

(2009) 11 MAD CK 0192

Madras High Court

Case No: O.P. No. 418 of 1999

N. John

APPELLANT

Vs

G. Narasaiah and G. Issac

RESPONDENT

Date of Decision: Nov. 17, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 32A Rule 3
- Constitution of India, 1950 - Article 141, 144
- Guardians and Wards Act, 1890 - Section 10, 11, 17, 17(2), 17(3)

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: Anna Mathew, for the Appellant; S.P. Prem Kumar, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

Heard both sides.

2. The Original Petition was filed by the petitioner under Sections 3, 7, 10 and 29 of the Guardian and Wards Act seeking for the custody of minor children Arunkumar and Kumari.

3. Notice was ordered on this application as early as 14.12.2000. At the time of the filing of the Original Petition, the minor boy Arunkumar (born on 23.08.1988) was about 10 years old and minor girl Kumari (born on 11.05.1992) was about six years old. Both the children were born to Mr.G.Daniel and Mrs.Mariam Daniel. The mother of the minor children, Mariam Daniel died on 25.06.1993. Their father Mr.G.Daniel, who was employed in the Southern railway as a Fitter died on 12.09.1997. The petitioner and his wife Moshamma were taking care of the two children since then.

4. It is claimed that the petitioner's paternal aunt G.Singamma had three children and the second child of hers was the father of the minor children. In fact, the late G.Daniel and the petitioner were cousins on the father's side. The respondents were brothers of the father of minor children. The second respondent is unmarried. The grand parents of the minor children also passed away on 12.02.1975 and 15.06.1975 respectively. The other surviving legal heirs were one maternal grand aunt, Pitchamma, the petitioner as well as the respondents.

5. The two children right from the death of their mother were under the custody of the petitioner. At the relevant time of filing of the Original Petition, the minor boy was studying in III standard and the minor girl was studying in I standard. The children were taken care of by the petitioner and his wife. The petitioner was a retired Government Employee and is drawing pension.

6. It was stated that the terminal benefits that were due to the death of G.Daniel, (a sum of Rs. 2,14,951/-) was deposited on a long term Fixed Deposit on equal share in the respective names of the minors. The children were entitled to withdraw it after they attain their majority. It was also claimed that the first respondent was married and was having two children and the second respondent was unmarried and also an alcoholic. Therefore, the custody of the minor children for their person and properties were sought for by the petitioner in this OP.

7. On behalf of the respondents, a common counter statement was filed dated 04.10.2002. In the common counter statement, the facts relating to the death of the parents of the minor children were not disputed. It was alleged that the petitioner was having an eye on the terminal benefits available to the death of the father of the minor children and hence he has chosen to file the present Original Petition. It was further alleged that the petitioner was a mischievous person and also a local "Dhadha". He was 67 years old and cannot take care of the children. The petitioner had not disclosed the names of other near relatives. The allegation that the petitioner and his wife were bringing up the children after the demise of their parents was also denied. While the first respondent was employed in a private concern, the second respondent was an Advocate Clerk. The only motive of the petitioner was to grab the amount due to the children.

8. Evidence of the parties were recorded by this Court on different dates starting from December 2002 to February 2005. On the side of the petitioner, three witnesses, namely P.W.1 to P.W.3 were examined. On the side of the respondents, two witnesses namely R.W.1 and R.W.2 were examined. Even though evidence was recorded as early as in February 2005, but for reasons best known, the matter was not posted for final disposal. It was only when a memo was filed by the petitioner dated 01.07.2009 stating that the minor boy Arunkumar was 21 years old and the minor girl Kumari was 17 = years old, the main O.P itself was was directed to be listed before this Court.

9. Thereafter, applications were filed in A. Nos. 2974 and 2976 of 2009. In A. No. 2974 of 2009, a direction was sought for to deposit the amount due to the minor girl Kumari in a Fixed Deposit until she attains majority. In A. No. 2976 of 2009, a direction was sought for to pay the amount due to the minor boy as he had attained majority. Those two applications were ordered by this Court on 17.07.2009 as prayed for. An application in A. No. 2975 of 2009 seeking for permission to receive the Original documents Exs.P1 to P4 filed by them was also ordered by this Court on the same day.

10. In view of the above, the issue relating to the custody of the minor boy Arun Kumar has become infructuous as he had become a major. In respect of the minor girl Kumari (born on 11.05.1992), she was already 17 = years. Therefore, this Court directed the production of the minor girl and questioned her about her wish. The girl who was aware of this petition and the rival contentions clearly stated that she would like to live with the petitioner as they are fully taking care of her. She also stated that ever since the death of her mother namely, since 1993, she was living with the petitioner only.

