

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2017

PRONOUNCED ON : 31-08-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Civil Miscellaneous Appeal No. 316 of 2016
and
C.M.P. No. 2501 of 2016

S. Ravikumar ... Appellant

Versus

S. Kamalatchi ... Respondent

Appeal filed under Section 19 of the Family Courts Act, 1984 against the Order dated 21.12.2015 passed in I.A. No. 9 of 2013 in H.M.O.P. No. 86 of 2014 on the file of Family Court, Tiruvallur in so far as it relate to Clause (1) of the decree with regard to the custody of the daughter minor. Ishwarya to the respondent is concerned.

For Appellant : Mr. S. Subbiah, Senior Advocate
for Mr. A.H. Srikanth

For Respondent : Mr. M. Udhaya Banu
for Mr. K.S. Loghanathan

JUDGMENT

R. SUBBIAH, J

This appeal is filed by the husband/appellant as against the order dated 21.12.2015 passed in I.A. No. 9 of 2013 in H.M.O.P. No. 86 of 2014 on the file of Family Court, Tiruvallur. The said I.A. No. 9 of 2013 was filed by the respondent/ wife seeking for a direction to the husband/appellant to give custody of the minor children to her, pending disposal of the Original Petition filed by her for dissolution of the marriage on the ground of cruelty.

2. Having regard to the fact that this appeal is filed as against the order passed by the Family Court, Thiruvallur in the interlocutory application filed by the respondent, we are not inclined to deal with the contentions raised in the Original Petition filed by the appellant as well as the respondent in detail. However, for disposal of this appeal, certain facts, which are necessary and germane alone are dealt with by us.

3. The marriage between the appellant and the respondent was solemnised on 19.05.1999 at Sri Lakshmi Thirumana Maligai, Iyyappanthangal, Chennai as per Hindu rites and customs. After the marriage, the appellant and the respondent lived at the house of the appellant at No.1/63-A, Pillaiyar Koil Street, Iyyappanthangal, Chennai - 500 056. Due to the wedlock, two children were born namely Master. Ajay Kumar, born on 03.05.2000 and Baby. Ishwarya, born on 18.10.2004. While so, due to difference of opinion between the appellant and the respondent, the respondent left the matrimonial home on 23.12.2012 leaving the minor children in the custody of the appellant. Thereafter, the respondent has filed H.M.O.P. No. 5 of 2013 for dissolution of the marriage on the ground of cruelty. The said HMOP No. 5 of 2013 was subsequently re-numbered as HMOP No. 86 of 2014. The appellant also filed H.M.O.P No. 238 of 2013 for restitution of conjugal rights on the ground that inspite of his best efforts to bring the respondent back to the matrimonial home, he could not succeed

4. Along with H.M.O.P No. 5 of 2013 (re-numbered as HMOP No. 86 of 2014) filed by the respondent for dissolution of marriage, she has taken out an application in I.A. No. 9 of 2013 praying for a direction to direct the appellant to handover the custody of the minor children to her. The Family Court, upon considering the evidence available on record, including the affidavit and counter affidavit filed by both sides, passed the order dated 21.12.2015 refusing to grant custody of the minor boy Ajay Kumar to the respondent, however, directed the appellant to entrust the custody of the minor daughter Ishwarya to the respondent. It is as against this order dated 21.12.2015 passed by the Family Court, the appellant has come forward with this appeal in so far as it relates to the direction directing him to entrust the custody of the minor daughter Ishwarya to the respondent.

5. The learned Senior counsel appearing for the appellant would submit that from the date when the respondent deserted the matrimonial company of the appellant, it is the appellant who is taking care of both the minor children. Further, inspite of repeated request made by the appellant, the respondent did not return back to the matrimonial home. The appellant also filed HMOP No. 238 of 2013 before the Family Court, Thiruvallur for restitution of conjugal rights and the same is also pending. In

such circumstances, the Family Court ought to have decided the issue relating to the custody of the minor children at the time of final disposal of the Original Petition and not at the instance of the respondent by way of Interlocutory Application. Both the children are in the lawful custody and care of the appellant. The minor children are taken care of by the mother of the appellant along with the appellant and he has provided them with all comforts. While so, the Court below, without any valid reason, has directed the appellant to entrust the custody of the minor Daughter Ishwarya to the respondent and it calls for interference by this Court.

6. Per contra, the learned counsel appearing for the respondent would submit that in the normal circumstances, the custody of the minor children has to be vested with the mother, unless, it is shown that the mother is not capable of maintaining the children or any other evidence to show the incapacity of the mother. In the present case, no such situation exists and therefore, the Court below has rightly directed the appellant to entrust the custody of the minor daughter to the respondent. As regards the custody of the minor son, the Family Court has refused it only on the ground that the boy is now studying XI Standard and if his custody is vested with the respondent, it would disturb his studies greatly. According to the counsel for the respondent, the Court below, by assigning valid reason, has directed the appellant to handover the custody of the minor daughter Ishwarya to the respondent and it calls for no interference by this Court.

7. Keeping the submissions made by the counsel for both sides, we have perused the materials placed on record. On perusal of the records, we feel that in normal circumstances, interest of the minor children will be best secured by entrusting their custody with the mother. In the instant case, the Family Court, taking note of the fact that the minor boy is studying XI Standard, refused to entrust his custody to the respondent as it would greatly affect his studies. As far as the custody of the minor daughter, the Family Court, taking note of the fact that the minor daughter was aged 11 years by then, now aged 13 years, her interest could best be taken care of by the mother. Therefore, the Family Court, Thiruvallur directed the appellant to entrust the custody of the minor daughter Ishwarya to the respondent.

