



O.S.A.Nos.4, 97 & 188 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2024

CORAM :

**THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ**

Original Side Appeal Nos.4, 97 & 188 of 2022
and
C.M.P.Nos.251 of 2022 & 24241 of 2023 in O.S.A.No.4 of 2022
and
C.M.P.No.6881 of 2022 in O.S.A.No.97 of 2022

OSA.Nos.4 and 97 of 2022:-

V.M.Muthulakshmi

.. Appellant

Versus

Dr.M.Rajesh

.. Respondent

OSA.No.188 of 2022:-

Dr.M.Rajesh

.. Appellant

Versus

V.M.Muthulakshmi

.. Respondent

OSA.No.4 of 2022:- This Original Side Appeal filed under Order 36 Rule 11 of the Original Side Rules read with clause 15 of the Letters Patent to set aside the order dated 02.11.2021 in A.No.3528 of 2021 in O.P.No.652 of 2020.



O.S.A.Nos.4, 97 & 188 of 2022

OSA.Nos.97 and 188 of 2022:- These Original Side Appeals filed under Order 36 Rule 1 of the Original Side Rules read with clause 15 of the Letters Patent to set aside the common order dated 23.03.2022 in A.Nos.797 and 801 of 2022 in O.P.No.652 of 2020.

OSA.Nos.4 and 97 of 2022:-

For Appellant : Mr.M.Praveen Kumar
For Respondent : Mrs. R.Sumithra Chakkaravarthi

OSA.No.188 of 2022:-

For Appellant : Mrs. R.Sumithra Chakkaravarthi
For Respondent : Mr.M.Praveen Kumar

COMMON JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J.)

OSA No. 4 of 2022 is filed against the order dated 02.11.2021 passed by a learned Judge in Application No. 3528 of 2021 in OP No. 652 of 2020. Whereas OSA Nos. 97 and 188 of 2022 are directed against the order dated 23.03.2022 passed by another learned Judge in Application Nos. 797 and 801 of 2022 in OP No. 652 of 2020.



O.S.A.Nos.4, 97 & 188 of 2022

2. For the sake of convenience, the parties in these appeals are referred to according to their relationship with their minor son by name, R.M. Nithin, ie., Dr.M.Rajesh / father and V.M.Muthulakshmi / mother.

3. Originally, O.P.No.652 of 2020 has been filed by the father against the mother under Section 25 of the Guardian and Wards Act and under Order XXI Rules 2 and 3 of the Original Side Rules r/w Clause 17 of the Letters Patent, praying to grant permanent custody of the minor son R.M.Nithin, born on 19.01.2012 to him. The marriage between the parties was dissolved by a decree of divorce on the ground of mutual consent *vide* order dated 09.11.2020 in O.P.No.62 of 2020 before the VI Additional Family Court, Chennai. While granting divorce, the custody of their minor son was given to the mother.

4. It was pleaded in the above Original Petition viz., OP. No. 652 of 2020 that the father is self-enriched and imbibed with the values and cultural traits inculcated from his family's glorious background; that he is constrained to refer to his family heritage because the mother, out of sheer misunderstanding, has eclipsed the same wilfully and wantonly and has cast a shadow in the mind of his only son and is totally trying to erase the paternal connection of the minor son from his memories which is completely detrimental to his welfare and best interests. As a result of this



O.S.A.Nos.4, 97 & 188 of 2022

estrangement, the minor child has developed a sense of disrespect or hostility towards him which has extended to his paternal grandparents also. It was further stated that the mother magnified conversations and found fault with every non-issue; that after the birth of their son, her attitude towards the family started changing in a negative manner and that she completely blocked his access to the minor child; that later, he came to know that she developed relationship with the badminton coach of their son, one Joseph Jayapal; and all his efforts to set right the things went in vain. According to the father, the mother is self-centered and has no concern about the welfare and well being of the minor child and this very clearly proves beyond reasonable doubt that the minor child is being deprived of the love and affection of both parents which is very much essential for his proper upbringing and grooming. Further, she has no proper means to take care of the child. With this background, he prayed this Court to grant permanent custody of the minor child, as stated supra.

OSA No. 4 of 2022

5. Pending the above original petition, the father has taken out an application in A.No.3528 of 2021 seeking interim custody of the minor boy R.M.Nithin, stating that the mother, on her own, left the matrimonial home without any sufficient cause or reason; that she has also subsequently remarried; that the future of the boy would be secured in all aspects, particularly his education, if the custody is given to the father till a decision is taken in the original petition.



6. The aforesaid application was resisted by the mother, stating that she has sufficient source of income from her family business and she would shower her undivided affection and attention on her son.

