who has been separated from the petitioner between 1991 and 1995 thought it fit to marry second time even during subsistence of the first marriage and the second alliance ended in failure as seen from Ex.P-5.

8. P.W.2 has also sworn to the fact that she has given birth to a child through the respondent and Ex.P-4 birth extract of the child would reveal that child was born on 28.3.96 and the respondent is named as father and P.W.2 as mother. Respondent is not an illiterate. He claims to have acquired many degrees and diplomas and he is occupying a comparatively good position as an officer in the General Insurance Corporation of India. He must be knowing fully well that the marriage between himself and the petitioner is still in subsistence and his attempt to get a divorce by filing Ex.P-1 petition has also failed in spite of which he chose to marry P.W.2, a young woman with whom also he, was not able to get along. While executing separation deed Ex.P-2 the respondent had no hesitation in stating that the child, namely the minor shall be with the mother, the petitioner for rest of her life, similarly when he got separated from P.W.2 he got

another similar document Ex.P-5 in which custody of the child was once for all given to P.W.2.

9. So, all these things would definitely go to show that the respondent was never interested in the welfare of the child, he had no hesitation in discarding the child when he wanted to marry another woman. It is not properly explained by the respondent to how he suddenly become interested in this minor girl who has been living happily with her mother for all these years who has been a proceeding her with all comforts and necessities.

10. Now it is well settled proposition in law that so far as appointment of guardian is concerned the rights of the parties are only secondary and it is not a question of vindication of right of the husband or wife but the paramount consideration must be only the interest and welfare of the minor, on the basis of which alone the court can chose the guardian whether it is mother or father. It cannot be also stated father has got a preferential claim than the mother. After all both are equal partners and therefore it cannot be stated that father has got a better claim to be the guardian or given custody of the minor child than the mother. Interest and welfare of the minor child consists in providing necessities and comforts which would ensure that the child grows up in proper atmosphere so that in course of time the child will stand on her own leg and will be an useful addition to the society and the family. Provision of basis necessities and comforts are only one of the aspects that has to be taken into consideration while choosing the guardian to be appointed. So far as resources are concerned the petitioner is a medical practitioner having obtained a degree in Medicine, besides Post Graduate Diploma in specialised subject. She is doing private practice and she is residing in a house in Anna Nagar, Chennai along with her parents who also appear to be very respectable people. Petitioner is having very good school where her educational needs are properly attended to. So, the resources of the petitioner to bring the minor and to provide necessities and comforts cannot be questioned.

11. Besides, meeting the basic needs, the child must be brought up in proper atmosphere and the conditions in the house must be conducive to her ever growing personality. Nothing can be said in this capacity. The averments made by the respondent against the petitioner are made in a reckless manner. No importance can be attached to the allegations made by the respondent against the petitioner. Since it has been proved that the respondent is in the habit of making reckless allegations against the petitioner. Petitioner comes from a very good Christian family. She is employed decently and she is earning sufficient income to support herself and the child. She is living with her parents who are all respectable people and the child who has been discarded by her father has been taken care of adequately by the mother and her grand parents. The atmosphere in the home of the petitioner is definitely more conducive to the minor Swetha Beulah and her interest will be served better if she is allowed to be in the custody and guardianship of the mother. Father is living alone. He does not seen

to have any good relationship with his parents. There is no womenfolk in the house or the respondent. The respondent will be away more the time will have neither have leisure nor the requisite love for the child and definitely the child will suffer very much if she is put in the custody of the respondent who is practically a stranger to the child inspite of being her father. The respondent has no respect for law and also has spoiled the life of two woman and it is also now stated that he has gone to live with another woman. Under such circumstances, it will be cruel to snatch the child from the mother, namely the petitioner with whom the girl has been very much attached and with whom she has been living for the past nine years. The girl has been brought to the court and even though she is a small girl to be asked to give her option or to choose intelligently it is apparent that she is deeply attached to her mother and she is very comfortable in the company of her mother and grand parents.

12. It will be an act of cruelty if the child is uprooted from the present surrounding and to be placed in the hands of the respondent. The respondent has not shown any interest in the Welfare and interest of the child so far. As already stated the respondent is practically a stranger to the child. Viewed in all these aspects, both material and spiritual, the child's interest will be better served if she is allowed to be in the custody of the mother who shall also have the guardianship of the minor. It seems that the respondent is only contesting the claim of the petitioner to spite her and to wreck vengeance on her with a view to snatch the child which will be a cruel blow on the petitioner who is left only with this child from the unfortunate alliance she rather entered unwillingly. Therefore, the petitioner definitely will be the better choice to be but in custody and guardianship of the minor.

13. I am not even giving any visitation rights to the father, namely the respondent because he has not taken any interest in the minor so far and if allowed to visit the child, the child also will be made a victim in the fight between the mother and father. Respondent is also likely to poison the mind of the minor and will not hesitate to turn her against her own mother. Therefore, I am not passing any orders giving visitation rights to the respondent and this view is also taken only to protect the child and in her interest and welfare.

14. In the result, petition is allowed and the petitioner is recognised as guardian for the minor Swetha Bedulah and the petitioner is also entitled to have the custody of the minor to the exclusion of the respondent.