

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.01.2018

Coram

THE HON'BLE MR.JUSTICE RAJIV SHAKDHER
&
THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.S.A.No.405 of 2012

Dr.Sathish Kumar ..Appellant/Respondent in
OP.NO.113/12 & O.A.NO.4154/12

Vs.

Dr.Helen Clarrisa ..Respondent/Petitioner in
OP.No.113/12/ Applicant in
O.S.No.4154/12

PRAYER: The Original Side Appeal has been filed as against the fair and decreetal order passed in O.A.No.4154/2012 in O.P.No.113/2012, dated 30.10.2012.

O.A.NO.4154 of 2012: Application praying that this Hon'ble Court be pleased to grant interim custody of Minor S. Nettra (Twin Sisters) both aged about 8 1/2 years in person to the petitioner.

OP.113 of 2012: filed under 3, 7 to 10 & 25 of the Guardian and wards Act r/w OXXI Rule 2&3 of OS.Rules and clause 17 of the letters patent to declare petitioner as the legal Guardian of Twin Sisters S. Nettra and S. Nehha (7 1/2 years) and to grant permanent custody.

For Appellant : Mr.C.Prabakaran

For Respondent : Ms.Srividhya Aravindan
: Mr. P. Godson Swaminath

JUDGMENT

(Judgment of the Court was made by RAJIV SHAKDHER, J.)

1.This is an appeal preferred against the interim order dated 30.10.2012, passed by the learned single judge in Application No.4154 of 2012, filed in O.P.No.113 of 2012.

2. Via this application, the respondent before us, had sought interim custody of two minor children, i.e., Ms.S.Nettra and Ms.S.Nehha. The children are twins and at that point in time, they were aged, approximately 8-1/2 years. A little over five (5) years has passed, since then.

3.The record shows that the appeal came before the Division Bench for the first time on 08.11.2012. At that stage, the Division Bench comprising of Hon'ble Ms. Justice R.Banumathi (as she then was) and Hon'ble Mr.Justice K.K.Sasidharan, after interacting with the children, passed the following operative directions:

"...6.We have spoken to the children as well as to the Appellant - father and the Respondent - mother. Though the children appear to be slightly reluctant to go with the Respondent - mother, Appellant - father had agreed that the Respondent - mother can exercise her visitation right on Deepavali day 13.11.2012 initially for four hours and thereafter, for six hours on Sundays. It is also stated that the children were away from the Respondent - mother for about one year.

7.Considering the facts and circumstances of the case and also a statement of the Appellant, Respondent - mother shall have interim custody of the minor children S.Nettra and S.Nehha on 13.11.2012. The Appellant - father shall hand over the custody of the twins viz., minors S.Nettra and S.Nehha to the Respondent - mother on 13.11.2012 at 10.00 a.m. At C.S.I. Church, Railway Station Road, Kancheepuram and the Respondent - mother shall take custody of the children. Parents of Respondent - mother shall accompany the Respondent, if needs. Respondent - mother shall hand over back the custody of the children to the Appellant-father at 2.00 p.m. on the same day (13.11.2012) in the same place.

8.Thereafter, in the succeeding weeks, Respondent - mother shall exercise her visitation rights on three Sundays i.e., 18.11.2012, 25.11.2012 and 02.12.2012 for six hours from 10.00 a.m. To 4.00 p.m. In the same Church. Taking of the custody and handing over of the children shall be in the same manner as aforesaid. Both the parties are directed to co-operate in ensuring compliance of the order. The matter shall be listed on 05.12.2012."

4. This was followed by another order passed by the very same bench on 05.12.2012. On that day, the following directions were issued:

"...2.Considering the submission made by the learned counsel on either side, it is ordered that

the respondent - mother shall exercise her visitation rights in respect of her children viz., S.Nettra and S.Nehha on 23.12.2012 for six hours from 10.00 a.m. To 4.00 p.m.; on the Christmas day i.e., on 25.12.2012 for three hours from 2.00 p.m. To 5.00 p.m.; and on 01.01.2013 for three hours from 2.00 p.m. To 5.00 p.m. in C.S.I. Church, Railway Station Road, Kancheepuram and she shall also continue to exercise her visitation rights on Sundays in the above said Church premises. When the respondent - mother exercises her visitation rights, the appellant - father shall leave the church premises. The respondent - mother shall not try to move the children from the Church premises."

