

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 11.03.2019

ORDER PRONOUNCED ON : 20.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

O.P.No.27 of 2015

S.Suresh

... Petitioner

Vs.

V.Sridevi

... Respondent

PRAYER: Petition is filed under Section 25 of Guardian and Wards Act, 1890 read with Order XXI Rule 2 and 3 of Original Side Rules, praying to grant permanent custody of Minor Sri Sabarivasan to the petitioner.

For Petitioner : Mrs.S.T.P.Kuilmozhi

For Respondent : Mr.V.Subramani

सत्यमेव जयते

ORDER

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The Original Petition has been filed by the father of the minor child Sri Sabarivasan who was born on 23.03.2009 seeking permanent custody of the minor to him.

2. According to the petitioner, he married the respondent on 28.06.2006 at Neyveli and out of the said wedlock, the male child Sri Sabarivasan was born on 23.03.2009. At the time of marriage, the petitioner was working in a Private Company at Pondicherry drawing a monthly salary of Rs.20,000/-. It is also claimed that he handed over the entire salary to the respondent for the maintenance of the family. The spouses also purchased a residential apartment in August 2006. According to the petitioner, his father gave Rs.5,00,000/- from his personal savings for purchase of the flat and the remaining sale consideration was drawn by way of loan from Bank and the Equated Monthly installments were paid by the respondent out of her salary.

3. It is also claimed that the father of the petitioner gave Rs.2,00,000/- for purchase of a car which was also purchased in the name of the respondent. It is further claimed that the petitioner suffered a heart ailment and underwent a bye-pass surgery on 07.11.2011. The said heart ailment and after effects of the surgery resulted in the petitioner being unable to carry on the conjugal life which resulted in the respondent having extra marital affair with one Sasikumar.

4. The petitioner who was working in Chennai shifted to Bangalore and he had left the respondent and the minor child at their residence at No.G6, Narayana Apartment, Mugalivakkam Main Road, Porur, Chennai-116. When the

petitioner was away at Bangalore, the respondent vacated the said flat and went and stayed in her brother's house at Porur. When the petitioner attempted to meet his child at respondent's brother's house, he was not allowed to meet the child which led to the filing of a police complaint.

5. It is further claimed that a divorce petition has also been filed in OP.No.1991 of 2014 on the file of the I Additional Family Judge and the same is pending. The petitioner would claim that the respondent is unfit to have the custody of the minor child and he being the natural guardian he is entitled to permanent custody of the child.

6. This application is opposed by the respondent wife. In the counter filed by the respondent it is contended that the Original Petition itself is not maintainable as the child is normally residing at Porur, outside the jurisdiction of this court. The allegations in the main Petition are denied as false. It is claimed that the petitioner was drawing only a sum of Rs.12,000/- as monthly salary at the time of marriage and he was not in a position to meet the family expenses. The respondent would claim that she was meeting the family expenses as well as the educational and other expenses of the minor child.

7. The claim of the petitioner that he had given the entire salary to the respondent was denied. It is the further claim of the respondent that she only purchased the flat by paying the initial amounts and the loan was in fact taken in her name and the apartment itself was purchased in her name and she only paid the monthly installments. Similarly, the car was purchased from and out of the earnings of the respondent and it was she who paid the monthly installments for the loan taken for the car.

8. The expenses for the heart surgery undergone by the petitioner were also borne by the respondent out of the medical insurance policy taken by her. She had also met the post operation expenses. The allegations relating to the extra marital relationship were also stoutly denied. The respondent would further claim that she is earning more than what the petitioner was earning at any point of time and she is better placed to take care of the minor child than the petitioner who is admittedly a heart patient.

9. The claim of the petitioner that she had vacated the apartment without notice to him was denied. According to her, she shifted to her brother's residence only for the safety of herself and the child. The petitioner was never in a permanent job and was shifting jobs very often. According to her, the

conduct of the petitioner made it impossible for her to live with him and hence she was forced to file OP.No1991 of 2018 seeking divorce.

