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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.07.2021	Pronounced on: 12.07.2021
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CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

and

THE HON'BLE MS.JUSTICE R.N.MANJULA

O.S.A.Nos.336 & 337 of 2019

&

C.M.PNos.27332 & 27337 of 2019

O.S.A.No. 336 of 2019

Arpana Rawat

...Appellant

Vs.

Sanjiv Rai

...Respondent

O.S.A.No. 337 of 2019

Arpana Rawat

... Appellant

Vs.

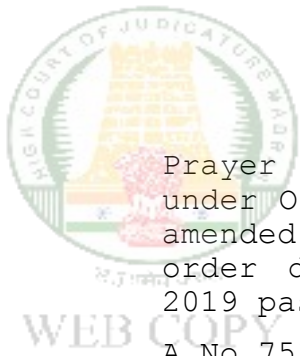
Sanjiv Rai

... Respondent

Prayer in OSA.No.336/2019: This Original Side Appeal is filed under Order XXXVI Rule I of the O.S.Rules read with Clause 15 of amended Letters Patent 1805, against the judgement and decreetal order of this Court dated 26.11.2019 in O.A.No.861 of 2019 in O.P.No.744 of 2019.

OA.No.861 of 2019:

Original Application praying that this Hon'ble Court be pleased to grant an order of ad interim injunction restraining the respondent from visiting the minor children Rushat Rai born on 27/11/2002 and Kushagra Rai born on 11/09/2005 either at their residence School or any where else until their final exams are completed in April 2020.



Prayer in OSA.No.337/2019: This Original Side Appeal is filed under Order XXXVI Rule I of the O.S.Rules read with Clause 15 of amended Letters Patent 1805, against the judgement and decreetal order dated 26.11.2019 in A.No.7538 of 2019 in O.P.No.744 of 2019 passed by this Court.

A.No.7538 of 2019:

Application praying that this Hon'ble Court be pleased to direct the respondent to restore the custody of Minor Kushagra Rai born on 11/09/2005 forthwith to the applicant/mother the other natural guardian who is the applicant/petitioner herein pending disposal of the case in O.P.744 of 2019.

O.P.744/2019:

a) Petition filed under Article of the Guardian and Wards Act 1890, as pleased to prayed that the petitioner herein may be appointed as the Guardian of the person of the minor children Rushat Rai born on 27.11.2002 and Kushagra Rai born on 11.09.2005.

b) to grant permanant custody of the minor children Rushat Rai born on 27.11.2002 and Kushagra Rai born on 11.09.2005 to the petitioner therein.

In both OSAs.

For Appellant .. M/S.K.Sumathi

For Respondent .. Mr.Sanjiv Rai (party in person)

COMMON JUDGEMENT

(Heard through video conferencing)

R.N.MANJULA., J,

These Original Side Appeals have arisen for challenging a common order of the learned single Judge, dated 26.11.2019 made in O.A.No.861 of 2019 and A.No. 7538 of 2019 in O.P.No.744 of 2019.

2. Heard the submissions of the learned counsel for the appellant and the respondent who appeared in person. Interaction with the minor child and the appellant also had been done through video conferencing.

3. The short facts from which these Original Side Appeals stemmed are as narrated herewith:

The appellant married the respondent and they lived together as husband and wife and two sons were born to them. They developed misunderstandings at some point of time. It went beyond the stage of patching up and they got separated. The



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appellant filed the Original Petition for appointing herself as the guardian of the persons of her two minor sons namely Rushat Rai and Kushagra Rai. During the pendency of the above said Original Petitions, the appellant has filed an original application for granting an order of ad interim injunction restraining the respondent from visiting the minor children either at their residence, school or anywhere else until the final year examinations scheduled to be completed in April 2020. Since the respondent has taken away the second son during the pendency of these proceedings, the Appellant filed another application in A.No.7538/2019 seeking to issue a direction to the respondent to restore the custody of the minor child Kushagra Rai to the appellant. Both the applications were taken up together and a common order was passed by the learned single Judge on 26.11.2019, by dismissing both the applications. Aggrieved over the said order of dismissal, the appellant has filed these Original Side Appeals and prayed to set aside the said order.

4. Out of the two children the elder one has attained majority now. Hence, the matter now under consideration is only with regard to the second son namely Kushagra Rai. And the petition filed for an order of interim injunction restraining the respondent from visiting the children until April 2020 has also become infructuous due to efflux of time. Hence, this appeal has got limited to the prayer which was sought in A.No.7538 of 2019, in which, the appellant sought a direction to be issued to the respondent to restore the second son Kushagra Rai to the appellant.

5. The appellant has challenged the order of the learned single Judge on the ground that the physical and mental condition of the respondent is not appropriate to have the custody of the second child Kushagra Rai; the harsh attitude of the respondent that he had taken away the child on 20.9.2019 from school and the fact that he was later intercepted by the police at the airport were not considered by the learned single Judge while passing the impugned order. It is further submitted that the wishes of the minor child cannot be the sole criteria for deciding his custody.

