

Reserved on : 11.02.2021
Pronounced on : 12.03.2021

Application No.6030 of 2018
in O.P.No.635 of 2018

R.PONGIAPPAN, J.

This application has been filed under Order XIV Rule 8 of Original Side Rules read with Section 12(2)(e) of the Guardians and Wards Act, 1890, wherein, the petitioners in original petition are seeking relief of interim custody of the minor male child Khushal S Jain pending disposal of the above O.P.No.635 of 2018.

2. Heard both sides.

3. Perused the documents.

4. The brief facts of the case are as follows:

(i). The petitioners herein are the parents of the 1st respondent.

Admittedly, the marriage between the respondent 1 and 2 was solemnized on 26.04.2007 at Hotel Abu Palace, Chennai. After marriage, the second respondent gave birth to two children where in, the first son Khushal S Jain was born on 16.11.2007 and the second daughter S.Muskaan was born on 19.01.2014 at Chennai.

(ii). After some time from the date of marriage, the second respondent illegally joined with one Mr.Suman who is a Doctor practising in Chennai and lived together for the period of one year. Thereafter, for the reason best known to her, she started to living alone. As of now, daughter S.Muskaan is in the custody of the second respondent. In this regard, way back on 07.08.2015, the first respondent had lodged a complaint against the second respondent to the Inspector of Police, C-3, Seven Hills Police Station, Chennai.

(iii). Further case of the petitioners is that on 10.08.2015, the first respondent, after bringing the child from school to home, found that Mr.Suman who is residing at Ayanavaram along with the second respondent in a copulating position. Immediately, 1st respondent had locked the door outside and reported to the Police Station. On enquiry, it was found that the second respondent was having extra marital relationship with the said S.Suman.

(iv). Ultimately, the second respondent left the matrimonial house on 07.08.2015 and settled in her parental house in Kondithope, Chennai. As of now, the petition in H.M.O.P.No.3185 2015 filed by the 1st respondent

for the dissolution of marriage is pending before the II Additional District Court, Chennai. Similarly, the first respondent is having illegal relationship with a woman namely, Mrs.Esha and settled down with her at Sidhara Sri yaji, 72, Choolai High Road, Chennai.

5. Since the respondents 1 and 2 are leading their life on their own accord, the minor child Kushal.S.Jain is living without any support. Now, the minor child's Left Ankle is in Equinus, Left TA is contracted. Ankle cannot be dorsiflexed to neutral even with the knee flexed Hamstrings are not tight and the left hip is stable. So the minor child has to undergo one major surgery at Kanchi Kamakoti Child Trust Hospital, Nungambakkam. Therefore, in the interest and for the child's welfare, the custody of the minor child has to be given in favour of the petitioners.

6. In response to the affidavit filed by the petitioners, both the first and second respondents separately filed their respective counter affidavits, wherein, the first respondent had levelled allegations against the second respondent that she is leading an immoral life. He has stated that the

second respondent frequently call her boyfriends and joins with them after receiving a sum of Rs.2000 to Rs.4000. On the other hand, in the counter affidavit filed by the second respondent, she has raised so many allegations against the 1st respondent. It is the case of the second respondent that the first petitioner along with his brother had murdered his first wife Mrs.Kama Devi and he has been charged for an offence punishable under Section 120(B) read with Section 302 of IPC. The said case had ended in conviction. Before filing the present application, second respondent herein filed application for the similar relief and the same was allowed in her favour. Only in the said circumstances, the petitioners filed this application only in order to disobey the orders passed in I.A.No.3553 of 2018 in H.M.O.P.NO. 3185 of 2015 dated 19.6.2018 which was confirmed by this court in C.R.P.No. 1993 of 2018 dated 11.07.2018.

7.Learned counsel appearing for the petitioners had relied on the following judgments:

- i. AIR 1977 Supreme Court 1359.
- ii. AIR 1982 Supreme Court 792

iii. AIR 2000 Supreme Court 2172

iv. AIR 2001 Supreme Court 2179

v. 2003 (3) CTC 577

vi. 2007(4) CTC 566

vii. AIR 2009 SC (Supp) 732

viii. AIR 2010 Supreme Court 1659

ix. 2010(6) CTC 426

8. The learned counsel for the petitioners would further submit that for deciding this type of application, it would be necessary to see the paramount welfare of the child. Further he would contend that before passing an order in respect to interim custody, it would be necessary to examine the minor child and after knowing the wishes of the minor child, the order has to be passed without affecting the wishes of the child.

9. Now on considering the said submission with the relevant Records, at the time of proceedings of the pending application for interim custody, the minor child was called before this Court on 01.02.2021 and on

enquiry, he refused to go along with his parents. But it is natural for the minor child, who gave reply as directed by the petitioners, since he was in their custody at the time of appearing before this Court.

10. Now on considering other circumstances in this case, both the petitioners and the first respondent had categorically admitted that the minor child was born to 2nd respondent through the 1st petitioner.

11. In this occasion, the type set produced by the second respondent disclose the fact that in HMOP.No.3185 of 2020 the second respondent filed petition against the first respondent for the relief of dissolution of marriage. In the said proceedings, the second respondent herein filed an application in I.A.No.3553 of 2018, wherein, she seeks relief of custody, in respect to minor male child Kushal.S.Jain. The said application by considering the consent given by the first respondent allowed in favour of the second respondent.

12. In fact, only after getting consent from the first respondent by way of making endorsement in the application, the said application was allowed and ultimately, the custody of the minor child was given to the second respondent. Subsequent to that since the first respondent has disobeyed the said order, the second respondent herein filed petition under Section 151 of CPC praying to order for Police aid by directing the Inspector of police Law and Order, Elephant Gate Police Station to execute the order passed in I.A.No.3553 of 2018 in O.S.No.3185 of 2015. In the meantime, the 1st respondent filed a Criminal Revision Petition in C.R.P.No.1993 of 2018, praying to set aside the order dated 19.06.2018 made in I.A.No.3553 of 2018 in O.P.No.3185 of 2015. This Court by order dated 11.07.2018 dismissed the said Revision after confirming the order passed by the Family Court Chennai. Therefore, the facts and circumstances of the case shows that if really the second respondent had leading an immoral life, there is no necessity for the 1st respondent for making endorsement in the application filed by the 2nd respondent which is for the custody of the minor child. Therefore, the attitude of the petitioners and the first respondent creates a

doubt whether they have approached this Court with clean hands.

13. Accordingly, the orders passed by the various Courts would reveal the fact that in respect to the custody of the minor child, already Judicial Order has been passed by the Sessions Court in favour of the second respondent and the same was confirmed by this Court. Without setting aside the said orders seeking the custody of the said minor child is nothing but an abuse of process of law. Hence, this application is dismissed. However, the interim order dated 07.08.2019 has to be complied with till the disposal of main original application.

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Pre-Delivery order in
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