

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.02.2017

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE M.SUNDAR

O.S.A.Nos.18 and 19 of 2017
and
C.M.P.Nos.1659 to 1661 of 2017

Sanjeev Ramachandran ... Appellant in both Appeals

Vs

Chandrika Sridhar ... Respondent in both Appeals

Appeals filed under Order XXXVI, Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the common order dated 26.10.2016 made in Application Nos.5248 & 5249 of 2016 in O.P.no.204 of 2016 on the file of this Court.

A.No.5248 of 2016 : Application praying that this Hon'ble Court be pleased to grant the immediate temporary custody of the minor girl child Akshara, born on 23.05.2014, presently aged 2 years and 4 months to the Applicant/Petitioner.

A.No.5249 of 2016 : Application praying that this Hon'ble Court be pleased to immediately suspend A.S.Kailasam and Associates from taking part in this case as the counsel for the Respondent.

For Appellant : Mr.Sanjeev Ramachandran
Party-in-person

COMMON JUDGMENT
(Judgment of the Court was delivered by M.Sundar, J.)

We propose to dispose of these two Intra-Court appeals by this common judgment.

2. For the purpose of appreciating our judgment, it may be necessary to set out the facts of the case in a nutshell.

3. FACTUAL MATRIX IN A NUTSHELL:

(i) This is a matter between the spouses fighting for custody of their now 2½ years old daughter.

(ii) The Original Petition for custody of the minor girl child was filed by the husband before the learned Single Judge.

(iii) The husband is the appellant before us.

(iv) We refer to the parties as 'appellant husband' and 'respondent wife', for the sake of convenience and clarity.

(v) The appellant husband and the respondent wife were married as per the Hindu rites and customs at Chennai on 17.05.2012. Prior to the marriage, they had met in 2007 and had decided to get married after interacting with each other over a period of five years. A daughter, who was given the name Akshara was born out of the wedlock on 23.04.2014. Akshara is the subject matter of the instant proceedings. Post marriage, after a stint in Singapore and Mumbai, the matter as it stands now that the appellant husband and the respondent wife are estranged and are living separately. The minor girl child Akshara is with the respondent wife.

(vi) The appellant husband filed a Original Petition being O.P.No.204 of 2016 under Sections 3, 7 to 10 and Section 25 of the Guardian and Wards Act, 1980 (hereinafter referred to as "GAWA" for the sake of brevity). The prayer in the said Original Petition was for permanent custody of the minor girl child with given name Akshara (born on 23.04.2014), who was just under two years of age on the date of the Original Petition viz., 03.03.2016. The other prayer in the said Original Petition, was for appointment of the appellant husband as the guardian of the person of the minor girl child. Residuary prayer for other prayers deemed fit and necessary by Court is there too.

(vii) Along with the main Original Petition, the appellant husband took out two interim applications being A.No.1601 of 2016 and 1602 of 2016 with prayers for interim custody of the minor girl child and for an injunction restraining the respondent wife from travelling abroad without permission of the Court respectively. Vide order dated 27.07.2016, the learned Single Judge, passed an order to the effect that the minor girl child shall be in the custody of the husband between 10.00 A.M. to 7.00 P.M. every Sunday. This order is operating. It is also not in dispute that this order is being complied with.

(viii) When the things stood as above, on 30.09.2016 the appellant husband took out two more interim applications being A.Nos.5248 of 2016 and 5249 of 2016 with prayers for immediate

temporary custody of the minor girl child and to suspend the counsel on record for the respondent wife from taking part in the case respectively.

(ix) While the first of the above said applications being A.No.5248 of 2016 was filed alleging that the respondent wife is not taking good care of the minor girl child, the second application being A.No.5249 of 2016 was taken out mainly on the ground that the counsel on record for the respondent wife had directly sent e-mails to the appellant husband, bypassing his counsel on record.

(x) A learned Single Judge of this Court, after hearing both sides, by a common order dated 26.10.2016 dismissed both the above said applications viz. A.Nos.5248 & 5249 of 2016.

(xi) Aggrieved, the appellant husband has preferred the instant two Intra-Court appeals being O.S.A.No.18 of 2017 and O.S.A.No.19 of 2017. O.S.A.No.18 of 2017 is directed against A.No.5248 of 2016 pertaining to the immediate temporary custody and O.S.A.No.19 of 2017 is directed against A.No.5249 of 2016 pertaining to the suspension of the counsel on record for the respondent wife.

