



CRP No.3846 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2024

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THE HON'BLE MR.JUSTICE V.LAKSHMINARAYANAN

CRP No.3846 of 2024 &
CMP.No.21090 of 2024

S.Ambiga : Petitioner

versus

C.K.S.Sujee : Respondent

Prayer: Petition filed under Article 227 of the Constitution of India to set aside the order dated 21.05.2024 in I.A.No.3 of 2022 in O.P.No.2073 of 2020 on the file of the learned I Additional Principal Judge, Family Court, Chennai.

For Petitioner : Mr.Hari Hara Arun Soma Sankar

ORDER

This civil revision petition arises against the order of the I Additional Family Court at Chennai in I.A.No.3 of 2022 in O.P.No.2073 of 2020 dated



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21.05.2024.

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2. The civil revision petitioner is the wife. She has presented O.P.No.2073 of 2020 seeking restitution of conjugal rights.

3. The case of the petitioner is that she married the respondent on 09.05.2011 at Chennai. From the wedlock, a female child was born on 13.04.2013. The child is now aged 11 years. Due to disputes and differences, the parties have separated.

4. According to the petitioner, she was admitted in the hospital and on her discharge, she found that the husband's attitude towards her had changed. She would plead that her husband is suffering from personality disorder. But nonetheless, she would state that in the interest of her daughter, she is willing to rejoin the husband.

5. Pending the proceedings, the wife took out an application in I.A.No.6 of 2023 and I.A.No.7 of 2023 seeking payment of Rs.2,43,748/- towards her medical expenses, Rs.3,68,021.24 towards educational



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expenses of the child and for a sum of Rs.5,00,000/- per month as interim maintenance for both.

6. By an order dated 21.05.2024, the learned Trial Judge allowed these applications directing the husband to pay for educational expenses, medical expenses and further ordered Rs.40,000/- as interim maintenance. On the very same day, she also allowed an application taken out by the husband seeking interim custody. She held that the father must not be separated from the child and granted visitation rights to the father to visit the child on first and third Saturday of every month between 10.00 am and 2.00 pm in the Child Care Centre attached to the Family Court, Chennai. The said order was passed with certain conditions, including a clause that in case the child is ill, the mother must inform the father through the assisting counsel. Insofar as the claim of interim custody is concerned, she dismissed the same.

7. Aggrieved by the said order, this civil revision petition has been instituted by the wife.



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8. I have heard Mr.Hari Hara Arun Soma Sankar for the civil revision petitioner.

9. Mr.Hari Hara Arun Soma Sankar placing reliance upon the order passed by the Supreme Court in *Priyanka vs. Santosh kumar in TP (Civil) No.964 of 2021 dated 08.12.2022* pleads that the husband has to file a separate petition for custody and cannot file an interlocutory application in the proceedings. He would state that the impugned order passed on the basis of the interlocutory application deserves to be interfered with by the court. He pleads that the wife is sincere in her plea that she is willing to perform her matrimonial obligations and she has no objection to allow the respondent to live with her at her residence.

10. I have carefully considered the submissions of Mr.Hari Hara Arun Soma Sankar and perused the materials on record.

11. The effect of argument of Mr.Hari Hara Arun Soma Sankar is that



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for custody of the child, the husband has to file a separate proceeding as similar to GWOP under Section 26 and cannot file an application pending disposal of petition for restitution of conjugal rights. This requires me to refer to Section 26 of Hindu Marriage Act. Section 26 reads as follows:

“ 26.Custody of Children: In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of



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within sixty days from the date of service of notice on the respondent.”

12. A careful perusal of Section 26 would show that granting custody of the child while dealing with any proceedings of the Act, the court passes such interim orders and make such provisions in the decree which would be just and proper in the interest of the child. Section 26 deals with situations which are interim in nature as well as at the time of final disposal. Therefore, the submissions of Mr.Hari Hara Arun Soma Sankar, if accepted, would run contrary to the statute.

13. A reading of the judgment cited by Mr.Hari Hara Arun Soma Sankar would at the first blush seem to be in support of his proposition. Yet, a careful perusal of the same would show that the Supreme Court did not lay down such a proposition. The case arose out of a proceeding for transfer of the case from Pondicherry to Bangalore. The wife was in Bangalore and the husband was in Pondicherry. She had a minor child to take care of. The husband took an application under Section 9 of the Hindu Marriage Act. The



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Supreme Court in Paragraph 3 came to a clear conclusion that the wife, not be in a position to travel from Bangalore to Puducherry, the demand of the husband for grant of custody of the child to him should not have been entertained by the Court as the petitioner/wife was not given sufficient opportunity to defend herself. The Court had held that the custody should not have been granted under Section 9 because the Court should have entertained a separate and individual petition under Section 26 and thereafter, pass the orders. In fact, in the facts of that case, the learned Trial Judge, instead of passing an order of interim custody and thereafter passing order under Section 9, had set the wife exparte in both and had allowed both the applications. Such a procedure is obviously erroneous. If the Court is going to pass final order in an application filed under Section 9, the question of passing a separate interim order under Section 26 would not arise. It was in those circumstances, that the Supreme Court said that separate and individual petition under Section 26 should have been filed and the Court erred in granting custody under Section 9.

14. In the facts of this case, the husband has, in fact, taken out an



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independent application in I.A.No.3 of 2022. In this interlocutory application, the petitioner had stoutly contested the same and had partly succeeded also.

15. Furthermore, it is in the best interest of the child to grow up knowing her father. Since the learned Judge has balanced the interest of the wife and the father and has passed an order in the best interest of the child, I am not inclined to interfere with the same.

16. At this juncture, Mr.Hari Hara Arun Soma Sankar would state that bringing the child to the Child Care Centre at Family Court, Chennai creates issues for the mother, especially on Saturday. Being an interlocutory application under Section 26, by very text of the Section, the Court is always entitled to modify such orders. Therefore, if an appropriate application is filed by the wife seeking change in time as well as the venue, I am sure that the learned Judge will consider the same positively.

17. With the above observations, this civil revision petition is



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dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

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Index : Yes/No

Speaking order/Non speaking order

Neutral Citation : Yes/No

To

The I Additional Principal Judge,
Family Court, Chennai.



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V.LAKSHMINARAYANAN, J.

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