

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13TH DAY OF APRIL, 2023

PRESENT

THE HON'BLE MR JUSTICE ALOK ARADHE

AND

THE HON'BLE MR JUSTICE VIJAYKUMAR A. PATIL

M.F.A. NO.8527 OF 2015 (GW)

BETWEEN

...APPELLANT

(BY MISS TANUSHA SUBBAYYA, ADV. A/W
SRI K.SHRIHARI, ADV.)

AND

...RESPONDENT

(BY SRI KRISHNAMOORTHY D., ADV.-ABSENT)

THIS MFA IS FILED U/S.47(A) OF THE GUARDIANS AND
WARDS ACT, AGAINST THE ORDER DATED 08.09.2015 PASSED
ON G & WC NO.15/2014 ON THE FILE OF THE PRINCIPAL
JUDGE, FAMILY COURT, DAKSHINA KANNADA, MANGALORE,

PARTLY ALLOWING THE PETITION FILED U/S 7 AND 10 OF THE GUARDIANS AND WARDS ACT.

THIS APPEAL HAVING BEEN HEARD AND RESERVED ON 10.04.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **VIJAYKUMAR A. PATIL J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 47(a) of the Guardians and Wards Act, 1890 has been filed against the judgment and decree dated 08.09.2015 passed in G & W.C.No.15/2014 by the Principal Judge, Family Court, Dakshina Kannada, Mangalore, by which the petition filed by the respondent/husband to appoint him as a guardian and seeking custody of female child Sakeena Muskaan, was partly allowed by allowing the appellant to retain the custody of the minor female child and permitted the respondent to get access to the child by way of visitation rights.

2. Brief facts giving rise to filing of this appeal are that, the marriage of the appellant and respondent was

solemnized on 04.11.2001, and out of the wedlock two children viz., Aamil Ayesh Umer and Sakeena Muskaan were born on 18.07.2002 and 08.08.2007 respectively. It is averred that after few years, the relationship between them turned out to be sour and the appellant filed the divorce petition on the grounds of desertion and cruelty. Consequently, the I Additional Civil Judge, Mangalore by Judgment and Decree dated 23.11.2010 dissolved the marriage between the appellant and the respondent. It is further averred that the son is in the custody of the respondent/husband. The respondent is seeking the custody of the second child viz., Sakeena Muskaan stating that he is capable of maintaining and taking care of his daughter, he has made arrangements to admit her to English medium School and he further claims that the daughter's future is safe in his hands. On the aforesaid grounds, the respondent filed petition to appoint him as guardian and further seeking custody of the minor daughter.

3. The appellant/wife has filed statement of objections opposing the petition. The appellant has not disputed the factum of marriage, dissolution of marriage and that the first child is in the custody of the respondent. It is further averred that the respondent has remarried and staying with another woman after dissolution of marriage with her. The second child being a daughter and the appellant being the natural guardian is entitled to retain the custody. The appellant denied other averments and allegations made in the petition and seeks for dismissal of the petition filed for custody of the child.

4. The Family Court has recorded the evidence of the parties. The appellant examined herself as RW.1 and produced Exs.R1 to R12. The respondent examined himself as PW.1 and produced Exs.P1 to P7. The Family Court based on the evidence adduced by the parties vide judgment dated 08.09.2015 partly allowed the petition filed by the respondent. In the aforesaid factual matrix the present appeal has been filed.

5. Learned counsel for the appellant submits that the impugned judgment of the Family Court is contrary to the pleadings and evidence on record. It is submitted that the Family Court has failed to appreciate the fact that the respondent has remarried after getting divorce from the appellant and is staying with another woman, hence, he is not entitled for any visitation rights as directed by the Family Court. It is further submitted that the respondent has not even once visited the appellant's house to see the child and not spent any money on the daughter's well being and education and it is the appellant who is taking care of the daughter by providing education. Hence, the Family Court has erred in granting visitation rights to the respondent-husband. It is also submitted that the minor child is a school going child, does not have any time to meet the respondent and the visitation rights are conferred against her wishes. It is stated that the Family Court has erred in appreciating the evidence on record as the respondent has married twice after obtaining the divorce and allowing the respondent to visit the child

would be contrary to the best interest of the child. If the child is allowed to meet the respondent it would affect the health and well being of the child, and therefore seeks to allow the appeal.

6. None for the respondent.

7. We have heard the learned counsel for the appellant and perused the material on record.

8. It is admitted by the parties to the proceedings that their marriage was solemnized on 04.11.2001 and out of wedlock two children viz., Aamil Ayesh Umar and daughter Sakeena Muskaan were born on 18.07.2002 and 08.08.2007 respectively. It is also admitted that the marriage was dissolved between the parties by decree of divorce on 23.11.2010 and the son viz., Aamil Ayesh Umar is under the care and custody of the respondent. It is also not in dispute that the minor daughter Sakeena Muskaan is in the custody of the appellant from day one and the respondent has filed petition under Sections 7 and

10 of Guardians and Wards Act, 1890, for appointing him as guardian of minor daughter viz., Sakeena Muskaan.

