

[2020] 10 S.C.R. 363

MRS RITIKA SHARAN

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v.

MR SUJOY GHOSH

(Civil Appeal No. 3544-45 of 2020)

OCTOBER 28, 2020

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**[DR. DHANANJAYA Y CHANDRACHUD,
INDU MALHOTRA AND IINDIRA BANERJEE, JJ.]**

Matrimonial Dispute – Custody of minor child – Appellant-wife and respondent-husband living apart since 2016 – Divorce proceedings pending before Family Court, Bengaluru – Appellant posted in Singapore in September 2017 – Child staying in Bengaluru with maternal grandparents – Appellant restrained from taking the child out of Bengaluru – Family Court vide order dated 01 March 2018 granted visitation rights to the respondent – Appellant's writ petition challenging the order restraining her from taking the child out of Bengaluru, dismissed – On appeal, held: While the child is attached to the respondent, he has indicated his desire to reside with his mother in Singapore – His welfare is of paramount concern – Technicality of whether or not the appellant challenged the Family Court's order dated 1 March 2018 cannot obfuscate the same – The fact that the parents of the appellant have moved to Bengaluru to help her, does not transfer the custody of the child from the appellant to the maternal grand-parents – Respondent's insistence that the court should direct for continued presence of the child under the care of maternal grandparents, not fair – Nor is there sufficient material to indicate that the respondent is in a position to look after the child on his own – Impugned judgment set aside – Appellant permitted to take the child with her to Singapore – Respondent to handover passport of the child to appellant – Directions issued to facilitate the grant of access and visitation rights to the respondent – Constitution of India – Art.142 – Hindu Marriage Act, 1955 – s.13(1)(i-a) – Domestic Violence Act, 2005 – Guardianship.

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Disposing of the appeals, the Court

Held: 1.1 Ever since the appellant and the respondent started living apart in 2016, the child has been in the care and custody of the appellant, his mother. The fact that the parents of

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- A the appellant have moved to Bengaluru to help their daughter, does not transfer the custody of the child, either as a matter of law or fact, from the appellant to the maternal grand-parents. The primary consideration that must weigh with the Court is the welfare of the child. For the respondent to insist that the court should direct the continued presence of the child under the care of the maternal grand-parents who have come to Bengaluru and stay in a rented accommodation obtained by the appellant, does not appear to be fair. Nor is there sufficient material before the Court to indicate that the respondent is in a position to look after the child on his own, by disturbing a position which has held the field since 2016. During the course of the interaction on the video-conferencing platform, the child indicated his desire to reside with his mother in Singapore. While he is attached to the respondent, he has indicated, in no uncertain terms, his desire to live with his mother. The appellant is gainfully employed in Singapore and her desire that she should be allowed to take the child with her is not an artifice. The appellant, as the mother of the child, has been continuously with the child since his birth, despite the demands of her employment. [Paras 13, 14 and 16][370-F-G; 371-A-D; G, H; 372-A]
- E 1.2 In matters such as the present, the welfare of the minor child is of paramount concern. The jurisdiction of this Court under Article 142 of the Constitution is a facilitative constitutional instrument to advance substantive justice. In exercise of these powers, the arrangement arrived at during the pendency of the proceedings should be modified so as to best subserve the interests of the child. The technicality of whether or not the appellant has challenged the Family Court's order dated 1 March 2018 cannot obfuscate the core issue which is the welfare of the child. Allowing this case to be lost in a maze of technicalities involving a formal challenge to the order, will eventually lead to the child staying in Bengaluru with the maternal grandparents, while the mother is employed in Singapore. The child will lose a year of education in Singapore, which is an additional reason for the exercise of the jurisdiction under Article 142. The interests of the child are best subserved by ensuring that both the parents have a presence in his upbringing. [Para 18][372-D-G]
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1.3 The impugned judgment and order of the High Court is set aside. The appellant is permitted to take the child with her to Singapore where she is employed and resides. Further directions issued. Directions also issued in order to facilitate the grant of access and visitation rights to the respondent, which arrangement shall hold the field in supersession of all previous orders of the Family Court and the High Court. The arrangement shall continue to govern, subject to the final orders as may be passed in the Guardianship proceedings which have been, or may be instituted, by either of the parties. [Paras 20, 21][373-C, G; 374-F]

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3544-3545 of 2020.

