

(1945) 08 MAD CK 0037
In the Madras High Court

Seeyali Veettil Abubacker

APPELLANT

Vs

Ovinakath Vayyilapurayil Mariyumma

RESPONDENT

Date of Decision : 30-08-1945

Acts Referred:

Citation : AIR 1946 Mad 110 : (1945) 58 LW 587 : (1945) 2 MLJ 463

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The appellant who is a Muhammadan, applied in the Court of the District Judge of North Malabar for an order appointing him the guardian of his children by the respondent. Subsequently he amended his petition and asked for an order of the Court requiring the respondent to return the children to his custody. The District Judge dismissed the petition. Hence the appeal.

2. The appellant has been married three times. The respondent was his second wife. By his first wife he had a son. He divorced her and the son is in the custody of his mother. By the respondent he has three children, two boys and a girl. The eldest child is nine years of age and the youngest five years of age. The appellant married his third wife before he divorced the respondent. He is now living with the third wife in the house of her tarwad. The respondent is living in her own tarwad house with her mother. Her children are living with her. The respondent has remarried.

3. Being the lawful guardian the appellant did not require an order of the Court to support his right to act as the guardian. In fact an application under the Guardians and Wards Act for an order appointing him guardian did not lie. See T. Sivasankara Mudaliar Vs. Radhabai Ammal and Another, . Being the guardian of his children under his personal law he was, of course, entitled to apply for an order u/s 25 of the Guardians and Wards Act, but the fact that he is their lawful guardian does not mean that the Court is compelled to pass an order in his favour u/s 25. When the appellant divorced the respondent she took her children

with her, which amounted to removing them from the custody of their father. The section does not require the Court to make an order for their return. It says that 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. The welfare of the minor is of primary importance.

4. The District Judge after reviewing the facts came to the conclusion that it was not in the interest of the minors that an order should be passed directing the respondent to return them to the custody of the appellant. We consider that the District Judge is quite right when he says that the children are likely to be better looked after in the respondent's tarwad house than in the house of the appellant's third wife. If they were returned to their father, they would have to live amongst strangers. There is evidence that the appellant's business requires his frequent absence. We have also to take into consideration the fact that the appellant after he had divorced the respondent did not visit his children or have them with him. Then there is the fact that in his petition he made allegations against the respondent's character. We consider that these allegations were made in order to bolster up his claim to the return of the children. They have certainly not been proved. The fact that they were made and not proved is in itself an indication that the father is not a proper person to have the custody of his children. There is a further factor. The application which has given rise to this appeal was not filed until after the respondent had written through a lawyer demanding further money for the maintenance of the children.

5. We see no reason for disagreeing with the District Judge and we dismiss the appeal with costs.