

**IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE
AIZAWL JUDICIAL DISTRICT : AIZAWL.**

PRESENT

Smt.Helen Dawngliani
Addl. District & Sessions Judge

RFA No. 31/2013

Lalramlawma S/o Zuiliana(L)
R/o Khatla High School Veng, Aizawl Appellant

Versus

Luni Hauzel D/o Vungzatawna(L)
C/o H.Zathuama Ex.MLA
R/o Dinthar Veng, Aizawl Respondent

A P P E A R A N C E

For the Appellant	...	Ms. N. Lalzawmliani, Advocate
For the Respondent	...	Mr. K. Laldinliana, Advocate
Date of Hearing	...	28.4.2014
Date of Judgment	...	15.5.2014

J U D G M E N T & O R D E R

1. This Appeal is filed u/s 17(3) of the Mizoram Civil Courts Act, 2005 against the Judgment & Order dt.5.4.2013 passed by Smt. Lalrochami Ralte, Civil Judge, Aizawl in Guardianship Case No. 141/09.

2. The brief facts of the case is highlighted below: -

On 6.9.2007, the Appellant and Respondent got married according to the Mizo Customary practices. On 7.9.2004 a son, Joseph Lalchhanchhuaha was born out of their wedlock. Thereafter, on 20.4.2009, the Appellant divorced the Respondent by way of 'Mak', one of the Mizo Customary practice of divorce. The minor child have been living with his mother, the Respondent.

The Appellant approached the Id. Trial Court for declaring him as the guardian of his minor son. The application was contested by the Respondent with a counter-claim to declare her as legal guardian for the said minor son.

The application was rejected by the Impugned Order and the Counter-claim of the Respondent was allowed. The Resondent was declared legal guardian of the minor boy Joseph Lalchhanchhuaha.

3. It may be mentioned at this stage that attempt to settle the matter through Lok Adalat failed. Thereafter, this Court summoned the parties. They appeared in my Chamber. But an attempt for amicable settlement once again was unfruitful. The parties are at logger heads even for a small issue. Being left with no other option, Judgment is being passed.

4. Heard the Id. Counsels.

Ms. N. Lalzawmliani, Id. Counsel for the Appellant submitted that the Id. Trial Court failed to give chance for submission of Written Argument which according to the Id. Counsel is violation of the principle of natural justice. It is next argued that the Id. Trial Court committed error of law by ignoring the Mizo Customary Law where a child of 3 years belong to the father under the Patrialchal system. The Id. Counsel further submitted that the Id. Trial Court failed to see that the Appellant is in a better position to provide roof over his only son. The Id. Counsel argued that the Id. Trial Court was bias and committed serious illegality by relying on a choice made by the child in front of the Police. The Id. Counsel also submitted that the Respondents have other sons. To sum up, the Id. Counsel submitted that the Appellant is ready and willing to provide the child all that the Respondent will not be able to provide in terms of the present and future needs of the minor as well as other contingencies that may arise.

On the other hand, Mr. K. Laldinliana, Id. Counsel for the Respondent, appearing under the Legal Aid Scheme submitted that the Respondent is putting in all out efforts to afford a decent living for her children. On the other hand, the Appellant has other wives apart from the Respondent. The Respondent is looking after her children by involving them in Church activities. Whereas the denomination followed by the Appellant does not even have proper Sunday School for children. According to the Id. Counse, even if the Appeal is dismissed, nothing is barring the Appellant from showing his fatherly love and affection towards the minor son. For the Respondent, being a mother, she cannot even dare think of living without her son. The Id. Counsel sumitted that the Respondent can provide a better environment for the physical and mental development of her son and thus pray to dismiss the Appeal.

5. In the instant case, the Appellant who is the father of the minor boy has filed an application for declaring him as the Guardian of his minor son. The Respondent who is the mother of the said child objected to it and further made a counter claim for declaring her as the guardian and also to give her maintenance. The Ld. Trial

Court had granted one of the counter claim of the Respondent and declared her as guardian of the minor son.

6. Guardianship and custody are all together a different matter. It is not known whether the application before the Ld. Trial Court was filed under the Guardians and Wards Act and it is also not known whether the same was proceeded under the said Act. In the absence of any other law being followed in the State with regard to this type of cases, I am of the considered view that it would be proper if the spirit of the said Act is followed if not in letters.

7. In a patriarchal society such as Mizo society, Father is the natural guardian of his children unless he is declared unfit. Perused the record and it appears from the evidence that the main grievance and allegation made against the Appellant is that he is in the habit of taking liquor, that the Respondent is his fourth wife and that he used to beat her. It has also been alleged that the Appellant has other children to look after. On the other hand, the Appellant alleged that the Respondent has loose moral character and slept around with many men, he also alleged that the Respondent is hot tempered, in the habit of using filthy language and beating the children. The Appellant also stated that the Respondent has another son from her previous husband. She does not have regular income whereas he being a Teacher in a Govt. High School can provide better education and living for his only son.

8. The Appellant being the father of the minor boy Joseph Lalhanchhuaha is not disputed. The Ld. Trial Court recorded a finding that the evidence against the Respondent of being cruel, that she used to beat her son and committed adultery while still married to the Appellant are hearsay. On the other hand, the Ld. Trial Court was convinced by the evidence adduced by the Respondent that she was looking after the minor son to the best of her ability and that even the child chooses to live with her when the Police asked him to make a choice between his parents.