8. During the pendency of this appeal, the appellant has filed an affidavit stating inter alia that the minor daughter Ishwarya has attained puberty on 13.05.2017 and at that time, his mother has taken care of her interest. It is also stated that immediately, the appellant called the respondent/wife and

requested her to attend the puberty function on 15.05.2017. That apart, the mother of the appellant, the minor son Ajay Kumar and the minor daughter Ishwarya have also invited the respondent over phone and requested her to attend the function on 15.05.2017. Above all, the elder brother of the appellant namely Dr. Selvamani personally went to the residence of the respondent and invited her to attend the function. In spite of the above invitations, the respondent did not attend the puberty function. By placing reliance on the affidavit of the appellant, the learned Senior counsel for the appellant would contend that the fact that the respondent did not attend the puberty function would only show that she has no interest in the welfare of the minor children and therefore also, the order passed by the Family Court, directing to entrust the custody of the minor daughter Ishwarya need not be allowed to continue.

9. We are not inclined to accept such submissions made by the learned Senior counsel for the appellant. Merely because the respondent did not attend the puberty function, it cannot be concluded that she has lost the interest towards the minor children. The respondent would not have attended the function owing to the pendency of the litigation with the appellant and the love lost between the spouse. In any event, even according to the appellant, the minor daughter has attained puberty on 13.05.2017. The minor daughter is aged 13 years now. At this tender age, we feel that the interest of the minor daughter would be secured if her custody is vested with the respondent-mother. While considering the cases relating to custody of the minor children, the Court has to take into consideration the paramount interest of the minor children and if it is considered, having regard to the tender age of the minor daughter, we feel that her interest could best be secured and protected by vesting her custody to the mother. It is needless to mention that Mother is also one of the natural guardians until the children attain majority, especially female children. In such circumstances, absolutely, we do not find any reason to interfere with the well considered order passed by the Court directing the appellant to entrust the custody of the minor daughter Ishwarya to the mother/respondent.

10. In the result, we confirm the Order passed by the Family Court, Thiruvallur and consequently, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous Petition is closed. Having regard to the fact that the Original Petition Nos. 5 of 2013 (re-numbered as HMOP No. 86 of 2014) and 238 of 2013 filed by the respondent and appellant respectively are pending for the past four years,

we direct the Family Court, Thiruvallur to take up the Original Petitions and to dispose of the same within a period of four months from the date of receipt of a copy of this Judgment.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rsh

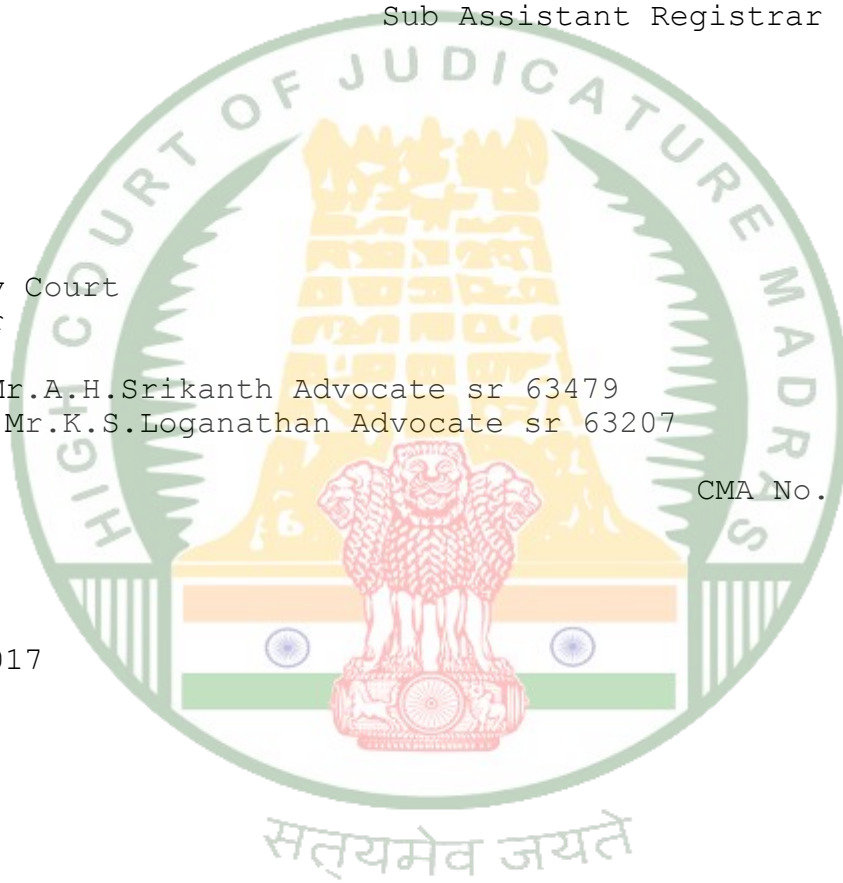
To

The Judge
The Family Court
Tiruvallur

+1 cc to Mr.A.H.Srikanth Advocate sr 63479
+2 ccs to Mr.K.S.Loganathan Advocate sr 63207

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