From the Judgment and Order dated 11.07.2019 of the High Court of Karnataka at Bengaluru in Writ Petition Nos. 9528 of 2018 and 11520 of 2018 (GM – FC)

Ms. Meenakshi Arora, Sr. Adv., Shoeb Alam, D.S. Parmar, Ms. Abha R. Sharma, Harshad V. Hameed, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J

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1. These appeals arise from a judgment dated 11 July 2019 of a Single Judge of the High Court of Karnataka.

2. The appellant and the respondent got married on 4 February 2009. Their child, Sattik, was born on 9 May 2013. There are serious differences between the spouses and they have been living apart since 2016. The appellant submits that she has been compelled to leave the matrimonial home due to domestic violence and abuse. The appellant instituted a petition on 6 October 2016, under Section 13(1)(i-a) of the Hindu Marriage Act 1955 seeking a decree for divorce on the ground of cruelty. The divorce proceedings are pending before the Family Court, Bengaluru (MC No. 4484 of 2016). The appellant also instituted an application under Section 12 of the Protection of Women from Domestic Violence Act 2005, which is pending in the Court of the Metropolitan Magistrate at Bengaluru (Crl. Misc. No. 228 of 2016). The appellant is in the employment of Nike Global Trading since 2011 and has been posted in Singapore in September 2017.

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- A 3. The appellant filed IA No. 3 in July 2017 in the proceedings before the Family Court in MC No. 4484 of 2016, seeking a direction to the respondent to handover the passport of the child. The appellant claims that she sought the child's passport on the ground that prior to her relocation in September 2017, she was required to travel for short durations outside India (where she was then based) and found it convenient to take the child with her. The respondent opposed the grant of relief and filed an interim application, IA No. 4,¹ seeking an injunction against the appellant from taking the child out of Bengaluru. On the same day, the respondent had also filed IA No. 5² and sought interim custody and visitation rights so as to enable him to meet the child. The appellant opposed IA No. 4 and IA No. 5 filed by the respondent, alleging that the respondent was abusive, violent and suffers from a psychiatric disorder as a result of which, he cannot be granted the custody of the child.
- B 4. By an order dated 4 January 2018, the Family Court dismissed IA No. 3 filed by the appellant for the child's passport, and allowed IA No. 4 of the respondent, restraining the appellant from taking the child out of Bengaluru. The Family Court granted this relief on the basis that if the child is moved out of Bengaluru, it would lose jurisdiction over the child. The appellant instituted two writ proceedings – Writ Petition No. 9528 of 2018 (GM-FC) and Writ Petition No. 11520 of 2018 before the High Court to challenge the order dated 4 January 2018 of the Family Court in IA Nos. 3 and 4.
- C 5. On 1 March 2018, the Family Court passed an order in IA No. 5 filed by the respondent seeking interim custody and visitation rights and directed the appellant or her parents (who had moved from NOIDA to Bengaluru to help the appellant with the child) to produce the child before the Mediation Centre on every third Saturday, at 11:00 am to allow for visitation by the respondent till 5:00 pm.
- D 6. On 9 July 2018, a Single Judge of the High Court in the appellant's Writ Petition No. 9528 of 2018 (GM-FC) and Writ Petition No. 11520 of 2018, in an interim order, noted that the minor child was in the custody of the maternal grand-parents (who are permanent residents of AWHO Colony, Greater Noida- 201310). The High Court noted that while the appellant resides in Singapore, the respondent was temporarily

¹ IA No. 4 of 2017 in MA 4484/2016

² IA No. 5 of 2017 in MA 4484/2016

residing in Ireland. The order of the Family Court dated 1 March 2018, restraining the appellant from removing the child from Bengaluru was stayed by the High Court, subject to the child being produced on every Saturday before the Bengaluru Mediation Centre in terms of the order of the Family Court.