10. It is the further contention of the respondent that the petitioner had totally neglected the minor child and it was she who was taking care of the minor child. Pending the Original Petition the respondent got a job in USA and she has taken the child along with her and the child is now studying in Austin, USA. She would further contend that the interest of the child is better placed if the child is with her. On the above contentions she had sought for dismissal of the Original Petition.

11. The petitioner has examined himself as PW1 and has produced Ex.P1 to Ex.P5. Ex.P1 is the birth certificate of the minor child, Ex.P2 is the complaint dated 18.05.2011 given by the petitioner to the Inspector of Police T15, SRMC Police Station, Porur, Chennai -11, Ex.P3 is the copy of the HMOP.No.1991 of 2014 filed by the respondent wife. Ex.P4 is another complaint dated 21.06.2014 lodged by the petitioner against the respondent complaining that she has not been allowing him to meet his child. Ex.P5 is declaration of willingness to be appointed as a guardian.

12. In his proof affidavit the petitioner as PW1 has reiterated the averments made in the petition. During cross examination he has deposed that he is drawing a salary of Rs.9.8 lakhs per annum. Though, he would admit that he has got proof to show that he is drawing Rs.9.8 lakhs as salary, he has not produced any proof. He has admitted that he is a Diploma Holder in Electronics and Communication. He would claim that he was working in HCL, Pondicherry at the time of marriage and drawing Rs.20,000/- per month. Thereafter, he got transferred to HCL, Chennai. After coming to Chennai he had left HCL and joined Maveric Systems Private Ltd., wherein, he was working up to 2010 and drawing a salary of about Rs.3.5 lakhs per annum. In 2010 he shifted to Precision Tech Serve, Bangalore during the period 2010-11. Between 2011 to 2014, he would claim that he was working at Head Office of the Precision Tech Serve at Chennai. From June 2014 he has shifted to Wipro Technologies.

13. He would claim that he had contributed a sum of Rs.5 lakhs for the purchase of the house. This claim is contrary to the averments in the petition. In the petition he had stated that his father had contributed Rs.5 lakhs, but, in his evidence during cross examination he had stated that he had contributed Rs.5 lakhs and since the apartment was purchased in her name loan was taken in the name of the respondent. He had also admitted that he has no proof to show that he has contributed Rs.5 lakhs for the purchase of the apartment.

14. Similarly though he claims to have contributed for purchase of the car he is unable to produce any proof of such purchase. Insofar as his claim that the respondent is involved in extra marital relationship, the answers given by him in his cross examination are very vague and un-convincing.

15. The respondent has been examined as RW1. In her proof affidavit she has reiterated the contentions in the counter filed to the main Original Petition. She has produced Exs.R1 to R11. Ex.R1 is the Bio-data of the petitioner which was given at the time of the marriage. The Exs.R2, R4, R5 and R7 are receipts showing purchase of domestic goods like chimney, Washing Machine, Television and Air Conditioner. Ex.R6 is the final bill given by the builder of the apartment. Ex.R3 is the Bank receipts for purchase of car. Ex.R8 and Ex.R9 are the school fee receipts for payment of fees for the education of the child. Ex.R10 is the copy of police complaint filed by the respondent against the petitioner. Ex.R11 is another series of school receipts evidencing payment of school fees.

16. The respondent has been extensively cross examined by the learned counsel for the petitioner. She has specifically denied that her in-laws presented her with jewelery at the time of marriage. To the specific questions relating to her ability to take care of the child, the respondent had deposed

that though her working hours at USA are 8 hours per day, the working hours are flexible and she has an option to work from home also. She has also said that she moved to USA for financial betterment and also for better education of the child. She has also denied the suggestion that she has marked the documents relating to purchase of Television, Air Conditioner etc., only to prove her financial superiority and her main focus is on financial aspects only.