9. The Family Court, on appreciation of evidence on record, has allowed the petition in-part permitting the appellant to retain the custody of the minor child Sakeena Muskaan and permitted the respondent to visit the minor child and take the child during Dasara and Christmas vacations for 5 days each and 15 days during summer vacation to his residential place. Further, liberty was granted to the respondent to visit the minor child once in a month preferable on Sunday between 3.00 p.m. to 6.00 p.m. after prior intimation to the appellant.

10. The assertion of the appellant is that the respondent has married twice after getting divorce from the appellant and his second wife has a child out of her earlier wedlock and son Aamil Ayesh Umar is in custody of the respondent, the grant of any visitation rights would affect the health, well being of the minor daughter. The apprehension of the appellant has been taken care of by

the Family Court keeping in mind that the minor child being the female child of the appellant and respondent, the permanent custody is given to the appellant-mother.

11. The Family Court has also recorded the finding that the respondent, being the father of the Sakeena Muskaan, is entitled to have visitation right for the overall development of the minor child. We do not find any error in the aforesaid finding of the Family Court. The Family Court has recorded the finding that the respondent cannot be declared as a natural guardian of the female child, however the respondent being the father of the child, the child needs love, care and affection of the father, hence, proceeded to grant visitation rights as well as permitted the respondent to take the minor daughter to his residence during the vacations.

12. The Family Court has specifically directed the respondent that he shall take utmost care about the safety of the minor child while exercising the visitation rights and when the child is in his custody during the vacations. It is

further directed by the Family Court that he shall not leave the minor child with any other person at any point of time. The Family Court while granting the visitation rights has kept in mind the welfare and wellbeing of the minor daughter, there is no error in the said finding calling for interference in the present appeal.

13. This Court vide interim order dated 17.02.2016 has recorded that the parties have filed joint memo dated 17.02.2016, which reads as under:-

"We have heard the learned counsel appearing for appellant and learned counsel appearing for respondent. The appellant, respondent and the children are present before the Court and their presence is placed on record.

Learned counsel appearing for appellant and learned counsel appearing for respondent, during the course of submission, have filed a Joint Memo dated 17th February, 2016 and submitted that appropriate order may be passed as per the terms and conditions of the Joint Memo.

The submission of the learned counsel appearing for both the parties, as stated supra, is placed on record.

The joint memo dated 17th February 2016 duly signed by the appellant and respondent and attested by the learned counsel appearing for the respective parties is also placed on record. The terms and conditions of the joint memo read thus: "In view of the intervention of the elders of the family of both the parties and also this Hon'ble Court, the parties have settled the lis between them in so far as the interim custody of the minor ward, namely, Sakeena Muskaan subject conditions: to following

1. The Respondent is entitled to take interim custody of the child every alternative Sunday from 9:00 am to 5:00 pm and it is his duty to pick the child from the house of the Appellant and drop the child. While taking custody, he should be accompanied with elder son by name Amil Ayush Umer.

2. The Appellant shall open a Bank account in the name of the minor Sakeena Muskaan and give the particulars of the bank account with IFSC code for transferring money to the account by Respondent with regard to the expenses and fees for the minor ward Sakeena Muskaan. The Appellant shall send the copies of the fees receipts to the Respondent.

3. The Respondent is entitled to visit the minor ward Sakeena Muskaan at school premises with prior intimation to the Appellant and the appellant shall

inform the school authorities about such visit of the respondent."

6. In the light of the terms and conditions of the aforesaid joint memo and also the submission of the learned counsel appearing for both the parties, both the parties are hereby directed to comply with the conditions in true letter and spirit without fail. If there is breach of any of the terms conditions of the Joint Memo dated 17/02/2016 by either of the parties, the other party is at liberty to move the matter before the Court for further orders.

The respondent is directed not to precipitate the matter until further orders."

14. The appellant has not pointed out any instances that the respondent/husband has acted prejudicial to the interest of the minor daughter and contrary to the arrangements entered into by them as per the joint memo referred supra. In the absence of any such instances from the order dated 17.02.2016 passed by this Court, we do not find any reason to interfere with the judgment and decree passed by the Family Court.

15. The Family Court, on meticulous appreciation of the evidence on record, recorded the finding that respondent is entitled for visitation rights during the vacations and the appellant is entitled for permanent custody of the minor daughter. The aforesaid finding do not suffer from any infirmity warranting interference by this Court in the present appeal.

16. For the aforementioned reasons, the respondent is entitled to take interim custody of the child every alternate Sunday from 9.00 a.m to 5.00 p.m. The respondent has to pick up the child from the appellant's house and drop the child back to the same place. While taking custody of the daughter he should be accompanied with the elder son viz., Aamil Ayesh Umer. The respondent shall transfer the expenses and educational fees of daughter Sakeena Muskaan to the account of the appellant. The appellant shall intimate the expenses and fees to the respondent. The visitation right shall be exercised by the respondent with prior intimation to the appellant and the appellant in turn shall intimate to the School Authorities about the visit of the respondent.

The judgment of the Family Court dated 08.09.2015 is modified to the above extent.

The appeal is allowed in part.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

BSR
CT:DMN