7. While these writ petitions were pending, in November 2018, the appellant filed an application (IA No. 11) in the proceedings in MC No. 4484 of 2016 before the Family Court under Section 26 of the Hindu Marriage Act 1955 to allow the child to travel to Singapore during his Christmas vacations, commencing on 14 December 2018 and ending on 2 January 2019. The appellant also filed IA No. 12³ to direct the respondent to submit the passport of the child to the Family Court. By an order dated 20 November 2018, the appellant was permitted to take the child to Singapore for the Christmas vacation and the respondent was directed to submit the passport of the child before the Family Court, to be kept in the safe custody of the Family Court. The respondent assailed this order before the High Court in Writ Petition No. 53079 and 53687 of 2018 (GM-FC). By the time the proceedings came up before the High Court on 18 February 2019, the relief which had been granted by the Family Court allowing the appellant to take the child to Singapore over Christmas was rendered infructuous since the appellant was not able to take the child due to the pending proceedings. With respect to the direction for the submission of the passport of the child, the High Court noted that the Family Court had not considered the objections of the respondent to this direction and the appropriate remedy for the respondent would be to file for a review of the Family Court's order dated 20 November 2018.

8. Eventually, on 11 July 2019, the Single Judge of the High Court dismissed the writ petitions instituted by the appellant,⁴ challenging the validity of the order of the Family Court dated 4 January 2018 restraining her from taking the child out of Bengaluru.

9. Assailing the judgment of the High Court, Ms Meenakshi Arora, learned Senior Counsel submits that:

- (i) There is a manifest error on the part of the Family Court in presuming that once the minor child accompanies his mother to Singapore it would lose jurisdiction;

³ IA 12 in MC 4484/2016

⁴ Writ Petition No. 9528/2018 and 11520/2018 (GM-FC)

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- A (ii) The issue before the Family Court did not pertain to the permanent custody of the child;
 - (iii) The child has been in the custody of the appellant since his birth;
 - B (iv) The appellant sought permission to take the child with her to Singapore, where she has now been relocated by her employer. The appellant does not seek to do so on a permanent basis since the move is only for the period during which she is posted in Singapore;
 - C (v) The paramount objective must be to ensure the welfare of the child. The child has been in the care of the appellant since his birth and the parents of the appellant shifted from NOIDA to Bengaluru to help her. The appellant was even ready and willing to bring the child on every third Saturday, for grant of visitation to the respondent as directed by the Family Court, should this be so ordered and directed by this Court; and
 - D (vi) The appellant and her son hold Indian passports and the appellant is willing to furnish such an undertaking, as this Court may direct, to ensure that the child is not placed outside the control and jurisdiction of the Family Court, Bengaluru.
 - E Ms Arora has urged that the appellant was constrained to move out of the jointly owned residential apartment due to the violent and abusive conduct of the respondent and the reason for her to seek the permission of this Court to take the child to Singapore is to enable her to look after the child.
 - F It has been submitted that the employer of the appellant is providing assistance towards the expenditure for the education of the child, who would be admitted to the Global Indian International School at Singapore.
10. Opposing the above submissions, Mr Harshad V Hameed,
G learned counsel appearing on behalf of the respondent submitted that:
- (i) The appellant has made an attempt to ‘shift the goal-posts’ from time to time. The pleading before the High Court was that the child has been in the custody of the maternal grandparents while a contradictory plea was now being taken up
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before this Court that he has been in the care and custody of A
the appellant;