11. Therefore, it was unnecessary to go into the rival contentions except to state that in the present case, the petitioner had proved himself as a good guardian by taking care of the children. The allegation that he wanted to covet the amounts due and payable to the minor children was also not proved. The amounts have were directed to be kept in a Fixed Deposit.

12. However, this Court is of the opinion that if such matters relating to guardianship were kept pending for over 10 years, it will virtually defeat the very purpose of such applications. In matters relating to guardianship, sensitive approach and expeditious disposal is expected and it should not be kept buried in Court dockets. An impression will be created that Courts have no time for such matters and it is busy dealing with the matters relating to property claims of more wealthy and influential persons. Therefore, this Court decided to utilise this opportunity to find out the state of affairs in the Courts throughout the State of Tamilnadu and Union Territory of Puducherry in dealing with such matters.

13. When the matter came up on 04.08.2009, this Court by an interim order emphasised the procedure to deal with such matters that too within a time frame was directed by the Supreme Court in Lakshmi Kant Pandey Vs. Union of India (UOI) . Though the said judgment laid down the norms for inter-country adoption, the directions given therein will apply to all proceedings initiated for domestic adoption and guardianship matters also. Hence, in Paragraph 22 of the said judgment, the following passages may be usefully extracted below:

22. Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various

persons including the parents of the child if they are residing in any State to which the Act extends.

A. But, we are definitely of the view that no notice under this Section should be issued to the biological parents of the child.

B. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship.

C. "This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child." The proceedings on the application for guardianship should be held by the court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed.

14. Further, in the very same judgment by a subsequent order, the Supreme Court vide its judgment reported in 1985 (Supp) SCC 701 has once again emphasised the need for adhering to the time schedule and also directed the High Courts to exercise effective supervising control. The following passage found in paragraph 16 may be usefully extracted below:

16. Some social and child welfare agencies made a complaint before us that the proceedings for appointment of a prospective adoptive parent as guardian of the child drag on for months and months in some District Courts and almost invariably they take not less than five to six months. We do not know whether this is true, but if it is, we must express our strong disapproval of such delay in disposal of the proceedings for appointment of guardian. We wish to impress upon the District Courts that proceedings for appointment of guardian of the child with a view to its eventual adoption, must be disposed of at the earliest and in any event not later than two months from the date of filing of the application. We would request the High Court to call for returns from the District Courts within their respective jurisdiction showing every two months as to how many applications for appointment of guardian are pending, when they were filed and if more than two months have passed since the date of their filing, why they have not been disposed of up to the date of the return. If any application for guardianship is not disposed of by the District Courts within a period of two months and there is no satisfactory explanation, the High Courts must take a serious view of the matter. We were also

informed that some District Courts are treating applications for guardianship in a lackadaisical manner and are not scrupulously carrying out the directions given by us in our judgment. This defiance by the District Courts of the directions given by us should not be tolerated by the High Courts and we would request the High Courts to, exercise proper vigilance in this behalf.

15. When this matter was being heard, this Court also had received several complaints from various organisations involved in processing of such applications regarding the prolonged delay in disposing of such matters and the strange practices adopted by various Trial Courts in the State. Therefore, this Court in paragraphs 6 to 9 of the interim order dated 04.08.2009 passed the following order:

6. In Lakshmi Kant Pandey-II case (cited supra), the Supreme Court had directed that if any application for guardianship is not disposed of by the District courts within a period of two months and there is no satisfactory explanation, the High Courts must take a serious view of the matter. It is further stated that a direction given by the Supreme Court if it is defied by the District Courts, it should not be tolerated and the High Courts must exercise proper vigilance in this behalf.

7. May be due to lethargy and insensitiveness, such disposals are not taking place. There is also a murmur that the disposal of OPs are not taken into account for considering the norms. Now that, the Full Court had decided to calculate two OPs as equivalent to disposal of one suit, there should not be any further delay in disposal of such OPs.

8. In the light of the directions given by the Supreme Court, it is, therefore, necessary to call for returns from all the Principal District Judges, Principal Judge, City Civil Court, Chennai and the Chief Judge, Pondicherry District Court. Accordingly, they are directed to send returns in respect of cases pending in their court regarding the number of applications for appointment of Guardian/Adoption pending, the dates of filing and if more than two months have passed since the date of their filing, why they have not been disposed of upto the date of the returns. The details must be given upto 31.7.2009.

9. The Registry is hereby directed to send directions to all the District Judges dealing with OPs in HAMA/GAWA forthwith and call for returns to be sent within ten days and place it before this Court.