5. By yet another order dated 01.02.2013, the respondent was entrusted with the custody of the children on their birthday on 15.02.2013, between 5.00 p.m. and 7.30 p.m., albeit, at the Church premises. However, given the work schedule of the appellant, the exercise of the visitation rights as on 03.02.2013, was dispensed with. The Court, however, continued with the directions put in place earlier, which was that, the respondent would have visitation rights, qua, the children on Sundays, except for 03.02.2013. The other part of the direction, which continued to operate, was that, the appellant would leave the venue in order to enable the respondent to interact with the children unimpeded. The Court, however, also directed the respondent not to bring her parents to the venue.

6. The record further demonstrates that on 27.03.2013, the orders dated 08.11.2012, 05.12.2012 and 01.02.2013 were suspended till April, 2013, based on the plea of the appellant that he had sit for an examination, which was to be held on 21.04.2013. Further submissions were made on behalf of the appellant, i.e., the father, that even the children had to write their Annual Examination, which were to commence from 03.04.2013.

6.1. It is in this background, as indicated above, the three (3) orders referred to above were suspended.

7. On 15.03.2013, the Court directed continuation of the interim arrangement put in place vide order dated 01.02.2013.

8. On 25.06.2013, the Division Bench suspended the order dated 05.12.2012, till further orders, as on that particular date, there was no appearance on behalf of the respondent. On behalf of the appellant, it was also indicated to the Court that the respondent had not visited the church for interaction with the children.

8.1. It is in these circumstances, that on 04.01.2017, C.M.P.No.1 of 2012 was disposed of by the Court based on the orders dated 01.02.2013 & 15.03.2013.

9. No substantive order was passed by the Court, thereafter, till 01.02.2017, when, the Division Bench observed as follows :

"The appellant appears to be successfully scuttling the order passed by this Court giving interim visiting rights to the respondent. This is quite apparent from the contention of the learned counsel for the appellant that since the respondent has married again, she should be deprived of the visiting rights. This, to our mind is a preposterous submission. The children need both care of the mother and the father and since parents are separated, the least that is expected is that the appellant would have facilitated the visiting rights of the respondent mother. This is not to be.

2. We are of the view that it would be appropriate, if the Officer in-charge of the District Legal Services Authority, Kancheepuram District would engage a child counselor to facilitate interaction of the children with the respondent at the same venue - Church.

3. A report be submitted to this Court on 01.03.2017."

(emphasis is ours)

10. Thereafter, this appeal was placed before the Court on several dates, when, from time to time, orders were passed to enable the respondent to interact with the children. Orders to this effect were passed on 28.08.2017, 21.09.2017, 09.10.2017, 01.11.2017 and on 22.12.2017. Prior to these orders, we had also referred the matter to the Mediator on 11.07.2017. Mediation proceedings, however, failed, which is when, we passed orders enabling interaction of the respondent with the children.

11. One of the primary reasons why we decided to pass the aforementioned orders, was that, over a period of time, alienation had set in between the children and the respondent, which to our minds was the creation of the appellant. It was our assessment that frequent meetings between the children and the respondent, i.e., the mother, would bring about a thaw in the relationship.

12. As a matter of fact, vide our order dated 01.11.2017, we had appointed Dr. Sangeetha Madhu, Clinical Psychologist, to examine not only the children but also interview the parents, i.e., the appellant and the respondent. The broad areas, which

we required the clinical Psychologist to examine, were detailed out in the order dated 01.11.2017.

"...3.Accordingly, Dr.Sangeetha Madhu, Clinical Psychologist, is requested to evaluate the children i.e. Ms.S.Nettra and Ms.S.Nehha and interview Dr.Sathish Kumar and Dr.Helen Clarrisa and render a report in that behalf.

3.1.We may only indicate herein that, presently, the children are in the custody of the father i.e. Dr.Sathish Kumar.

