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OSA.No.363 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27-11-2025

CORAM

**THE HONOURABLE MR JUSTICE S. M. SUBRAMANIAM
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

**OSA No. 363 of 2025
AND
CMP Nos. 29747 & 29748 OF 2025**

1. R.Rajkumar
S/o.Mr.E.Ravishankar,
No.1/53, O, 2nd Street,
Sripuram Colony, St.Thomas
Mount, Chennai - 600 016.

Appellant(s)

Vs

1. Swapna Raj
W/o.R.Rajkumar, 11h, D Block,
78, Parthasarathy Koil Street,
Arulayiammanpet,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai - 600 032.

Respondent(s)

PRAYER Original Side Appeal is filed under Order XXXVI Rule 9 of the Original Side Rules r/w Clause 15 of Letters Patent, praying to set aside the impugned order dated 26.08.2025 passed in A.No.3606 of 2025 in OP No.707 of 2024 on the file of this Hon'ble Court.



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For Appellant(s): Mr.S.Rajasekar

For Respondent(s):Mr.M.Mohanraj

J U D G E M E N T

(Judgment of the Court was delivered by S.M.Subramaniam J.)

The present Original Side Appeal has been instituted to assail the order dated 26.08.2025 passed by the learned Single Judge in A.No.3606 of 2025 in OP.No.707 of 2024. The marriage between the appellant and the respondent was solemnized on 20.08.2010 as per the Hindu rites and customs.

2. Twin children born out of wedlock between the appellant and the respondent, and they are Master Pranaav Kumar and Master Abinav Kumar, aged about 11 years.

3. Due to misunderstanding, the appellant and respondent are living separately, and an attempt to resume the matrimonial home failed. The petition seeking dissolution of marriage in HMOP.No.1584 of 2024 filed by the appellant is pending on the file of the II Additional Family Court at Chennai. During pendency of the above petition,



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GWOP.No.707 of 2024 has been filed on the Original Side of the High Court of Madras by the respondent seeking a direction to hand over the minor children to the respondent.

4. Even before that, the appellant also filed GWOP.No.203 of 2024 seeking custody of the minor children. Both the petitions though heard together, the learned Single Judge disposed of A.No.3605 of 2025 filed in OP.No.707 of 2024.

5. The learned Single Judge in the order impugned dated 26.08.2025 recorded that the Court examined the minor children on 12.08.2025 in pursuance to the orders dated 11.08.2025. Both the minor children were produced, and the Court had an interaction with the minor children aged about 11 years. Before the Court, the children had made a statement in clear terms that they have been mentally and physically ill-treated and assaulted not only by the appellant/father but also by his parents and other relatives. After interaction, the Court directed the matter to be listed on 18.08.2025, and the learned Single Judge directed the children to be produced before the Counsellor



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attached to the Family Court, Chennai on 20.08.2025, and requested the Counsellor to ascertain the children and file a report. In compliance with the orders of the learned Single Judge, the Counsellor attached to the Family Court, Chennai, had an interaction with the minor children and submitted a report, which has been extracted in the impugned order, and for better appreciation, this Court also records the same:

“Observations and Findings:

(a). Interaction and Comfort level:

The Children Pranav and Abinav both are interested to talk with their Mother. When they saw their Mother both went and sit with her lap. The Children communicated with their Mother so well.

(b). Emotional Response:

The Children appeared to be more comfortable with their Mother and they like to see their Mother always without any hesitation. The Children told that they are not comfortable with their father and their Grandparents.

(c). Father's involvement:

There is no any interference from the Father, he only observed their conversation and their activities.

(d). Child's Psychological condition:

Based on the interaction and Psychological evaluation:

When the counselling started to the Children first few minutes, the children not open their mouth, then I (counsellor) created rapport with the Children after that only they have slowly started to speak.

The Children are very scared about their Father and Grandparents, because they did Physical and Mental



harassment to the Children, due to this harassment the Childrens are affected Psychologically and Emotionally.

During the counselling session, the Children cried and said can't able to live with their Father. His Grandparents also (Father Parents) supported the behavior and activity of their Father.

The Children said their Father didn't spend time with the Children and always busy with his work.

Finally, the Children said that their Father would take Photographs portraying them as living a happy life. Merely for the sake of evidences However the children have revealed that, they were suffering Physical and Emotional abuse.

The Children said to me (counsellor) not to tell their Father about their statement.

End of session Abinav was crying and can't control his emotion showing with his Mother and said he cannot go with his Father home and Pranav also said same statement.

(e). Conclusion and Recommendation:

The interaction between the Respondent/Mother and the children, there is lots of bonding on their behavior.

Based on the assessment, I recommended the Children are interested to see their Mother and wants to live with their Mother.

It is recommended to continue visitation in provide additional support and stability to the childrens.

So, Consider Additional Visitation in support the children's emotional well being."

6. Considering the report submitted by the Counsellor indicating that the children have been clear in their statements made about their father and his relatives and the learned Single Judge found that the minor children are not happily living with the appellant/father.



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7. The learned Single Judge found that the better physical and emotional well-being of the children is to be protected and accordingly granted weekly custody to the respondent/mother from Monday to Friday and custody was granted to the appellant on Saturdays and Sundays.