9. Section 60 of the Indian Evidence Act provides that oral evidence in all cases must be direct that is to say- *“if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;*

If it refers to a fact which could he heard, it must be the evidence of a witness who heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of the witness who says he perceived it by that sense or in that manner.....”

In the case at hand, PW/Vanlalhriatpuia Chhangte who was living with the family of the Appellant and Respondent for about 11 months stated that *‘the Respondent had committed adultery while her husband was away from home. Though I did not see who the man was, but from their sounds, I know that it was the sound of sexual intercourse between a man and a woman. I have no nerve to open the room and verify who the man was’*. PW/Rhodes Lalenkawli who is the daughter of the Appellant/Plaintiff stated that the respondent used to sue vulgar language like *“Mi hurnu, or hmelchhe hurnu or I hurmu a keh em ni”* to her and her sister. She also stated that the Respondent hit her and her elder sister with *“kuhva chehna”*. The statements of these witnesses have not been demolished during cross-examination except that they were unable to relate the date, time etc.

Due to lapse of time between the incident and the date of deposition as well as the difference in the memory from one person to another it cannot be expected as a matter of rule that the witnesses should know when, where, how and all the minute details of the incident. To insist on such details is not something which is humanly impossible and it would amount to evaluating human being by a mathematical formula.

It is all together a different matter whether the said evidence would have relevance in the instant issue. But it appears that the Ld. Trial Court has not clearly appreciated the nature of evidence adduced by the parties when it concluded that the evidence adduced by the appellant on the allegation against the Respondent were all hearsay. I do not see any reason why the evidence of the said two witnesses cannot be considered as direct evidence on the character and nature of the Respondent which was a fact in issue.

10. Upon appreciation of the entire evidence, it is seen that the difference is between the two parties and both of them, like any other human being, have their shortcomings. The core issue here is the welfare of a minor child borne between the parties.

11. Parents are the natural guardians of their children. The rights of the parents are sacret rights because their duties are also secret duties. If for any reasons the parents render themselves unable or unfit to perform their sacred duties, they cease to be natural guardians and can no longer claim the rights of natural guardians. The unfitness may be brought about by variety of reasons.

But in the instant case, strangely, the parties being the parents of the minor boy have approached the court to declare themselves to be more fit than the other to look after their son and to declare them as guardian. Certainly, there would be difference in their idea of bringing up the child as well as their outlook of life. But keeping in mind the physical, mental and emotional needs of the minor, upon appreciation of the entire evidence on record, I do not find any reason to declare either of the parties “unfit” to look after the child.

12. It has been held in a number of cases that economic affluence is not the sole criteria for judging the welfare of a child. In the case at hand, it is clear from evidence that the appellant has regular income and would be more affluent than the respondent who has no regular employment. The appellant is also more educated than the respondent. On the other hand, it is noticed that from the time of their separation, the minor son has been living with the respondent who is his mother and it appears that she is trying her best to bring up her son. The appellant has three other daughters from his previous marriage one of which is married. It appears that the minor boy is the only son of the appellant. On the other hand, the respondent has a son namely Anthony.

Keeping in mind the position of the parties, their strength and shortcomings as human beings, the welfare of their minor son Joseph Lalchhanchhuaha as a supreme consideration, the court passeses the following

ORDER

1. Appellant Lalramlawma and respondent Luni Hauzel are declared Joint Guardian of minor Joseph Lalchhanchhuaha.
2. Minor Joseph Lalchhanchhuaha shall be in the custody of his mother Respondent/Luni Hauzel until further order or until he attains the age to exercise an intelligent choice.
3. Appellant Lalramlawma shall have the right to meet/keep his minor son with him on Saturdays & Sundays. If the child spend the weekend with his father, he shall be returned to his mother positively on Sunday afternoon so as not to disturb his school on Monday.
4. From the academic session 2015, appellant shall admit his minor son in the school of his choice and bear necessary expenditure for his education.

5. The arrangement made above from sl. 2 to 4, shall not bar the parties from making a CONSENSUS alternative arrangement in the interest of the minor.

The Impugned Judgment & Order dt.5.4.2013 stands modified to the extend indicated above.

Parties shall appear before the Court of Pu.Lalramsanga, Civil Judge on 23.5.2014. The said Court shall issue Joint Guardianship to the parties and Respondent Luni Hauzel shall surrender the Guardianship Certificate No. 141/2009 issued in her favour.

Send back the case record to the Court of Pu.Lalramsanga, Civil judge, Aizawl.

With the above Order, the appeal stands disposed off.

Sd/- HELEN DAWNGLIANI
Addl. District & Sessions Judge
Aizawl Judicial District, Aizawl

Memo No.:_____/AD&SJ(A)/2014 : **Dated Aizawl, the 15th May, 2014**
Copy to: -

1. Lalramlawma through Counsel Ms. N. Lalzawmliani, Advocate.
2. Luni Hauzel through Counsel Mr. K. Laldinliana, Advocate.
3. Pu Lalramsanga, Civil Judge, Aizawl.
4. Registration Section.
5. Guard File.
6. Case Record.
7. Calendar Judgment.

P E S H K A R