3.2.In order to effectuate the aforementioned direction, Dr.Sathish Kumar will present the children before the Clinical Psychologist on 09.11.2017 at 11.00 a.m. At National Sport Medicine Centre, No.21/5, 5th Cross Street, CIT Colony, Mylapore, (Near Alwarpet Anjaneyar Temple), Chennai 600 004 (Phone No.044-4210 9248; Mobile No.98404 39335).

3.3.As indicated above, the Clinical Psychologist will also interview both Dr.Sathish Kumar and Dr.Helen Clarrisa either on 09.11.2017 or any other suitable date.

3.4.Apart from anything else, the Clinical Psychologist will render a report as to whether housing the children with Dr.Sathish Kumar will augur well for the development and growth of the children.

3.5.A similar exercise would also be carried even vis-a-vis Dr.Helen Clarrisa. The fact that the children have not been with Dr.Helen Clarrisa since July, 2011 will be borne in mind by the Clinical Psychologist.

3.6.Furthermore, the Clinical Psychologist will also opine whether or not the children and / or, the parents are required to undergo therapy to deal with this difficult phase in their lives.

3.7.Dr.Sangeetha Madhu, Clinical Psychologist, will render her report to this Court before the next date of hearing i.e. 04.12.2017...."

13. Since, Dr.Sangeetha Madhu was unable to take up the task of evaluation, we were required to appoint another Psychologist for the aforesaid purpose. Accordingly, Dr.Nappinnai, was appointed vide order dated 21.11.2017.

14. It is, in this background that we have received a report from Dr.Nappinnai, Psychologist cum Marital Therapist, which is dated 21.12.2017. When, the matter came up on 22.12.2017, we informed both the appellant as well as the respondent, that we had received the report of the psychologist. However, having regard to the fact that the report had been received by the Court in a sealed cover, we opened the sealed cover and directed

the registry to permit the appellant and the respondent to peruse the report. Both parties were also advised to return with suggestions regarding visitation rights. Resultantly, the matter was fixed for further proceedings today, i.e. 08.01.2017

15. Given this background, we had suggest to the appellant's counsel that in the very least, the appellant could agree to the interaction of the children with the respondent on any day of the week, preferably, on Sunday between 9.00 a.m. and 6.00 p.m., in substitution to the direction issued by the learned Single Judge, which would enable the respondent to keep the children in her custody at night as well.

16. The appellant's counsel, however, flatly, declined the suggestion based on the instructions received from the appellant, i.e. Dr.Sathish Kumar. In these circumstances, the Court, is placed in a rather difficult position. The reason for this is two fold:

(i) First, there has been a gap of five (5) years between the time the learned Single Judge passed this order and now when we, finally, taken up the appeal for disposal; with the main suit pending trial.

(ii) Second, the alienation between the mother and children, which, we are convinced, has occurred on account of continued tutoring by the appellant has worsened since 2012.

17. Faced with this, we are left with certain hard options, one of which is to enforce the order of the learned single judge.

17.1. In this context, the counsel for the respondent referred us to the judgment of the Hon'ble Supreme Court, rendered in : Vivek Singh v. Romani Singh, 2017 (2) CTC 97. This was a case where a girl child was snatched by the father, while, she was aged about 21 months. The matter came up for hearing before the Supreme Court, when, she was aged approximately 8 ½ years. The Court, after considering the issues involved in such like cases, at great length, recognized the fact that when, the child lives in the custody of one of the spouses, the child tends to develop "Parental Alienation Syndrome" vis-a-vis the other spouse. The Court in that case observed that the mother is the primary care giver. Furthermore, taking this rationale forward, the Court directed that the child be in the custody of the mother for a period of one (1) year. For the sake of convenience, we may only extract the observations made by the Supreme Court in this behalf:

".....16.The aforesaid observations, contained in Para 31 of the Order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old Child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the

future. She would need regular and frequent contact with each parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience. Towards this end, it also becomes necessary for parents to exhibit model good behaviour and set healthy and positive examples as much and as often as possible. It is the age when her emotional development may be evolving at a deeper level than ever before. In order to ensure that she achieves stability and maturity in her thinking and is able to deal with complex emotions, it is necessary that she is in the company of her Mother as well, for some time. This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the Appellant and the Respondent, where each party feels that they are 'right' in many of their views on issues which led to separation. The intensity of negative feeling of the Appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of Appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period would not have said anything about the positive traits of the respondent. Even the Matrimonial discord between the two parties would have been understood by Saesha, as perceived by the Appellant Psychologist term it as "The Parental Alienation Syndrome". It has at least two psychological destructive effects.

