

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

DATED THIS THE 03<sup>rd</sup> DAY OF JULY, 2019

PRESENT

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MR. JUSTICE K.NATARAJAN

**M.F.A. No.9692 OF 2018 (GW)**

**BETWEEN:**

M.V. KRISHNA MURTHY  
AGED ABOUT 68 YEARS  
S/O. LATE VARADHARAJAN,  
#227, 53<sup>RD</sup> CROSS,  
4<sup>TH</sup> BLOCK, NEAR RAMA MANDIRA,  
RAJAJINAGAR,  
BENGALURU -- 560 010.

... APPELLANT

(BY Miss. SOFIYA MANSOOR ADVOCATE FOR  
SRI KAMALUDDIN AHMED ADVOCATE)

**AND:**

SRI ARUN .C  
S/C. M. CHAKRAVARTHY,  
AGED ABOUT 34 YEARS,  
R/AT NO.37, 3<sup>RD</sup> CROSS,  
DUJO HEIGHTS LAYOUT,  
BEGUR ROAD,  
BENGALURU - 560 068.

... RESPONDENT

(BY SMT. SUNITHA M. ADVOCATE)

THIS MFA IS FILED UNDER SECTION 47(a) OF THE GUARDIANS & WARDS ACT, 1890 AGAINST THE JUDGMENT DATED 25/10/2018, PASSED IN G&W CASE NO.106/2017 ON THE FILE OF THE I ADDITIONAL PRINCIPAL JUDGE, FAMILY COURT, BENGALURU, ALLOWING THE PETITION FILED UNDER SECTION 7 READ WITH SECTION 25 OF THE GUARDIANS AND WARDS ACT, 1890.

THIS APPEAL COMING ON FOR *HEARING ON IA* THIS DAY, **NAGARATHNA J.**, DELIVERED THE FOLLOWING:

**J U D G M E N T**

Though this appeal is listed for hearing on interlocutory application namely, IA No.2 of 2018, seeking stay of the judgment dated 25/10/2018 passed in Guardians and Wards Case No.106 of 2017 by the I Additional Principal Judge, Family Court at Bengaluru, we have nevertheless heard learned counsel for the respective parties at length. We have also interviewed the respondent-father of the minor child Kumari A.Kushi and his second wife and the maternal grand-father of the minor child and thereafter, we have proposed the following judgment.

2. This appeal is preferred by respondent No.1 before the Family Court who is the maternal grand-father of the minor child Kumari A.Kushi, assailing the judgment passed by the said Court in G&W Case No.106 of 2017. The respondent-father of the child filed a petition under Section 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act' for the sake of brevity), seeking his appointment as the guardian and for permanent custody of the minor child, Kushi. At this stage, itself we may observe that the maternal grand-

mother of Kushi who is respondent No.2 before the Family Court has not assailed the said judgment.

3. Briefly stated the facts are that, Smt.K.Rekha Rani—daughter of the appellant—was married to the respondent on 01/06/2009 at Bengaluru. Out of the wedlock, they were blessed with a daughter, Kushi, who was born on 29/07/2011. The family resided at Chennai. On 22/06/2014, they were proceeding from Chennai towards Bengaluru. When they were near Kanchipuram, their car met with an accident. The respondent sustained serious head and body injuries, while his wife died on the spot. Fortunately, Kushi survived the accident. According to the appellant, he and his wife requested the respondent to permit them to take care of Kushi for a few months as they had lost their only daughter Smt.Rekha Rani in the accident. The respondent was kind enough to permit them to take care of Kushi for a few months. Thereafter, they requested that until Kushi completed her Lower Kindergarten, she could be with them, which was agreed to by the respondent. Presently, Kushi is studying in Baldwin's Girls School in III Standard and till date, has been residing with her maternal grand-parents. However,

on account of certain differences with regard to the custody as well as visitation rights *vis-à-vis* Kushi, the respondent herein filed the petition seeking appointment as guardian and for permanent custody of Kushi.

4. The said petition was contested by the respondents by filing statement of objections. It is noted that the respondent herein let-in his evidence as PW-1 and got marked eleven documents as Ex.P-1 to Ex.P-11 and closed his side of evidence. He was not cross-examined. No evidence was let-in by the appellant and his wife before the Family Court.