6. The learned counsel for the appellant submitted that the child was forcibly taken away from the lawful custody of the appellant and because of the attitude of the respondent, the physical and mental health of the child is affected and the child and his education is also disturbed. It is further submitted that the child is under the influence of his father and the intervention of the psychological expert is required to help the child to have a balanced view of the circumstances.

7. The respondent appeared in person and the 2nd son by name Kushagra Rai was also present during the video conference.



Subsequent to the marriage between the appellant and the respondent which went into rough weather, frequent problems arose between themselves. The respondent had taken away the 2nd son from the school even during the pendency of the Injunction proceedings and that is the cause of action for the present petition. Though the elder son remained in the custody of the appellant, the respondent had snatched away the younger son alone. Strangely the child which was taken away in the above said manner seems to be comfortable with his father and prefers to be with the father himself.

8. Since an order for restoration of the child would affect his interest, efforts were taken through an interaction with him in order to know how he wishes to be handled in the present situation. The child persistently expressed his desire to be with his father and he did not show any inclination to return to his mother. The child continued to be in the custody of his father for a long time without any craving to see his mother. Nearly 537 days have passed and during this time, the child did not complain that he is missing his mother and his elder brother. Even prior to the present phase, the child was living with his father for 3 years. During that time the appellant was in Bombay.

9. The appellant who was present personally online has stated about her maternal concerns about the child and her good intentions of keeping the child under her custody. The appellant submitted that the health condition of the respondent is not compatible to have the custody of the child and he has started to show strange attitude which is not desirable for his welfare. When the child was counselled about the importance of the role of both of his parents, he was not interested and continued to claim that his father should have his custody. Since he is 16 years old, he is capable of understanding the proceedings reasonably. Though he could show some interest on his elder brother, he did not consider the importance of the company of his mother. He has stated that he is performing well in his studies and has a clear idea about his future. He is presently under home schooling. He stated that home schooling would enable him to attend the board examinations much earlier than the students of the regular stream.

10. It is true that the appellant being his mother would have real sentiments and concern for him. In fact she was visibly disturbed for not being successful in making the child bond with her. When the child strongly expresses his wishes and opts to choose one parent over the other, the Court is helpless and no order can be passed in a manner that would affect the current equilibrium and the preference of the child. It is true that he needs to be taken care of by both of his parents and should receive the love and affection from both of them. But



that cannot be done all of a sudden with an order of the Court. The child is in the midst of his secondary education at home schooling. Disturbing him would also affect his studies and other comforts for which, he has adapted himself for a considerably long time.

11. Though it is correct that in the matters of custody, the wishes of the child alone should not be a deciding factor, the impact on the psychology of the child cannot be overlooked and he cannot be compelled to change his wishes. Had the appellant and the respondent lived as one family under one roof, things would have been different and both the children would have grown in a healthy atmosphere, where they would have got the care and custody of both the parents.

12. Though the unfortunate events that happened in the marital journey of the appellant and the respondent were something beyond their control, its impact on the children has become inevitable. This child seems to have assumed the problems and quarrels between the appellant and the respondent to himself and reflected it as a reason for his preference to be with his father. When the child becomes a major and understands the world better, there may be changes in his attitude and he would think about his world independent of the events that affected the relationship between his parents.

13. Further, the child is 16 years old and reasonably matured to his age. So it is not possible to make him to think in terms of what others think and consider good for him. However, it could be known from the conversation with him that he does not have any aversion to his elder brother and he welcomes him if his brother could visit his father's place sometime and be with them. During such interactions with his brother, the child might become comfortable with his other sibling and both of them can share their feelings and ideas in order to get more clarity about their situation. And that would help them to handle themselves in a more balanced way and that could improve the family equilibrium. Until that time the appellant has no other option except to wait and do things which might improve her bondage with the child.

14. However, the appellant is not deprived of her visitation rights which have been already granted in the order of the learned single Judge while passing the order of dismissal. Since the custody of the child is not disturbed and he is allowed to be under the custody of the respondent, when the appellant exercises her visitation rights as per the Order of the Court, the respondent shall be fair enough to extend co-operation and make necessary arrangements in all fairness in order to enable the appellant to enjoy her visitation rights uneventfully.



In view of the above said reasons and observations, these Original Side Appeals stand dismissed and the Orders of the learned single Judge dated 26.11.2019 passed in O.A.No.861 of 2019 and A.No. 7538 of 2019 in O.P.No.744 of 2019, are confirmed. However, the visitation rights given by the learned single Judge while dismissing the Application stands good and continues as such. The appellant can choose the days which are convenient to herself and the child and the child shall stay with the appellant at least for two or three days. The respondent shall take the child to the place of the appellant and ensure that the appellant could exercise her visitation rights without any hurdles. And the expenses incurred towards travelling for such visits shall be shared equally by both the appellant and the respondent. No costs. Consequently connected civil miscellaneous petitions in C.M.PNos.27332 & 27337 of 2019, are closed.

s/d-
Assistant Registrar(CS-VIII)

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Sub-Assistant Registrar

jrs

To

The Sub Assistant Registrar
Original Side Section
High Court, Madras 104.

+4 Ccs to Mr.K. Sumathi, Advocate sr 32432, 32433.

O.S.A.Nos.336 & 337 of 2019

RK(CO)
SP(19/08/2021)