

**O.A No.861 of 2019 &
A.No.7538 of 2019 in
O.P.No.744 of 2019**

K.KALYANASUNDARAM., J

The Original Petition No.744 of 2019 has been filed to appoint the petitioner as a guardian of the minor children viz., Rushat Raj born on 27.11.2002 and Kushagra Raj born on 11.09.2005 and for their permanent custody to the petitioner.

2. O.A.No.861 of 2019, is filed for interim injunction, restraining the respondent from visiting the minor children Rushat Rai and Kushagra Rai either at their residence, School or anywhere else until their final exams are completed in April 2020.

3. A.No.7538 of 2019 came to be filed to restore the custody of the minor Kushagra Rai forthwith to the applicant / mother, pending disposal of the case in O.P.No.744 of 2019. It is the case of the applicant that during the pendency of the injunction application O.A.No.861 of 2019, the respondent removed the younger son Kushagra Raj on 20.09.2019.

4. The case of the applicant is that the marriage between her and respondent was solemnized on 09.02.2002 at Calcutta. Immediately thereafter, they moved to Mumbai. The first son was born on 27.11.2002 at Breach Candy Hospital in Mumbai. Subsequently, the respondent had gone to U.S. to establish his business. It appears that in 2004, the applicant secured her job in U.S and while she was working in U.S., the second son- Kushagra Raj was born on 11.09.2005. It is stated that the entire medical expense in both the occasions was borne by her.

5. It is further stated that in U.S., the applicant was paying for the entire family expenses and she had to do all household work including cooking, cleaning, washing, ironing and purchasing household articles, but there was no assistance from the respondent. So, she decided to come back to Mumbai and in 2005, a house was purchased in Hiranandani Gardens, Powai in the joint name of the applicant and the respondent. Though the respondent has paid about 50% of the sale price, the rest of the amount was paid by the applicant as E.M.I.

6. The applicant has further averred that between 2011 and 2015, the respondent was initiating new business and he was in China for the

extended period and the applicant was busy with her earnings for their livelihood and taking care of the children. In December 2016, the applicant received a notice from her employer and got a new role in her Company in Chennai and after discussing with her children, she moved in February 2017, while children were residing in Mumbai with the respondent. It is alleged that the respondent was not taking care of their minor children. On the other hand, she was flying from Chennai to Mumbai, every weekend to take care of the minor children for their whole weekends.

7. It is further alleged that in July 2018, the respondent behaved indifferently when they went to the late night movie and on another occasion when a car without a number plate came into the campus of the applicant. The applicant has narrated some of the incidents said to have happened in November 2018, January 2019 and on 10.03.2019 in the application. Therefore, on 25.03.2019, the applicant consulted a Psychiatrist and she was informed that it is a mental health issue, but the medicines prescribed by the Doctor was not taken by the respondent. So, the applicant consulted the respondent's sister and ultimately her mother-in-law convinced the respondent to meet a doctor. The respondent again refused to consume medicines prescribed by the doctor. Eventually, the

applicant and her sister-in-law admitted the respondent in Dr.L.H.Hiranandani Hospital, Mumbai on 23.04.2019. Though the respondent stayed in hospital till 26.04.2019, he did not cooperate for treatment and also refused to take medication. The Doctors provisionally diagnosed that this is delusional disorder and opined that the respondent is to be observed for a period of 12 weeks in the OPD to reach a final diagnosis.

8. According to the applicant, on 04.09.2019, the respondent had got into school bus of the children and compelled them to get down with him. It is alleged that the respondent tried to harass the applicant saying that he will not allow the children to continue their education at Chennai and on 14.09.2019, the respondent compelled the younger son to go along with him an outing after his school hours. Hence, submitting so, the applicant seeks to allow her prayer.

9. A detailed counter affidavit, running 28 pages, has been filed by the respondent, denying each and every allegations made by the applicant. It is the case of the respondent that when the applicant was working, the respondent was taking care of the minor children and educated them. When the applicant expressed her financial insecurity, he acted like a loving and

dependable husband and to remove such insecurity from the mind of the applicant, he transferred money to the account of the applicant from U.S. towards the fixed deposit accumulating to the maturity value of Rs.50,00,000/-. However, the applicant prematurely withdrew the amount on 2nd May 2019 and moved to Chennai with the money.

10. An elaborate reply affidavit has been filed by the applicant running to 48 pages, for which, the respondent has filed a rejoinder, having 8 pages.

11. The learned counsel for the applicant would urge that the child Kushagra Rai is pursuing his studies in APL Global School, Chennai, but he could not attend school since 20.09.2019, as he was illegally taken away by the respondent. It is the case of the applicant that the respondent was admitted in Hospital from April 2019 and he was directed to be under observation for 12 weeks to determine his exact illness, but the medical bills and report pertaining to the 12 weeks observation are not filed by the respondent to show that he underwent the procedure. The respondent himself admits that he was hospitalized and took treatment for pulmonary embolism till September 2019 and therefore, he is not competent to take

care of the minor children. It is also alleged that since 20.09.2019, the respondent is not allowing the child to have free access with the applicant. She further added that the applicant is earning reasonable amount to maintain the family, but no proof is shown by the respondent for his current employment and his financial details and hence, in the interest of the minor children, the custody is to be immediately restored to the applicant.