5. The Family Court raised the following points for its consideration:

- "1. Whether the petitioner proves that he is fit and proper person to be appointed as guardian of minor child Kum.A.Kushi?
2. Whether the petitioner is entitled for permanent custody of minor daughter Kum.A.Kushi as sought in the petition?
3. What order? "

6. On the basis of the evidence on record, the Family Court answered issue Nos.1 and 2 in the affirmative and has allowed the petition filed by the respondent under Section 7 read with Section 25 of the Act and has appointed the respondent as the legal guardian of the person and property of the minor child, Kumari A.Kushi and has also granted permanent custody to the respondent-father. Being aggrieved by the said judgment, the maternal grand-father has preferred this appeal.

7. We have heard learned counsel for the appellant, Miss. Sofiya Mansoor and learned counsel for the respondent-father, Smt.Sunitha M. and perused the material on record. As already noted, the maternal grandmother has not appealed against the judgment of the Family Court.

8. Appellant's counsel contended that the Family Court could not have appointed the respondent as legal guardian of Kumari A.Kushi and her property. She contended that the respondent is not capable of taking care of Kushi. That there could not have been a direction for appointment of the respondent as guardian of the

property of the minor child. She further contended that although the statement of objections was filed by the appellant herein, he did not cross-examine the respondent and neither did he let-in evidence. That the impugned judgment is one sided and virtually an *ex parte* one. She further contended that it may not be in the interest of the minor child to be with the father who has since married and the environment in the house-hold of the respondent may not be conducive or in the interest of Kushi. She further contended that the father of Kushi may not have the financial capacity to educate Kushi as she is presently studying at Baldwin's Girls School which is one of the prime schools in Bengaluru. Learned counsel contended that this Court may set aside the impugned judgment and allow the appeal filed by the appellant herein. She further submitted that the appellant has also preferred G&W case No.76 of 2017, which is pending consideration.

9. *Per contra*, learned counsel for the respondent who is the father of Kushi supported the judgment of the Family Court and contended that the appellant and his wife did not appear before the Family Court despite so many opportunities being granted to them. That, when the

Family Court directed that the child be produced before the Court, the appellant and his wife resiled from the said direction and virtually withdrew from the case. The child was also not produced and no cross-examination of the respondent took place and neither did they let-in any evidence in support of their case. The Family Court, therefore, has rightly allowed the petition filed by respondent and the same would not call for any interference at the hands of this Court. She further contended that the appellant is none other than the father of Kushi and he has financial capacity to educate her and bring her up in the best possible manner and that the appellant and his wife may not have any apprehension in that regard.

10. By way of reply, learned counsel for the appellant drew our attention to Section 17 of the Act and alternatively submitted that in the event this Court is to confirm the judgment of the Family Court, at least visitation rights may be permitted to the appellant and his wife.

11. Having heard learned counsel for the respective parties, the following points would arise for our consideration:

“(i) Whether the Family Court was right in appointing the respondent—the father of the minor child as legal guardian to the person and property of the minor child Kumari A.Kushi and giving permanent custody to him?

(ii) What order?”

12. The detailed narration of facts and contentions would not call for a reiteration except highlighting the fact that the minor child-Kushi is the daughter of respondent through his first wife Smt. Rekha Rani. They were married on 01/06/2009 at Bengaluru. Kushi was born on 29/07/2011. It is also not in dispute that Smt.Rekha Rani died in a road traffic accident on 22/06/2014. The respondent was injured. As a result, Kushi was with the appellant and his wife—the maternal grand parents—who took care of the child. It is also on record that the respondent was visiting the child at her maternal grand-parents home. She has been admitted to Baldwin’s Girls School, Bengaluru, where she is presently studying in III

Standard. But, there appears to be some misunderstanding between the maternal grand-parents and father of Kushi—respondent herein, resulting him filing the petition under Section 7 read with Section 25 of the Act. The Family Court after recording the evidence of the respondent has passed the judgment, the operative portion of which reads as under:

“The petition filed by the petitioner/father under Section 7 R/w Section 25 of Guardians and Wards Act is hereby allowed.

Consequently, the petitioner Sri.Arun C., father of the minor child is hereby entitled for permanent custody and also he is appointed as legal guardian to the person and property of the minor child Kumari A.Kushi, who is born on 29-07-2011.

Issue guardian certificate accordingly.”