- (ii) The only application that was filed by the appellant in the Family court - IA No. 3 – dated 21 July 2017 was for the return of the passport of the child; the basis of which was *occasional* travel overseas; B
- (iii) The appellant has not instituted a substantive proceeding claiming guardianship of the child. On the other hand, the respondent has filed for guardianship of the child before the Family Court, Bengaluru;
- (iv) Pursuant to the order dated 1 March 2018 of the Family Court, the child has been living in Bengaluru with the child's maternal grand-parents. The appellant has not assailed the validity of this order; and C
- (v) If the appellant were to take the child to Singapore, it would not be possible to ensure that she will not relocate elsewhere and take the child with her, effectively placing the child outside the jurisdiction of the Indian courts. D

11. During the course of these proceedings, parties had on the suggestion of the Court, agreed to explore the possibility of resolving their disputes through mediation. Mediation proceedings were conducted by Ms Laila T Ollapally under the auspices of the Bengaluru Mediation Centre. The mediator held extensive sittings stretching over twenty seven hours. The mediation has not resulted in a settlement. This Court must, however, acknowledge the efforts which have been made by Ms Laila T Ollapally, and records its appreciation. Though the parties have not been able to resolve their disputes, we can only hope that with the facilitative assistance of the Mediator, each of them has appreciated better the perspective of the other. Since the hearings during the COVID-19 pandemic have been conducted before this Court through video-conferencing, the Court has had the opportunity to interact with the appellant and the respondent as well as their child, Sattik, who is now about 7 years old. E F G

12. The narration of facts and the record before this Court indicate that after lodging a petition for divorce before the Family Court, the appellant sought the passport of the child. It was thereafter, that the respondent filed an application for restraining the appellant from taking H

- A the child out of Bengaluru. IA No. 4 of the respondent was allowed, and IA No. 3 for the return of the passport to the appellant-mother was rejected. Close on the heels of the above order, which was passed on 4 January 2018, the Family Court by its order dated 1 March 2018 noted that the child was presently residing with the parents of the appellant and directed the appellant “or her parents” to produce the child before the Mediation Centre for access on every third Saturday at 11:00 am, and the respondent was directed to return the child to the appellant “or her parents” by 5:00 pm.

- 13. On 21 July 2017, through IA No.3, the appellant had stated on affidavit before the Family Court that the custody of the child, who was then about 4 years of age, was with her and since she was required to travel out of India occasionally for work, the passport may be handed over to her. She, in fact, stated that neither had the respondent any intention to seek the custody of the child nor had he visited the child after the spouses parted ways. The fact that the child is in the care and custody of the appellant was not denied by the respondent in his reply dated 29 July 2017. In July 2017, when the appellant sought the return of the passport, she was based in India. The Court has been apprised of the fact that it was in September 2017 that the appellant had relocated to Singapore. Ms Meenakshi Arora, learned Senior Counsel, stated before the Court that the appellant was given an option by her employer to relocate to Singapore as a part of a restructuring exercise. Whatever be the reason underlying her relocation to Singapore, it is evident from the material on record that the purpose of the appellant in doing so was not to place the child outside the jurisdiction of Indian courts. Ever since the appellant and the respondent started living apart in 2016, the child has been in the care and custody of the appellant, his mother. The fact that the parents of the appellant have moved to Bengaluru to help their daughter, does not transfer the custody of the child, either as a matter of law or fact, from the appellant to the maternal grand-parents. The record indicates that it was after the appellant sought the return of the passport on 21 July 2017,⁵ that the respondent moved an application restraining the appellant from removing the child outside Bengaluru⁶ and for the grant of custody and visitation rights on 29 July 2017⁷.

⁵IA No 3 of 2017

⁶IA No 4 of 2017

H ⁷IA No 5 of 2017

14. The primary consideration that must weigh with the Court is the welfare of the child. The respondent has asserted in the course of the submissions, that the child is in the custody of the parents of the appellant in Bengaluru and should remain with them. Alternatively, he submitted that he would take charge of the child. While the parents of the appellant may have volunteered at least temporarily to relocate from NOIDA to Bengaluru to help the appellant in looking after the child, we are clearly of the view that the respondent cannot be heard to assert that the child must continue to remain in Bengaluru with the maternal grand-parents. For the respondent to insist that the court should direct the continued presence of the child under the care of the maternal grandparents who have come to Bengaluru and stay in a rented accommodation obtained by the appellant, does not appear to be fair. Nor is there sufficient material before the Court to indicate that the respondent is in a position to look after the child on his own, by disturbing a position which has held the field since 2016. Before 2016, when the spouses were together, the child lived and grew up in the care of both the parents. Since 2016, the appellant has taken the responsibility for the welfare of the child.