4. DISCUSSION:

(i) At the outset, it is to be stated that in these Intra-Court appeals, besides the common typed set of papers dated 27.12.2016 (filed on 09.01.2017), an additional typed set of documents dated 03.02.2017 has also been filed by the appellant husband. A specific query was put to the appellant husband, in the hearing today as to whether the twelve documents contained in the additional set of documents were placed before the learned Single Judge. The appellant husband appearing party in person before us fairly conceded that none of the twelve documents were placed before the learned Single Judge. We also noticed that all the twelve documents are prior to the order of the learned Single Judge dated 26.10.2016 which has been called in question before us. In other words, all the twelve documents were available with the appellant husband when the matter was taken up before the learned Single Judge. It was stated before us that the appellant husband intended to place these twelve documents before the learned Single Judge by way of soft copies contained in a pen drive, but that did not happen. However, it is to be noticed that hard copies duly compiled in the form of typed set of documents have been placed before us. On this being pointed out, the appellant husband appearing party in person stated that he would argue the matter based on the common typed set of papers dated 27.12.2016 alone, besides his affidavit filed in support of the interlocutory prayers before us.

(ii) In the hearing today, the appellant husband appearing

party in person, raised three points in O.S.A.No.18 of 2017 and they are set out in the paragraphs infra.

(iii) The first point is that the minor girl child was taken in a two wheeler by the respondent wife without having valid driving licence. According to the appellant husband, this has put the minor girl child in perilous and highly hazardous circumstances.

(iv) The second point is that the minor girl child was taken to a wedding in inclement weather conditions. This also, according to the appellant husband has put the minor girl child in hazardous circumstances.

(v) The third point urged before us is perjury. The appellant husband would state that the respondent wife has stated on oath in her affidavit that she had a valid driving licence, when she did not have one.

(vi) With regard to O.S.A.No.19 of 2017, in the hearing before us today, only one point was urged and we set out the same in the next paragraph infra.

(vii) The sole point urged in O.S.A.No.19 of 2017 is that the counsel on record for the respondent wife had sent e-mails to the appellant husband directly, bypassing his erstwhile counsel on record. Stating so, the appellant husband would urge that the counsel on record writing to his client's adversary directly bypassing the counsel on record is a serious breach of the professional duty of a counsel towards the opponent. It was also urged that the tone and tenor of the e-mails, leave a lot to be desired.

(viii) Urging the points set out supra, the appellant husband would contend that the learned Single Judge has not appreciated his submissions correctly and has also brushed aside/ignored some of his submissions. Stating so, the appellant husband canvases that the order of the learned Single Judge which is being called in question in these Intra-Court appeals (hereinafter referred to as "impugned order", for the sake of brevity and clarity) deserves to be set aside.

(ix) In the light of the submissions set out supra which were made before us today in the hearing, we examined the impugned order.

(x) At the outset, we notice that the learned Single Judge in the impugned order has adverted to the points that have been urged.

(xi) In the impugned order, the learned Single Judge has

referred to the pleadings of the respondent wife, wherein and whereby, the respondent wife has stated that she received a barrage of messages from the appellant husband asking for her driving licence and that she refused to provide the same to him. The learned Single Judge has also returned a finding that the perceived threat and danger to the minor girl child being taken on a scooter ride is in the nature of an apprehension. Mere apprehension qua legal concept of 'interest of minor' in the context of the instant matter under GAWA is what we are able to see indisputably. In this view of the matter, we agree with the learned Single Judge and sustain the finding returned. Further reason is, we are unable to persuade ourselves to believe that the respondent wife being the mother of the minor girl child would have wantonly put the minor girl child in an extremely perilous and hazardous scooter ride with intention of acting against her interest. It may be a subjective opinion and perception that scooter ride for a young minor child who is two years old is hazardous. These may be matters for discussion which may come up between the spouses for taking a decision depending on various circumstances and prevailing specifications if both the parents were together. In the given case, when the parents are not together, this kind of day to day monitoring and a mere desire to provide travel/transport to the minor in a particular mode and manner cannot be stretched to the extent of a 'ground' for depriving a two year old girl child mother's care and custody particularly, when law on the point qua the custody of a minor girl children is very clear. We are unable to persuade ourselves this scooter ride to be so serious a ground as to make a departure from the stated position of law that minor girl children shall be in the custody of their mother upto a given age. We do not think this is exceptional circumstance to make a departure.

(xii) With regard to the second point of taking the minor girl child to a wedding in inclement weather conditions, the trajectory of the submission again went back to the scooter ride without valid driving licence and without helmet. This has already been discussed above and as noticed supra, the learned Single Judge has returned a finding that the scooter ride issue and the danger perception is an apprehension qua custody and GAWA.

(xiii) We make it clear that we are not condoning or endorsing a scooter ride without licence or helmet. We have tested the incident in the light of being a ground with regard to custody of minor child under GAWA.