13. The first contention of learned counsel for the appellant is that the Family Court did not give sufficient opportunity to the appellant to contest the case. In that regard, learned counsel for the appellant contended that though statement of objections was filed in the matter, the

respondent was not cross-examined by the appellant and neither did the appellant let-in any evidence in support of his case. Therefore, the impugned judgment is one-sided. In response to this argument, learned counsel for the respondent contended that the Family Court directed the child to be produced. Since then, the appellant and his wife did not participate in the proceedings. For that, the respondent cannot be blamed nor can the judgment impugned be set aside. Learned counsel for the respondent further submitted that even in the absence of any evidence on record from the side of the appellant herein, this is a case where the Family Court has rightly granted the custody of the minor child to the respondent herein having regard to Section 17 of the Act which deals with the aspect of welfare of the minor. She contended that the judgment impugned would not call for interference at the hands of this Court on account of the appellant not participating in the proceedings before the Family Court.

14. We have considered the rival submissions with regard to opportunity not being granted to the appellant before the Family Court in light of Section 17 of the Act. As already noted, the appellant herein filed statement of

objections. But, for reasons best known to the appellant, he did not cross-examine the respondent who let-in evidence as PW-1. Further, the appellant also did not let-in any contra evidence. However, the point to be considered is whether the judgment passed by the Family Court is in accordance with Section 17 of the Act. Section 17 of the Act reads as under:

**“17. Matters to be considered by the Court in appointing guardian.—**(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

\*(4) x x x

(5) The Court shall not appoint or declare any person to be a guardian against his will.

\*[Sub-section (4) omitted by Act 3 of 1951, sec.3 and Sch.] "

15. The Court, which is considering a proceeding for declaring the guardian of a minor, has to bear in mind the welfare of the minor. The Court also has to take into consideration the age, sex and religion of the minor; the character and capacity of the proposed guardian and his nearness of kin to the minor; the wishes if any, of a deceased parent; and any existing or previous relations of the proposed guardian with the minor or his property. The Court may also consider the preference of the minor and the Court cannot appoint any guardian against the will of the minor child.

16. Bearing in mind the facts of the present case in light of what has been stated in Section 17 of the Act, it is noted that the minor child-Kushi was with her parents. It

is on account of the unfortunate road traffic accident that occurred on 22/06/2014 resulting in the death of her mother and serious head injury to her father, which resulted in Kushi residing with her maternal grand-parents. It was on account of the precarious conditions in which her father was placed and on account of the death of her mother that the maternal grand-parents were handed-over the custody of Kushi and she continued to remain there since then, i.e., for about five years now, by way of a temporary custody. Since there was a misunderstanding which developed between the maternal grand-parents of Kushi and the respondent, the latter was constrained to file the petition before the Family Court. But for the unfortunate accident and the repercussions it had, that Kushi had to be with her maternal grand-parents. She was, at that time, about three years old and she is presently about eight years old.

17. The question that arises for our consideration is whether the respondent could be denied custody of his daughter-Kushi, even though it may be assumed that Kushi is comfortably placed and is living with her maternal grand-parents. Bearing in mind the facts and

circumstances of the present case and the fact that the best interest of the minor child is to be taken into consideration, we find that Kushi being of a tender age of eight years, must be with her lawful guardian i.e., her father, as any delay in handing over her custody to her father would only create a distance in the relation between the father and daughter. Even though the respondent-father of Kushi has married again, it has come on record that his second wife cannot conceive and therefore, any apprehension in the mind of the maternal grand-parents that Kushi may be neglected in the event of birth of children to the second wife of her father is removed and unwarranted.

18. We are fortified with the view that we have taken by a judgment of the Division Bench of the Madras High Court in the case of **(Kode) Atchayya Vs. Kosaraju Naraharai**, reported in **AIR 1929 Madras 81**. In the said case, it has been held that the even if grounds are made out against the father so as to oppose the custody being given to him, then considering the case from the point of view of the welfare of the minor, it would not be in

the minors' welfare to estrange the child—the daughter in the instant case—from his father at this tender age.