8. Not satisfied with the said arrangements, the appellant/father preferred the present appeal.

9. The learned counsel Mr.S.Rajasekar appearing on behalf of the appellant would contend that the children were living happily in the house of their father along with the paternal grandparents and the appellant is paying school fees and other expenditure for the well-being of the children. He would raise several allegations against the respondent, which in the opinion of this Court is unnecessary to adjudicate in the present Appeal, since the petition seeking dissolution of marriage is subjudiced.



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10. *Per contra*, the learned counsel Mr.M.Mohanraj appearing on

behalf of the respondent would oppose by stating that the children are being abused by the father and his parents. He showed several photographs, wherein the children suffered injuries from the hands of the father and the paternal grandmother. He would submit that the children underwent trauma in the house of the appellant/father and not willing to live with father anymore.

11. In view of the above submissions, this Court thought fit to examine the children once again to find out the wishes and choice of the minor children aged about 11 years, to consider best interest of the children.

12. Minor children at no circumstances be treated as commodities either by the parents or by Courts or by anyone else. Their emotions, well-being, mental health, human touch and future interest ought to be taken care of by the Courts, when such disputes arise between the father and mother. Best interest of the children, which is globally recognized is to be ascertained by the Courts and accordingly, custody



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is to be granted. Grant of custody is not a mere arrangement or a transaction. It involves emotions, well-being and the future of the children, who are all back bone of our great Nation. Thus, the Courts are not expected to act by merely making some arrangements so as to find out a solution. Top most priority is to be granted to the choice, wishes and emotions expressed by the minor children. Question would arise whether the minor children is capable of expressing their choice and wishes. It depends on age and the way in which they communicate their ideas and wishes. In the present case, both the minor children are twins, aged about 11 years and studying in a school in Chennai city. They born and brought up in city and capable of understanding the circumstances and the prevailing matrimonial dispute exists between their father and mother.

13. It is well settled that the principal consideration of the Court while deciding an application for Guardianship under the Act in exercise of its *parens patriae* jurisdiction would be the Court and welfare of the minor children. If the minor is old enough, capable of understanding the Court proceedings and the circumstances and able to form an intelligent



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preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

14. In the opinion of this Court, in such cases, it is not the “negative test” that the father is not “unfit” or “disqualify” to have the custody of his son/daughter that is relevant, but the “positive test” that such custody would be in the welfare of the minor, which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of a minor in favour of the father, mother or any other guardian.

15. In the context of the above proposition, we have allowed the minor children Master Pranaav Kumar and Master Abinav Kumar to speak about their wishes in the open Court by having close interaction with them. Both the minor children are bold enough to express their views in clear terms and capable of understanding the Court atmosphere and the on-going proceedings inside the Court hall. Unhesitatingly, the children spoken about various incidents which in the



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opinion of this Court is disturbing. There is lot of clarity of thought in the mind of the children and they have narrated several incidents recorded in their mind relating to physical and emotional abuses caused by the appellant/father and his family members. When this Court asked a straight question whether they are willing to stay with the appellant/father, both the children spontaneously and unhesitatingly reiterated that they are not at all willing to live with their father and they would prefer to live with their mother. When there is a clarity of thought of the minor children, which is expressed in clear terms in the open Court, this Court has to consider the choice and wishes of the minor children, aged about 11 years by adopting 'best interest theory', which is recognized by the Courts across the Country. Best interest of the children being a paramount consideration and in the present case, the minor children were physically and emotionally abused by the appellant/father, the trial Court also recorded the said findings, the Court ought to have granted full custody to the respondent/mother, where the children are living comfortably, happily and in a peaceful manner. Both the children since expressed their choice to live with their



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mother and not willing to live with their father nor interested in meeting their father, there is no point in granting custody to the appellant/father for two days on Saturdays and Sundays, that itself will create a mental stress on the children at this age. Thus, this Court is of the considered view that the order passed by the Trial Court requires modification.

16. Modification in the order impugned is required in view of the expressions made by the minor children before this Court. Any forcible custody will affect the mental health of the children.

17. The learned Single Judge having recorded the report of the Counsellor attached to the Family Court and having itself examined the wishes and choice of the minor children ought not to have granted custody to the appellant, which is only going to cause mental agony and emotional stress to the minor children and may not be in their welfare.

18. In view of the facts and circumstances and the discussions made in the aforementioned paragraphs, this Court has no hesitation in holding that the respondent/father is not entitled for the custody of the



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minor children. Granting custody of two days on every Saturdays and Sundays by the trial Court in the impugned order dated 26.08.2025 passed in Application No.3606/2025 in O.P.No.707/2024 is set aside. The appellant/father is at liberty to file a petition seeking visitation rights and the Court, while granting visitation rights, shall not grant custody or allow the minor children to stay with the respondent/ father during night hours. The appellant/father is directed to meet out the entire educational expenditures of the minor children and the other expenses to protect the education and livelihood of the children. In the event of any default in payment of School fees or to meet out the expenditures by the appellant/father, the respondent/ mother is at liberty to approach the Court for appropriate relief. The respondent/mother shall continue to have custody of the minor children.

19. With the above directions, O.S.A.No.363 of 2025 stands disposed of. No costs. Consequently, connected CMPs are closed.

(S.M.SUBRAMANIAM J.)(MOHAMMED SHAFFIQ J.)
27-11-2025

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Index:Yes/No

Speaking/Non-speaking order

Neutral Citation:Yes/No



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AND
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AND
CMP NOS.29747 &
29748 OF 2025**

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