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C.M.A.No.2913 of 2



THE HIGH COURT OF JUD ICATURE AT MADRAS

DATED: 13.10.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE DR.JUSTICE D.NAGARJUN

C.M.A.No.2913 of 2022

and

C.M.P.No.22513 of 2022

Stalin Samuel

...Appellant

Vs.

Gracy Sylvia

...Respondent

Prayer: Civil Miscellaneous Appeal filed under Order 19 of the Family Courts Act, 1984, against the fair and decreetal order dated 23.11.2022 passed in I.A.No.3 of 2020 in D.O.P.No.383 of 2020 by the learned Family Judge, Salem.

For Appellant : Mr.Christopher Vijayachandran

For Respondent :Mrs.Raj Genevive Veena



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J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

This appeal is at the instance of the husband. Challenge is to the order of the Family Court made in I.A.No.3 of 2020 in D.O.P.No.383 of 2020, a petition filed under Section 41 of the Divorce Act, seeking interim custody of a minor girl, Tvisha Selby.

2.The background facts are as follows:-

The parties, who are christians got married on 19.05.2014 at Salem. The husband, was working in Mumbai as a Software Engineer. The wife, who was working as HR (Support) in FLSmidth, Chennai. She had resigned her job and shifted to Mumbai. Soon after the wedding, the parties moved to United States and the minor child, Tvisha Selby was born at Salem. Differences arose between the parties and they returned to Mumbai in December, 2019. According to the wife, she was forced to leave the matrimonial home after they had returned to Mumbai in December, 2019 and she took proceedings thereafter. She lodged a complaint in All Women's Police Station at Suramangalam and also filed the main petition in D.O.P.No.383 of 2020, seeking judicial separation. Pending the same, she



filed an Interlocutory Application, invoking Section 41 of the Divorce Act seeking interim custody of the child.

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3.The said petition was resisted by the husband contending that the girl child is in the custody of his parents and she has been put in a School in Mumbai. The Family Court however, took note of the conduct of the parties and concluded that, being a minor girl child aged about 8 years, the child should be with her mother. Therefore, the Family Court granted interim custody to the mother. Aggrieved, the husband is on appeal.

4.We have heard Mr.Christopher Vijayachandran, learned counsel for the appellant and Mrs.Raj Genevive Veena, learned counsel for the respondent.

5.Mr.Christopher Vijayachandran, learned counsel appearing for the appellant / husband would vehemently contend that the Family Court was not right in concluding that the child should be with her mother. He would point out that though the husband had a lucrative job at United States of America, he had resigned the same after the order of the Family



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Court and he has come back to India only to take care of the minor girl child. He also produced the passport, which shows that the husband has come back to India on 22.02.2023.

6.It is claimed that he has left his job and he has taken up a job in Mumbai. The only point that is to be considered in the case of this nature is the welfare of the minor. The minor child was born in 2015 and she is now eight years old. The father, who had the custody of the child had left the child with his parents and had left to United States of America even in February, 2020. Though the father would claim that there was a prohibitory order passed by the Additional Judge, Mahila Court, Salem on 30.11.2020, injuncting him from taking the child and the same was passed only on 30.11.2020 whereas the husband left to US on 01.02.2020 and had come back to India on 26.11.2020. He has not chosen to challenge the order of the Additional Mahila Court which prohibited him from taking the child to United States of America. The husband, on 20.01.2021 left to US and returned on 04.09.2022. Thereafter, we find from his passport, he has gone back to US again on 09.10.2022. These facts would show that the husband was happy to be in the US, leaving the child in the care and custody of his



aged parents.

7. Admittedly, the parties are tamil speaking christians and the child was left in Maharashtra in the custody of the grand parents, where the local language is either Hindi or Marathi. The Child was born at Salem. When she came to Mumbai, she was only four years old and she was exposed to these cultural differences that too, in the absence of mother in Maharashtra.

8. The Hon'ble Supreme Court has again and again reiterated that it is the welfare of the child, which should be a paramount consideration in proceedings of this nature. In ***Kumar V. Jahgirdar Vs. Chethana Ramatheertha*** reported in (2004) 2 SCC 688, the Hon'ble Supreme Court had held as follows;-

"The mother always can claim superior right to retain the custody of the child. The High Court has taken into consideration all other relevant facts and circumstances to come to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification for it."



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9.The Family Judge has taken note of the above decision of the Hon'ble Supreme Court and has concluded that the interest of the minor will be served better, if she is in the custody of the mother. As on the date when the Family Judge passed the order, the husband namely, the father was not in India and the child was in the custody of the grand parents in Mumbai. Therefore, the Family Court concluded that the mother would be the best person to have the custody of the child.

10.The learned counsel for the appellant would attempt to project the change of circumstances namely, his coming back from the US as a reason for us to interfere with the order . Even today, the child is of a tender age of eight years and her interest, in our opinion, will be better served only if she is in the custody of her mother. The only fact that the husband has chosen to come back to India after resigning his job in the US will not cloth him with a better right to have the custody of a girl child of eight years.

11.No doubt, there is no provision under the Guardians and Wards Act, which makes age a factor for custody but, we can take judicial notice of



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provisions available under another enactments namely, Hindu Minority and Guardianship Act which provides that custody of a girl child less than 10 years must always be with a mother. We therefore, see no reason to interfere with the order of the Family Court. This Civil Miscellaneous Appeal therefore, fails and it is accordingly, dismissed. No costs. Consequently, connected miscellaneous petition is closed.

12. There will be a direction to the husband to handover the child to the mother / wife at Salem within a period of four weeks from the date on which, the order is uploaded on the Website.

(R.S.M.,J.) (D.N.R.,J.)
13.10.2023

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Internet: Yes/No
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Speaking/Non-speaking
Neutral Citation : Yes/No



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R.SUBRAMANIAN, J.
and
D.NAGARJUN, J.

KKN

To:-

The Family Court,
Salem.

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