7. On 02.11.2021, when the application was taken up for consideration, the learned Judge, after having interaction with the parties and minor boy, has observed that the boy likes to be only with his mother and not willing to go with his father even on a visitation arrangement. The learned Judge also found that the mother of the boy or someone behind him, has deviously tutored him and defiled the unalloyed mind of the tender minor boy to the vicious extent of the boy adopting a tough posturing during the entire course of the interaction of the Court with him. Taking note of the total facts and circumstances, the learned Judge thought it fit to appoint an Advocate Commissioner to ascertain the natural state of mind of the minor boy and his relationship with his biological father, and accordingly passed the following order:

"16. After brief consultation, the learned counsels for the respective parties have agreed for the following arrangement till the next date of hearing of the above application.

(a) The applicant is permitted to visit his minor son every Saturday at 8.00 a.m. and have his custody till 7.00 p.m. on Sunday. The applicant is at liberty to pick up his son at the residence of the respondent and spend time with him till Sunday 7.00 p.m. He shall ensure that the minor boy is dropped back at 7.00 p.m. on Sunday at the residence of the respondent.

(b) The respondent is directed to extend her utmost co-operation for the smooth facilitation of the visitation right having granted to the applicant and shall not cause any impediment.



(c) She is also directed to ensure anyone on her behalf, shall not cause any hindrance to this arrangement.

(d) Both parties are directed to adhere to the time and days of the visitation and also to ensure that the minor boy is not put to any emotional strain.

17. Shri.N.Balamurali Krishnan, Advocate, residing at Plot No.278, Pillayar Koil Street, Golden George Nagar, Nerkundram, Chennai 600 107, (Cell No.9841946780) is hereby appointed as an Advocate Commissioner to carry out the following assignment:- (i) The Advocate Commissioner is directed to visit and inspect and collect the details from the respondent by conducting a detailed enquiry as to the source of income, marital status and the persons living in her place, the minor boy's natural state of mind and his emotive relationship, bondage with his mother and father as well. (ii) The Advocate Commissioner shall also collect any other allied facts/information that may be useful for consideration of this Court in the pending application and original petition as stated above. (iii) The Advocate Commissioner is also directed to take professional assistance of a reputed psychologist/ counsellor and have the boy examined by the psychologist in order to ascertain the true state of mind of the minor boy and his disposition towards his father and mother as well."

8. Challenging the above interim order passed by the learned Judge, the mother of the boy filed the appeal viz., OSA No.4 of 2022 stating that the learned Judge had a personal interaction with the boy and his parents; and that, right from the beginning assumed that since the mother was engaged or married after divorce, she will not be able to concentrate on the minor child on account of her love life. It is not correct on the part of the learned Judge to order for appointment of Advocate Commissioner to check her personal affairs and also to assess the mindset of the child towards his father and the mindset of the parents, with the help of a Psychiatrist / Counsellor and in such endeavour to take the assistance of the State machinery. When the husband had agreed for divorce and grant of custody of the minor to the wife on the very same facts and circumstances, it cannot be reopened in



O.S.A.Nos.4, 97 & 188 of 2022

a fresh round of litigation for custody. It is also stated that it is settled law that an Advocate Commissioner cannot collect evidence and the order passed by the learned Judge is tantamount to collection of evidence for the husband by the Advocate Commissioner. Stating so, the learned counsel sought to set aside the order passed by the learned Judge in A.No.3528 of 2021 in OP No. 652 of 2020 and allow this appeal.

OSA Nos.97 and 188 of 2022

9. Pending the original petition in OP. No.652 of 2020, the mother and father have taken out the applications in A.Nos.797 of 2022 and 801 of 2022 respectively, seeking permission to file additional documents in the main case, the details of which are tabulated below:

A. No. 797 of 2022

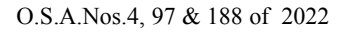
Sl. No.	Dated	Documents
1	08.08.2017	St.Bede's Academy Annual School fee remitter's copy pertains to minor M.Nithin
2	2017-18	Minor Nithin's Achievement record certificate for UKG class issued by St. Bede's Academy
3	12.04.2018	St. Bede's Academy School fee payment slip pertains to minor M.Nithin
4	2018-19	Minor M. Nithin's Achievement record for class I issued by St. Bede's Academy