16. This direction of this Court was circularised by the Registry to all the concerned courts vide circular R.O.C. No. 3817-A/2009/F1 dated 25.08.2009. Pursuant to the direction, details were submitted by various Courts dealing with such applications up to 30.07.2009 to the Registry of this Court.

17. Thereafter, when the matter came up on 30.09.2009, this Court further directed the registry to call for the returns from all the Courts dealing with such applications giving the pendency of cases up to 30.09.2009. Accordingly, the Registry issued a

further circular in R.O.C.No.3817-A/2009/F1 dated 01.10.2009 about the pending applications filed under the Hindu Adoption and Maintenance Act (for short HAMA) and Guardians and Wards Act (for short GAWA). The District Judges were also directed to give reasons for the pendency. Once again the details were furnished by the various Courts dealing with such applications.

18. The statistics furnished by the Registry about the pendency of the matters up to 30.07.2009 and upto 30.09.2009 must be reproduced below:

Number of Petitions Under Hindu Adoption Maintenance Act/Guardian and Wards Act Pending as on 30.07.2009 and 30.09.2009 in the Courts of Tamilnadu and Puducherry.

Sl.No.	Districts	Total No. of Cases as on	
		30.07.2009	30.09.2009
1	Chennai	15	48
2	Coimbatore	54	57
3	Cuddalore	38	38
4	Dharmapuri	4	6
5	Dindigul	83	91
6	Erode	32	28
7	Kancheepuram	7	3
8	Kanniyakumari	53	55
9	Karur	13	14
10	Krishnagiri	25	25
11	Madurai	23	42
12	Nagapattinam	3	3
13	Namakkal	7	2
14	The Nilgiris	11	8

15	Perambalur	25	22
16	Puducherry	54	34
17	Pudukkottai	13	15
18	Ramanathapuram	14	12
19	Salem	147	151
20	Sivagangai	28	28
21	Thanjavur	27	30
22	Theni	6	8
23	Tiruchirappalli	2	Nil
24	Tirunelveli	84	74
25	Tiruvallur	11	15
26	Tiruvannamalai	13	12
27	Tiruvarur	2	2
28	Thoothukudi	43	53
29	Vellore	57	55
30	Villupuram	8	8
31	Virudhunagar	34	32

19. From the above, it can be seen that the Courts which are having more than 50 cases are as under:

1. Coimbatore - 57

2. Dindigul - 91

3. Kanniyakumari - 55

4. Salem - 151

5. Tirunelveli - 74

6. Thoothukudi - 53

7. Vellore - 55

It was also noted that many matters were pending from 2006 onwards.

20. However, the direction to call for such reports from the District Courts by this Court (as directed by the Supreme Court) had a salutary effect. The Supreme Court in the Laxmi Kant Pandey's case (cited supra) had also stated that if there was no satisfactory explanation for not disposing of the matters within two months, the High Court must take a serious view of the matter. Despite such directions, if defiance was shown by the District Courts, it should not be tolerated by the High Court and it must exercise proper vigilance in this behalf. This vigilance kept by the High Court had a desired result as can be seen from the statistics which were furnished in a two months gap.

21. It is needless to state that the Trial Courts must attend such cases with utmost sensitivity and diligence. While many of the Courts have adhered to the circular, however, it is also a disquieting factor to see that some district's current pendency of cases shows an alarming picture and slackness in dealing with such matters, despite the binding law laid down by the Supreme Court under Article 141 of the Constitution of India. Under Article 144 of the Constitution, all the Courts shall act in aid of the Supreme Court.

22. Apart from adhering to the time schedule fixed by the Supreme Court, it is also necessary to give appropriate directions regarding the reasons adduced by the District Courts for the cause of delay in disposing of the applications. The reasons for the delay as found from the returns submitted by them were as follows:

i) Matters were referred to Mediation Centre

ii) Reports from the Probation Officers were not received.

iii) Delay in submission of Reports by the Scrutinizing Agencies.

23. It is also seen from the returns that many Courts have ordered publication in News papers about the applications. In so far as paper publication in respect of guardianship matter is concerned, the procedure adopted by the Courts are totally repugnant to the decision of the Supreme Court in Laxmi Kant Pandey Vs. Union of India (UOI) and Another, at page 710 (cited supra).