19. That apart, howsoever affectionate the maternal grand-parents may be and they may take every care to bring up Kushi, the same cannot be a substitute for the father (parents) bringing up the daughter. The void created by the death of the mother of Kushi, though is an important factor in the mind of the maternal grand-parents, who seem to fulfill that void by bringing up Kushi, this Court at the same time must also take into consideration that the void on account of the death of biological mother of Kushi would be erased by Kushi having a mother in the form of second wife of the respondent. We have also interviewed the appellant / maternal grand-father of Kushi, the respondent-father of Kushi as well as second wife of the respondent, in our chamber and we are satisfied that the respondent and his second wife would look after Kushi and bring her up in the best possible manner.

20. In the circumstances, we do not find it of significance or importance to consider the contention of

the learned counsel for the appellant to the effect that the appellant did not cross-examine the respondent nor did he let-in any evidence and therefore, the impugned judgment being virtually one-sided would have to be set aside and the matter would have to be remanded to the Family Court. In fact, the appellant has not explained the reasons as to why he did not cross-examine the respondent nor let-in any evidence in the matter. In the circumstances, it is inferred that he stayed away from the proceedings before the Family Court since a direction was issued to him to produce the child, which he did not do so and consequently discontinued his participation in the proceedings before the Family Court. Therefore, it cannot be held that there was no fair opportunity given to the appellant to contest the matter or to participate in the proceedings.

21. The next contention of the learned counsel for the appellant is that the respondent does not have the financial capacity to bring up Kushi as she is presently admitted at Baldwin's Girls School, Bengaluru, which is one of the prestigious schools, where the fee is of a high order and education of Kushi at Baldwin's Girls School would

require considerable financial expenditure and incidental expenditure in bringing up Kushi. When the same was put to the respondent, he submitted that he indeed has the financial capacity to bring up his daughter in the best possible manner and that he would continue Kushi in Baldwin's Girls School and that he has financial wherewithal to bear the school fees and other educational expenditure. We are satisfied that the respondent who had sought for permanent custody of Kushi and he, being her father, would take all possible care and make the necessary financial outlay for providing the best possible education and upbringing of his daughter.

22. In the circumstances, we find that the Family Court was justified in allowing the petition filed by the respondent herein and handing-over permanent custody of minor child Kushi to her father and appointing him as the legal guardian of Kushi. To that extent the judgment of the Family Court is justified. But, the respondent cannot be appointed as the legal guardian to the property of the minor child. Therefore, that portion of the judgment only is set aside.

23. But, the matter does not end. The feelings of the maternal grand-parents cannot be ignored. Kushi is their grand-daughter and they have lost their daughter. Therefore, to fulfill the void caused on account of the death of their daughter, Kushi is the only way in which they could assuage their feelings. Therefore, despite confirming the judgment of the Family Court granting the permanent custody of Kushi to the respondent, nevertheless the visitation rights of the appellant are recognised. The appellant and his wife are at liberty to meet Kushi once in a month or as and when Kushi requests to meet her maternal grand-parents. This liberty is reserved with them despite there being no claim made by them in that manner before the Family Court.

24. However, the appellant and his wife shall not meet Kushi in the educational institution. As far as holidays and festivals are concerned, there can be mutual arrangement as regards Kushi spending time with her maternal grand-parents. We do not find it necessary to give specific directions in that regard. We further hope and trust that the appellant and respondent will make mutual arrangements so that Kushi is able to spend time

during holidays and festivals with her maternal grand-parents also. Above all, we feel that it is in the interest of the minor child-Kushi who is aged about eight years old to be with her father as, the earlier the child is with her father and mother, it is better for the child.

25. We hasten to add that by this we are not disregarding the right of the maternal grand-parents to have company of the minor child but, in our view the parents rather than the grand-parents are the best guardians of a minor child, particularly when there is no reason or impediment, legal or otherwise, coming in the way of handing-over of permanent custody of Kushi to her father. We also find that any delay in granting permanent custody of the child to the father would only create a distance in the relationship between the father and the daughter. One cannot under-estimate the role of parents, particularly the father in the life of a daughter.

26. In the result, the appeal is ***allowed in part*** and disposed of in the aforesaid terms.

In the circumstances, a direction is issued to the appellant as well as his wife, though not a party in this

appeal but who was respondent No.2 before the Family Court, to hand-over the permanent custody of Kushi to her father on Saturday, 06/07/2019 at 11.00 a.m.

Parties to bear their respective costs.

The operative portion of this judgment shall be handed-over to the learned counsel for the appellant and learned counsel for the respondent for implementation of the same.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**

*RK/-*