O.S.A.Nos.4, 97 & 188 of 2022

5	28.03.2019	Cheque issued by respondent in favour of St. Bede's Academy school
6	-	Merit certificates issued by St. Bede's Academy achievement record for class I & II pertains to minor M.Nithin
7	22.06.2020	Vaels International School Fees paid through online by respondent
8	13.10.2020	Vaels International school term fees -2 receipt
9	19.02.2021	Vaels International school term fees -3 receipt
10	30.04.2021	Vaels International school essential fees receipt
11	15.06.2021	Vaels International school term fees 1 receipt
12	23.07.2021	Discharge summary and other medical records pertains to respondent's father (series)
13	11.09.2021	Death certificate issued by Apollo Hospital Enterprises Ltd pertains to respondent's father
14	05.10.2021	Death certificate issued by Greater Chennai Corporation pertains to respondent's father
15	23.10.2021	Vaels International school Uniform fee receipt
16	07.12.2021	Vaels International school terms fees 3 receipt
17	02.01.2022	Badminton coaching fee of Leap Sports Academy
18	02.02.2022	Badminton coaching fee of Leap Sports Academy
19	25.02.2022	Vaels International school essential fee receipt
20	2021-22	Vaels International school Achievement record for class IV
21	-	Extracurricular activity certificates (Nos.8) (series) issued by various institutions to Minor M.Nithin
22	-	Extracurricular activity certificates (Nos.8) (series) issued by St.Bede's Academy school to minor M.Nithin
23	-	Extracurricular activity certificates (Nos.11) (series) issued by Vaels International School to Minor M.Nithin

A. No. 801 of 2022



10. Considering the fact that these applications have been filed, when the matter was pending for recording evidence before the learned Master, the learned Judge by order dated 23.03.2022, allowed both the applications, subject to payment of costs of Rs.1,00,000/- each to the credit of the original petition, on or before 13.04.2022. Aggrieved by the same, the parties have preferred these original side appeals viz., OSA Nos.97 and 188 of 2022, mainly stating that the order passed by the learned Judge is a non-speaking one, which does not disclose any reason for



O.S.A.Nos.4, 97 & 188 of 2022

imposition of costs for allowing the applications and that, the deposit of costs will not serve any purpose.

11. By orders dated 28.10.2022 and 21.04.2022, an order of interim stay has been granted in OSA Nos. 4 of 2022 and 97 of 2022 respectively.

12. On 28.07.2023, when the matters were taken up for consideration, this court passed the following order:

"After hearing both sides, this court is inclined to direct the learned counsel appearing for the appellant and the respondent to be present before this court along with their parties and child on 04.08.2023.

Post the matters on 04.08.2023."

13. Thereafter, the appeals were listed on various occasions, in which, the parties along with their minor son, were present and had discussion / interaction among themselves.

14. Accordingly, on 13.02.2024, when the matters were taken up, the learned counsel appearing for the parties, on instructions, submitted that both the parties are inclined to resolve the dispute relating to custody and visitation rights of the minor son, between them. At present, as agreed by both the parties, their boy stays with his father and he is continuing his studies at Tiruppur.



O.S.A.Nos.4, 97 & 188 of 2022

15. In view of the above, this court is of the opinion that the order of the learned Judge in A. No. 3528 of 2021 in O.P. No. 652 of 2020 appointing the Advocate Commissioner, is liable to be interfered with and is accordingly, set aside, leaving it open to the parties to agitate their respective claims in the main original petition as agreed by both the parties. The submission of both the parties that they are withdrawing the allegations and counter allegations raised before this court against each other, is hereby recorded.

16. Insofar as the challenge made in O.S.A.Nos.97 and 188 of 2022, it is an admitted fact that the applications seeking permission to file additional documents were filed at the stage of commencement of the trial. However, that, by itself, cannot be a reason for imposition of exemplary costs of Rs.1,00,000/- each. It is also to be noted that the learned Judge has not assigned any reason for imposition of costs on the parties, for receiving the additional documents in the original petition. This court is of the view that the documents sought to be filed by the parties will not, in any way protract the trial or is an abuse of process of law so as to impose costs as a deterrent. On the other hand, the documents are sought to be filed only for the purpose of providing a holistic understanding of the financial capacity of the parties, which is one of the factors necessary to be taken into account to decide the issue of custody of the boy considering his welfare / development. In any event, since the



O.S.A.Nos.4, 97 & 188 of 2022

very issue of custody for which the additional documents are sought to be filed, will be resolved by the parties among themselves, the order of the learned Judge in respect of imposing costs for receiving the additional documents in A.Nos.797 and 801 of 2022 in O.P.No.652 of 2020, alone, is uncalled for and is hence, set aside. The additional documents mentioned in the applications filed by the parties shall be taken into consideration by the learned Judge at the time of trial of the original petition.

17. All the original side appeals are disposed of on the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

[R.M.D., J.] [M.S.Q., J.]

05.03.2024

r n s

Index: Yes / No.

Speaking order/ Non-speaking order

Neutral Citation: Yes / No.



WEB COPY



O.S.A.Nos.4, 97 & 188 of 2022

R. MAHADEVAN, J
and
MOHAMMED SHAFFIQ, J

rns

Original Side Appeal Nos.4, 97 & 188 of 2022

05.03.2024