(i) First, it puts the Child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone, who is devoid of any positive characteristics. Both of

these assertions represent one parent's distortions of reality.

("The Parental Alienation Syndrome was originally described by Dr. Richard Gardner in "Recent Development in Child Custody Litigation". The Academy Forum, Vol.29 No.2. The American Academy of Psychoanalysis, 1985).

17. The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the motion that a Child's primary need is for the care and love of its mother, when she has been its primary care giving parent, is supported by a vast body of Psychological Literature. Empirical studies show that Mother infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its Mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesizes that the mother is the center of an infant's small world, his Psychological home base, and that she "must continue to be so for some years to come, "Development Psychologists believe that the quality and strength of this original bond largely determines the Child's later capacity to fulfill her individual potential and to form attachments to other individuals and to the human community.

18.No doubt, this presumption in favour of maternal custody as sound Child Welfare Policy, is rebuttable and in a given case, it can be shown that father is better suited to have the custody of the Child. Such an assessment, however, can be only after level playing field is granted to both the parents. That has not happened in the instant case so far.

19.It is also to be emphasised that her mother is a teacher in a prestigious Kendriya Vidyalaya School. Saesha is herself a School going child at primary level. If Saesha is admitted in the same school, where her mother is teaching, not only Saesha would be under full care and protection of the mother, she would also be in a position to get better education and better guidance of a mother, who herself is a teacher.

20.We, thus, find that the factors in favour of respondent are weightier than those in favour of the appellant which have been noted above. It is a fit case where respondent deserves a chance to have the

custody of child Saesha for the time being, i.e., at least for one year, and not merely visitation rights.

21. New Academic session would start in April 2017. At this time, the process of fresh admissions in School is underway. We are confident that the respondent shall be able to have Saesha admitted in her school, where she is teaching inasmuch as wards of the teachers are accorded such preferences. Therefore, the respondent is allowed to process the case of admission of Saesha in Kendriya Vidyalaya, INA Colony, New Delhi and for this purpose appellant shall fully cooperate. In case she is able to secure the admission, custody of Saesha shall be handed over to the respondent by the remain with the respondent for full Academic year. The matter shall be listed in the month of March, 2018 for further directions when this Court would assess as to how the arrangement devised above has worked out. We, however, give liberty to both the parties to move application for variation of arrangements turn out to be such which necessitate alternation or modification in the aforesaid arrangement."

18. In this case, we are placed in somewhat similar situation. The only difference is that the children, today, were studying class nine (9) and are aged about 15 years. As alluded to above, the Parental Alienation Syndrome, qua respondent has deepened. It is because of this that we had suggested that the appellant to allow the respondent to interact with the children on any one of the weekdays, i.e. between 9.00 a.m and 6.00 p.m.

19. As a matter of fact, the learned Single Judge also viewed the conduct of the appellant very dimly, while passing the impugned order. Our view about the appellant is no different.

20. This apart, the personality trait of the appellant emerges, clearly, upon perusal of the report submitted to the Court by Dr.Nappinnai. We are inclined to extract the relevant part of the said report :

"INFERENCE:- The children had been staying with the respondent till class 2 and are currently doing their 9th standard. The children do not have a good opinion about the respondent. They dislike her for being strict with them.

One needs to take into consideration the following points for the concluding remarks.

1. Will a child of class 2 be able to identify the content in the bottle as alcohol?

2. When the child had the knowledge of complaining to their maternal grandmother for not feeding them, then why didn't she complain on seeing the mother being close with Pradeep?