24. If there is any doubt about the bonafides of such applications, the Supreme Court itself has given a way out by asking for reports from the Scrutinizing Agencies. There are two Scrutinizing Agencies in Tamilnadu namely, the Indian Council for Child Welfare (ICCW), Chennai -30 and the Indian Council for Social Welfare (ICSW),

Chennai -8. Therefore, there will not be any difficulty in calling for scrutiny reports from those agencies. The task of assigning work to those agencies can be equally divided. Even after reference, if there was delay, the Registry of the concerned Courts can be asked to send constant reminders for sending their reports. Therefore, on no account a paper publication can be ordered in entertaining such applications.

25. Further sending the matter to Mediation Centre is again wholly unwarranted. In fact such an exercise should be undertaken by the Trial Court itself as it can be seen from the amendment made to Civil Procedure Code. By the Central Act 104 of 1976, Order XXXII-A was introduced wherein "Suits relating to matters concerning the family" was dealt with. Special proceedings have been provided under Order XXXII-A Rule 3, which enjoins upon the Court to make effort for settlements. Therefore, it is the Trial Court which must deal with the mediation process. If this Rule is read along with Order XXXII-A Rule 2 wherein, proceedings have to be held in camera, the question of sending it to outsiders may not arise except when an opinion was called from the experts on a matter. The Trial Courts only to explain the delay in disposal cannot dump the matters to Mediation Centres and avoid its duty imposed upon them under Order XXXII-A Rule 3 CPC.

26. Similarly Section 17 of the Guardian and Wards Act, 1980 makes the Court to be guided by what is consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. u/s 17(2), the guidelines for determining as to what the welfare of the minor was about is also provided. u/s 17(3), it was also stated that if the minor is old enough to take an intelligent preference, the Court may consider that preference in deciding matters.

27. Therefore, in such circumstances, it is open to the Trial Court to send for the minor and determine the issue by taking into account the wishes of the minor also. Since the Supreme Court has already directed the utilisation of Scrutinizing Agencies for getting reports about the background of the parties involved, there is no scope for the trial Courts to involve the Probation Officers who are totally alien to such proceedings. The Court should not think that they are dealing with child in conflict with law and therefore, the Probation Officer's assistance to be required for getting reports.

28. On the contrary, adoption and guardianship issues entirely come under the family law jurisprudence. Therefore, the question of involving either the Police Officers or the Probation Officers and letting them loose on the parents are wholly unwarranted. The assistance of the Police may be required only in cases where there is a breach of the order of the court in the grant of child custody and not otherwise. The attempt by the Trial Courts to call for reports from the Probation Officers even in cases where no child in conflict with law was before it is unwarranted and should be deprecated.

29. It must also be stated that most of the guardianship and adoption issues, there is hardly any contesting parties and the paper work is largely done not before the Court but by the Registry and the other agencies involved. Therefore, there should not be any delay in processing such uncontested matters and giving an expeditious disposal.

30. Apart from this fact, there was also complaint that the Courts are constantly asking the police/Agencies to produce the minor child for every hearing. There are some courts also call for the production of the child even after the disposal of the Original Petition at periodic intervals till the minor attains majority. This is strange practice which is not contemplated under the GAWA. Besides it creates a considerable embarrassment for the guardians/adoptive parents. As a child grows in age, it may also feel strange for its appearance before Courts at periodical intervals. It may also create a considerable alienation of the child with the new home in which it is made to grow. Since the Removal of a guardian is provided u/s 39 either on application or on its own motion, the guardians are sufficiently put on check. u/s 46, the Courts are also empowered to call for reports from the Collectors and Subordinate Courts and to treat them as evidence. Even otherwise, such reports can also be called for from Scrutinizing Agencies rather than using the Police or the Probation Officers who are only empowered to deal with correctional measures under the Probation of Offenders Act.

31. If these factors are taken into account by the Trial Courts, certainly there will be no difficulty in disposing of matters under HAMA and GAWA within the time frame stipulated by the Supreme court. It is also necessary to circularise this order to all the Courts dealing with such matters for their due obedience in following the law as laid down by the Supreme Court.

32. In so far as the present op is concerned, it is needless to state that the OP has to be allowed for the reasons already set out above.

33. Recently, the Supreme Court in *Anjali Kapoor v. Rajiv Baijal* reported in 2009 (5) CTC 283, after referring to the decisions of the Courts in U.K., American and Newzealand in this regard quoted those decisions with approval which is found in Paragraphs 15 to 17, and they are as follows:

15. In *McGrath (infants)*, Re: 1893 (1) Ch 143 : 62 LJ Ch 208 (CA), it was observed that, "...The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded".

16. In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that an application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the Court, and custody may be withheld from the

parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

17. In *Walker v. Walker & Harrison* 1981 NZe RL257, the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that "welfare" is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.

34. In the light of the above, the Original Petition stands allowed. No costs.