17. I have heard Mrs.S.T.P.Kuyilmozhi, learned counsel appearing for the petitioner and Mr.V.Subramani, learned counsel appearing for the respondent.

18. Mrs.S.T.P.Kuyilmozhi, learned counsel appearing for the petitioner would strenuously contend that the respondent was not justified in removing the child from the jurisdiction of this court and taking him to United States of America without permission of the Court. She would further contend that the petitioner is in a better position to take care of the child.

19. Contending contra Mr.V.Subramani, learned counsel appearing for the respondent would submit that the respondent is well placed and having been employed in United States of America drawing sufficient salary to maintain herself and the minor child. Relying upon the documentary evidence as well as the oral evidence Mr.V.Subramani would submit that it was the respondent who

has been supporting the family financially, even when the spouses were living together.

20. According to him, the petitioner though claims that he is drawing a decent salary of Rs.9,80,000/- per month, he has not produced any proof. He would submit that the production of proof or receipt of salary in these days is not difficult since salaries are credited to the accounts of the employee, he could have very easily produced the bank statement to show that he is drawing a decent salary. This according to the learned counsel for the petitioner would show that the petitioner is not in a position as to prove his current salary as he is drawing a very meager salary and the child will not be comfortable if he is put in his custody.

21. In the matters of custody of the minor child, it is the paramount welfare of the minor child that has to be taken into account. No doubt the father is also a legal guardian of the child. The said legal guardianship alone does not give a right to the father to demand custody of the child. As rightly pointed out by the learned counsel for the respondent the petitioner has not produced any evidence of his income. Except his oral assertion that he is drawing a salary of Rs.9,80,000/- per annum, there is not even a shred of paper produced to justify his claim.

22. He would also point out that all the expenses have been borne by the respondent. The apartment has been purchased in her name and Equated Monthly installments has been paid by her. The car has been purchased in her name and Equated Monthly installments has been paid by her. To sum up, the respondent is more financially well placed than the petitioner. Being resident of United States of America, she would be in a position to give better ambience to the child. Shifting the child from United States of America to Chennai at this point of time would have an adverse effect on the child's psychology as well as his future.

23. I have considered the rival submissions. A perusal of the evidence on record shows that the respondent is both financially and socially better placed than the petitioner to take care of the child. The petitioner has singularly failed to prove that the welfare of the child would be better served if the child is put in his custody. The fact that the petitioner is not even able to prove his monthly income creates a doubt in my mind as to the earnings of the petitioner and his ability to maintain the child and to give the child a better social and financial status.

24. I am therefore of the considered opinion that the child's interest will be better served if the child continues to be in the custody of the respondent and hence, I do not see any merits in the Original Petition. The Original Petition is therefore **dismissed**. However, in the circumstances of the case without costs.