(xiv) With regard to the third point pertaining to the perjury, the nature of the submission made before us again travelled back to the driving licence issue and therefore the

scooter ride. It is the case of the appellant husband that the respondent wife has stated in her sworn affidavit that she had a valid driving licence while she does not have one. We are of the considered view that perjury is always a matter for trial, in the instant case, when there has been no trial and when interim custody of a minor girl child at tender age of around two years is being dealt with in interlocutory applications by way of affidavits and counter-affidavits, the ground of perjury cannot be examined.

(xv) With regard to the submission in O.S.A.No.19 of 2017, we find that in the impugned order the learned Single Judge after referring to the e-mails sent by the counsel on record for the respondent wife to the appellant husband has also noticed that it is the case of the respondent wife that such mails were sent by her counsel, on instructions from the appellant husband's erstwhile counsel on record. The learned Single Judge has also clearly recorded, in the impugned order, that the erstwhile counsel on record of the appellant husband has not denied the fact that she requested her counter part to write to her client as she was away. This is also assailed by the appellant husband by saying that the mails do not contain any averment to the effect that it was being sent to him directly as per instructions of the erstwhile counsel of the appellant husband. We do not find any force in this submission, particularly, in the light of the fact that the learned Single Judge recorded that the erstwhile counsel for the appellant husband has not denied that she requested her counter part to write to his client. With regard to the contents of the mails, they have to be seen only in the light of the correspondence exchanged in the course of a litigation touching upon the issue of custody of a minor girl child. It may not be apposite to examine the same so as to impute motives to a counsel.

(xvi) We also notice from the impugned order that on the date the impugned order came to be passed viz., 26.10.2016, the matter stood posted before the Mediation and Conciliation Centre in the afternoon. Notwithstanding, the appellant husband insisted in pursuing the applications. We take note of this aspect of the matter.

(xvii) The learned Single Judge has also noticed that the counsel on record for the respondent wife is the counsel is regularly appearing in Court and is a regular practitioner. We have no hesitation whatsoever in agreeing.

(xviii) We also notice that with regard to the grievance the appellant husband is attempting to make out, qua the counsel on record for his wife writing to him directly, the plea of the appellant husband is only for suspending the counsel from

appearing for his wife. Therefore, it is clear that the appellant husband does not want the said counsel to appear for his wife. Therefore, we are convinced that nothing turns out of these and it is merely an attempt on the part of the appellant husband to get the counsel for his wife out of the way, apart from venting his ire by treating the counsel also as an adversary.

(xix) Besides all the above, the appellant husband appearing party in person before us made an attempt to rely on the judgment of the Hon'ble Supreme Court in *Roxann Sharma v. Arun Sharma* (Civil Appeal No.1966 of 2015). We find that the said judgment does not help the appellant husband in any manner. The reason being, the said judgment, turns on proven facts. It also pertains to matrimonial issue. In the instant case, the appellant husband was attempting to say that his submissions are based on proven facts. The instant appeals arise out of applications at interlocutory stage, where the matters have been decided on the basis of the affidavits and counter-affidavits. The trial has not commenced. No oral and documentary evidence has been let in. At this stage, the question of proven facts does not arise at all. Therefore, we are not inclined to consider the said judgment as being helpful to the appellant husband in any manner.

(xx) Under GAWA, the law is too very well settled that interest of the minor child is a paramount. In other words, all other aspects of the matter under GAWA are secondary and tertiary qua the interest of the minor.

(xxi) The law is also well settled that a minor girl child shall be in the custody of the mother in the tender years and the rigour of the ground that needs to be established for making an exception in this regard is very high.

(xxii) We do not find any such exceptional circumstance and we had no hesitation in concluding that the minor girl child aged 2½ years in the custody of the mother that 10.00 A.M. and 7.00 P.M. visitation/interim custody rights for the appellant husband on Sundays alone is safe as it stands now.

5. CONCLUSION:

(i) Owing to all that we have stated supra, particularly under the caption DISCUSSION, we come to the conclusion that there is no merit in the prayer of the appellant husband for immediate interim custody of his minor girl child who is now 2½ years old.

(ii) With regard to the suspending the counsel on record for

the respondent wife from appearing in the case as has been stated supra, we are not inclined to accede to the prayer of the appellant husband, as we are convinced that it is only an attempt on the part of the appellant husband to treat his wife's counsel also as an adversary.

6. DECISION:

Both the Intra-Court appeals - O.S.A.No.18 of 2016 and O.S.A.No.19 of 2016 are dismissed. As we have not issued notice and we are dismissing the appeals at the admission stage itself, we are not examining the aspect of costs. Consequently, connected C.M.P.Nos.1959 to 1961 of 2017 are also dismissed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+4cc's to Mr.Sanjeev Ramachandran, Advocate, S.R.Nos.1668 & 1670

O.S.A.Nos.18 & 19 of 2017

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