12. *Per contra* Mr.Sanjiv Raj, the respondent who is appearing party-in-person reiterated his stand taken in the counter affidavit. He submitted that the younger son on his own volition joined with the respondent on 20.09.2019 and when they were in Airport, on the complaint filed by the applicant, they had been at Police station and even before the Police, the minor child had expressed his willingness to join with the respondent. It is further restated that the entire statement of the minor child was recorded by the Police. According to the respondent, he owns immovable properties and also earning considerable amount therefrom. By producing the medical certificate dated 01.10.2019, issued by psychiatrist from Dr.L.H.Hiranandani Hospital, Mumbai, he argued that he recovered from depression and pulmonary embolism and he is in sound health to take care of his sons.

13. Heard the rival submissions and perused the materials available on record.

14. In the case on hand, the allegations and counter allegations made by both the parties need not be considered at this juncture. From the materials available in this case, apart from family disputes, which is bound to take place almost in all the families, it is stated that the applicant could see behavioural indifference of her husband from June 2018 and the psychiatrist at Hiranandani Hospital opined that the respondent suffers from mental health issue and he shall be under observation for 12 weeks. In this regard, the applicant relies on the opinion of the doctor issued on 05.02.2019. However, the medical certificate dated 01.10.2019 issued by the psychiatrist from the same Hospital shows that the respondent fully recovered and is doing well. He is euthymic and is capable of nurturing and parenting his children.

15. With regard to financial capacity, it is the case of the respondent that he owns immovable properties and derives regular income therefrom. Further it is not disputed that the respondent transferred money from U.S.A

for the maturity value of Rs.50 Lakhs and that has been taken away by the applicant.

16. It is pertinent to note that on 20.09.2019, the younger son of the applicant was brought to the police station from the Airport and a statement was taken from the younger son. It appears that he stated that he has joined with his father on his own and wanted to accompany him to Mumbai. As observed supra, the minor may be interested to take football practice with old friends and to continue his studies at Mumbai. It is not in dispute that the respondent is also a natural guardian of the minor child. So the statement of the child, who is aged about 14 years, cannot be ignored. It is not disputed that the minor was under the custody of the applicant continuously for about five months and only on 20.09.2019, he joined with the respondent. Hence, I find no substance in the contention of the applicant that only on tutoring he gave such a statement before the Police.

17. Taking note of the above facts, this Court is of the opinion that the applicant is not entitled for the prayer sought in these applications and hence, the applications O.A No.861 of 2019 & A.No.7538 of 2019 are dismissed. However, considering the undisputed facts, the applicant is

granted the rights of visitation of minor Kushagra Rai, once in fortnight preferably on Sundays. The applicant with prior intimation to the respondent is entitled to visit the minor child at Mumbai and on such request, the respondent is directed to make necessary arrangements. The place and timing of visitation shall be decided by the parties at their convenience.

26.11.2019

Index : Yes/No

Speaking/Non-Speaking Order

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Note: Issue order copy on 03.12.2019

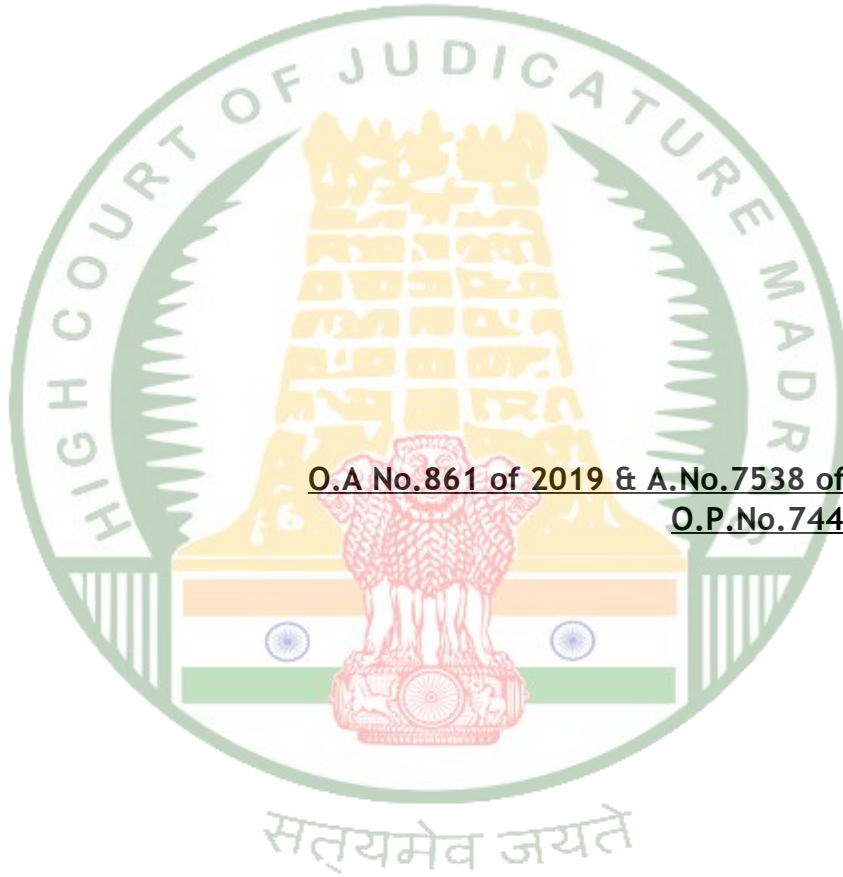


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