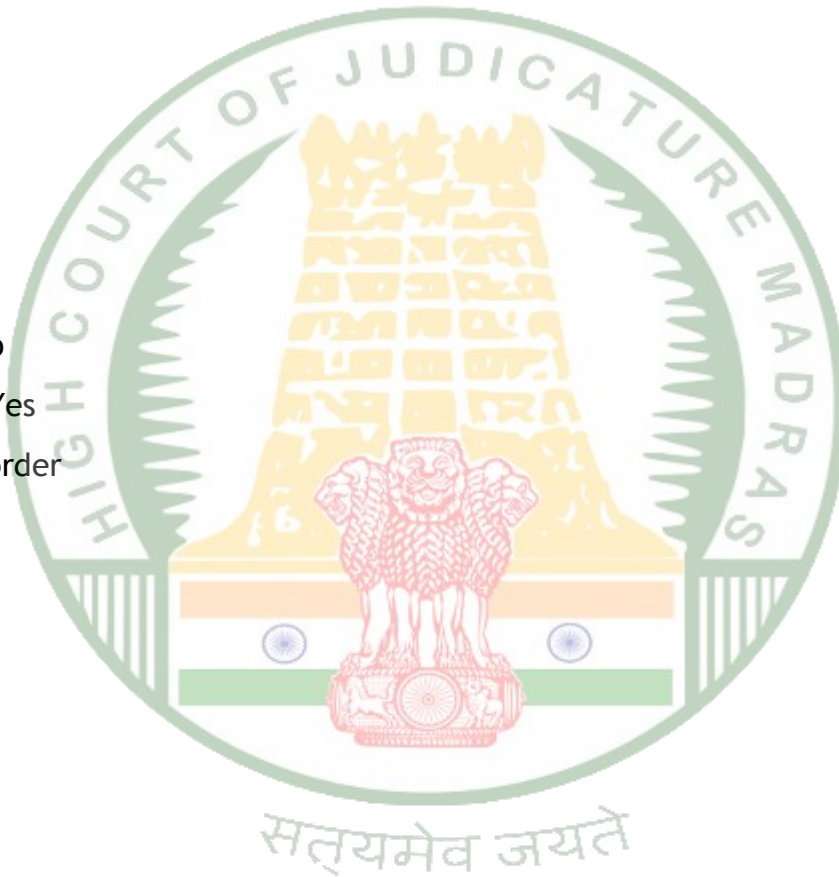
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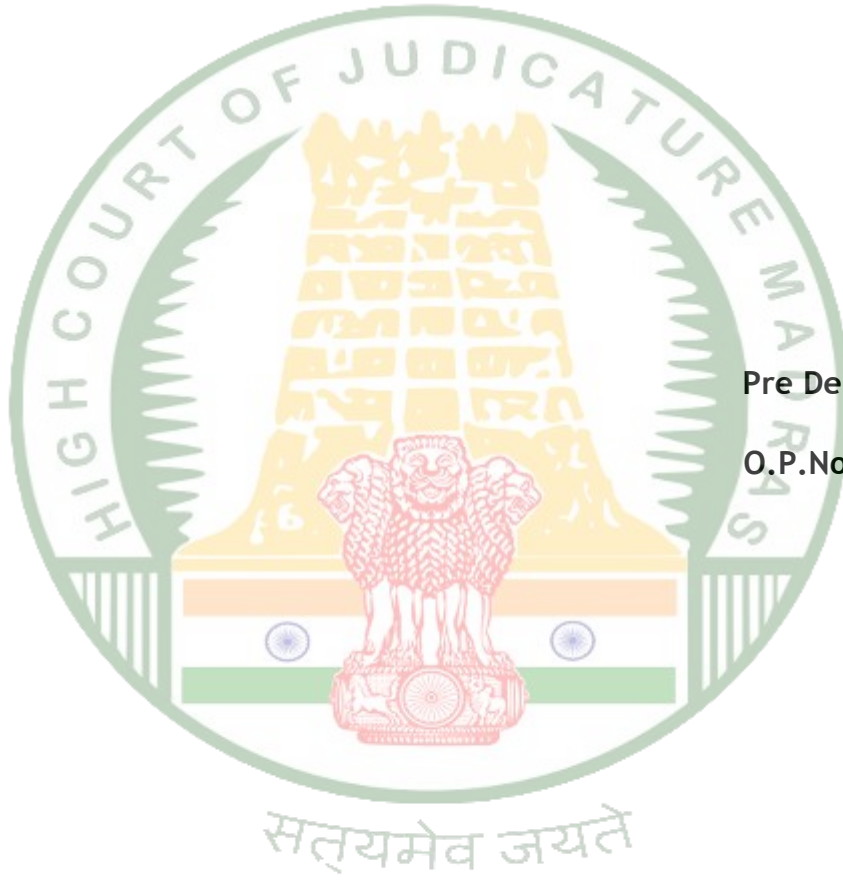
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Speaking order



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