3. The petitioner had been visiting them during weekends and even he was not told then?

4. Why didn't the child react on seeing Pradeep under the cot?

5. Is it wrong for the mother to be strict with the children when it comes to education?

21. The questions posed by Dr. Nappinnai would show that the appellant has not only created negative perception vis-a-vis the respondent, but has also tried to distort facts by attributing aspects to a personality of the respondent, which, perhaps, to exist. The Psychologist has, after evaluating the children, come to a clear conclusion that it is a case of tutoring by the appellant, who, apparently, has fed the children baseless canards regarding their mother, i.e., the respondent.

22. Thus, having regard to the totality of the facts and circumstances, we are of the view that the only way the respondent can have, if at all, a relationship with her daughters, if she is allowed time and space with them, without the hovering presence of the appellant. We are aware of the fact that our direction would, perhaps, be difficult to implement, given that the appellant has complete hold over the children. However, it is not unknown in other jurisdiction to remove the children from their parents, if child experts find unfit in ensuring all round development of children. Thus, if, the appellant were to impede directions issued by this Court, the Court could then, at that stage, take recourse to appropriate measures.

23. For the movement, since, the suit is still pending adjudication and given the foregoing circumstances, we are of the view that no interference is called for with the impugned judgment order.

24. Accordingly, the appeal is dismissed. We request the learned Single Judge to conclude the trial of the suit at the earliest in order to determine the aspect of the final custody. Since, we are told that the respondent, who is the petitioner in the O.P.No.113 of 2012, pending before the learned Single Judge has completed her evidence, the learned Single Judge will endeavour to conclude the trial on or before 27.04.2018. There shall, however, be no order as to costs.

25. Accordingly, O.P.No.113 of 2012 will be listed before the learned Master on 22.01.2018 for issuance of further directions.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

vsm/kas

To

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

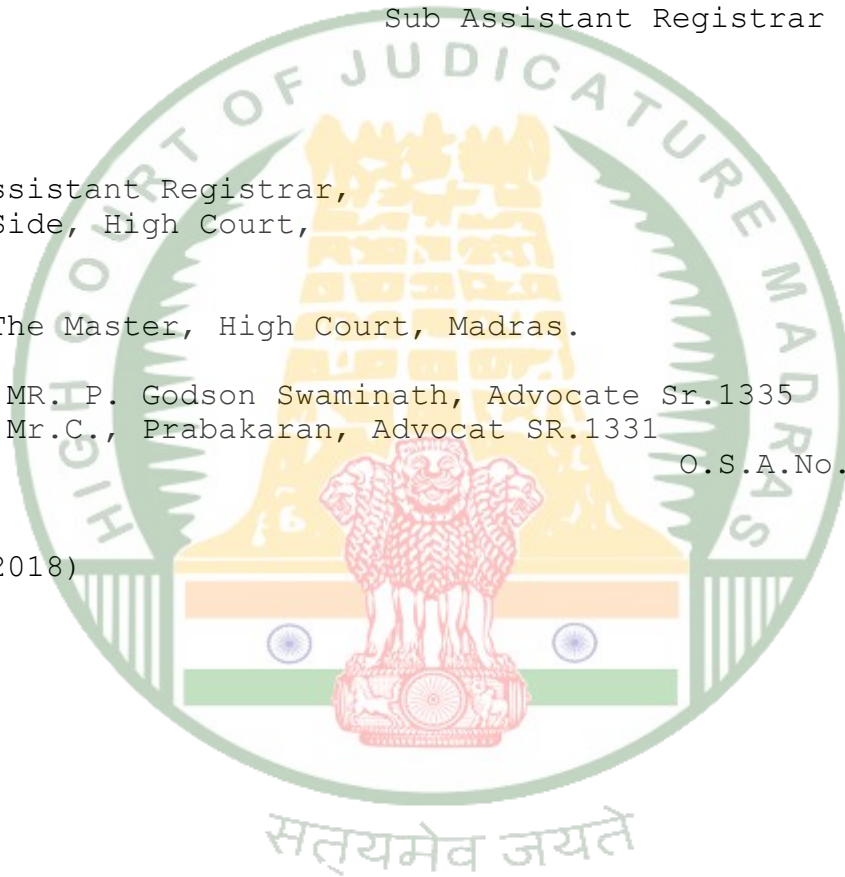
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