
(2022) 04 KL CK 0034
In the High Court Of Kerala
Case No : MAT Appeal No. 914 Of 2018

Subin Babu

APPELLANT

Vs

Susamma

RESPONDENT

Date of Decision : 05-04-2022

Acts Referred:

Citation : (2022) 04 KL CK 0034

Hon'ble Judges : A.Muhammed Mustaque, J;Sophy Thomas, J

Bench : Division Bench

Advocate : G.Sreekumar, C.Rajendran, Jobi Jose Kondody, R.S.Sreevidya

Final Decision : Allowed

Judgement

Sophy Thomas, J.

1. This appeal has been preferred by the respondent in O.P (G&W) No.512 of 2016 on the file of Family Court, Pathanamthitta, challenging the impugned judgment and decree by which he was deprived of permanent custody of his minor girl child Thejal Santy Subin. The respondent is the maternal grandmother of the child and mother-in-law of the appellant.

2. The respondent/mother-in-law filed the above O.P for appointing her as the guardian of the minor child with her permanent custody, as the mother of the child was no more. The appellant/respondent opposed that O.P as he was the father and natural guardian of the child, and the child was permanently staying with him since the death of her mother.

3. The Family Court, Pathanamthitta formulated necessary issues and thereafter the parties went on trial. PWs 1 to 3 were examined and Exts.A1 to A8 were marked from the side of respondent/mother-in-law. RW1 was examined and Exts.B1 to B13 were marked from the side of the appellant/father.

4. After analysing the facts and evidence, the Family Court allowed the O.P giving permanent custody of the minor child to the respondent/grandmother with

visitation right to the appellant/father at the house of the respondent at any time, and he was directed to hand over the child to the respondent within 60 days from the date of judgment. Assailing the impugned judgment and decree, the appellant approached this Court.

5. Pending appeal, the husband of the respondent got himself impleaded as additional 2nd respondent as per order in I.A No.2 of 2021.

6. Now, let us have a scrutiny of the rival contentions and evidence, to find out whether any interference is warranted in the findings of the Family Court.

7. Admittedly, the minor child Thejal Santy Subin was born on 28.06.2014 in the wedlock of the appellant and Smt.Sruthy Susan Mathew. Smt.Sruthy committed suicide on 21.09.2015 while she was staying at her paternal house along with her parents. Though the respondent had a case that her daughter Sruthy was subjected to physical and mental cruelty by the appellant demanding dowry, Ext.B1 was sufficient to show that, after a quarrel between Smt.Sruthy and her mother, who is the respondent herein, she committed suicide. At that time, the child was only one year and three months old. The appellant took the child to his house and since then, the child was with him. The respondent filed complaints against the appellant and his family members and also against her own husband and his brother regarding death of her daughter. It is also an admitted fact that, the crime registered for the unnatural death of Smt.Sruthy was referred. Thereafter, the respondent was fighting for the custody of the child alleging that, the appellant is not competent to get guardianship and custody of the minor child.

8. The appellant contended that, the respondent/mother-in-law is a senior citizen and she is not cordial with her own husband and the atmosphere in her house is not conducive for the proper development of the child. Moreover, the child was with him throughout after the death of her mother, and now the child is 7½ years old. The appellant is working in Australia and the child also is with him in Australia attending school and she is very comfortable with him. It is true that, the child was taken to Australia by the appellant without taking sanction from the court. So, we directed him to produce the child and on 01.04.2022, the child was produced before us. The child seemed so happy with her father and she is attending school in Australia, and she expressed her desire to go back with her father. The respondent also was present before us but the child was very reluctant to mingle with her. Even then, the appellant was amenable to give custody of the child to the respondent till 04.04.2022 evening, as they are returning to Australia on 05.04.2022. But, the respondent/grandmother refused to take custody of the child as the duration of custody was very short. It is submitted from the Bar that, the husband of the respondent is diagnosed with Carcinoma and the respondent is at loggerheads with him and he was even evicted from the house, and only with the help of local people, he could resume his stay in his house. In such a situation, the child may not get a peaceful accommodation in the house of the respondent even for a short duration.

9. Husband of the respondent got himself impleaded in the appeal as additional 2nd respondent. He filed affidavit in support of that petition fully supporting the appellant. According to him, the welfare of the child will be safe with the appellant, and if the child is given custody to the respondent, its life will be in peril.

10. Since the child is now happily residing with her father in Australia and he is properly attending all her affairs including education, and the child expressed her intention to be with her father in Australia, the appellant, who is the natural guardian, is the proper person to get guardianship and permanent custody of the child. The court exercising its *parens patriae* jurisdiction has to ensure the welfare and well-being of the child, rather than the rights or sentiments of the parties wrangling for the custody of the child.

11. The respondent has no case that, the appellant is not able to attend the affairs of the child or to protect her interest as well as her education. Since the mother is no more, the father is the remaining natural guardian to take care of the child. Since he is employed in Australia and the child also is with him in Australia, this Court has no apprehension with respect to the welfare and well-being of the child, being safe in the hands of her father. The respondent is aged and her husband is ailing from cancer. Moreover they are at loggerheads, though staying under same roof. Since the minor child is the only child of her deceased daughter, she may have some sentiments towards her, and the child also has to get the love and affection of her maternal grandparents, for her emotional well-being and development. So, reservations can be made, to ensure her contact rights with the child while she is in Australia along with her father. Whenever she comes down to Kerala, the respondent can have custody of the child for short durations, proportionate to the period of leave. Anyhow, the appellant is the proper person to get guardianship and permanent custody of the minor child Thejal Santy Subin and so much so, the impugned judgment and decree are liable to be set aside.

In the result, the Mat.Appeal is allowed as follows:

I) The impugned judgment and decree are hereby set aside.

II) While the child is in Australia, the respondent will have contact rights with the child through whatsapp video calls on any day according to the convenience of the child.

III) Whenever the child reaches Kerala, the respondent can have custody for short duration proportionate to the period of leave, on taking orders from the jurisdictional Family Court.

IV) No order as to costs.