15. The child, Sattik, was born on 9 May 2013, following which the appellant and the respondent resided together with the child until they parted ways in 2016. Since then, in any event, the appellant has been looking after the care and welfare of the child. That she has done so with the assistance of her parents who have moved to Bengaluru, does not detract from her role and responsibility as a mother. In fact, the order of the Family Court dated 1 March 2018, which has been adverted to earlier, indicates that on the days when the respondent is to obtain visitation, it is the appellant or her parents who were to produce the child before the Bengaluru Mediation Centre and it is the appellant or her parents to whom the child would be returned after the conclusion of visitation. The fact that the child has been in the care of the appellant and her parents is also evident from the order of the High Court dated 9 July 2018.

16. During the course of the interaction on the video-conferencing platform, Sattik indicated his desire to reside with his mother in Singapore. While the child is attached to the respondent, he has indicated, in no uncertain terms, his desire to live with his mother. The appellant is gainfully employed in Singapore and her desire that she should be allowed to take the child with her is not an artifice. The appellant, as the mother

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- A of the child, has been continuously with the child since his birth, despite the demands of her employment.
 - 17. The child is likely to be admitted to the Global Indian International School in Singapore. Ms Meenakshi Arora, learned Senior Counsel, has stated that the appellant would abide by the requirements
 - B entailed in travelling between India and Singapore during the pandemic. Learned Senior Counsel stated that on arrival in Singapore, at the present time, the appellant and the child would be required to spend 14 days together in an isolation facility. The Court has been apprised of the fact that the employers of the appellant have informed her that they would
 - C facilitate the documentation for travel and relocation of the child with the appellant in Singapore.
18. In matters such as the present, the welfare of the minor child is of paramount concern. The jurisdiction of this Court under Article 142 of the Constitution is a facilitative constitutional instrument to advance substantive justice. In exercise of these powers, we are of the view that
- D the arrangement which has been arrived at during the pendency of the proceedings should be modified so as to best subserve the interests of the child. The technicality of whether or not the appellant has challenged the Family Court's order dated 1 March 2018 cannot obfuscate the core issue which is the welfare of the child. Allowing this case to be lost in a
 - E maze of technicalities involving a formal challenge to the order, will eventually lead to the child staying in Bengaluru with the maternal grandparents, while the mother is employed in Singapore. The child will lose a year of education in Singapore, which is an additional reason for the exercise of the jurisdiction under Article 142. We have informed that Singapore is Covid free and the child would be able to attend regular
 - F school and some on-line classes. Undoubtedly, the respondent, as the father, is entitled to have adequate rights of access and visitation. A balance has to be drawn so as to ensure that in a situation where the parents are in a conflict, the child has a sense of security. The interests of the child are best subserved by ensuring that both the parents have a
 - G presence in his upbringing.
19. Ms Meenakshi Arora has submitted that the respondent has made no contribution for the maintenance of the child. On the other hand, the respondent in the course of his submissions, stated that he is bearing the expenses of servicing the loan which was undertaken by the
- H parties for obtaining a residential flat in joint names. Be that as it may,

we are of the view that the interests of the child require that the appellant be allowed to take the child with her to Singapore, where the appellant resides. At the same time, the ultimate directions that the Court issues must also address the apprehension of the respondent that the child should not be placed outside the control and jurisdiction of the Family Court, Bengaluru. Adequate arrangements for access and visitation to the respondent should be ensured.

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20. For the above reasons, we allow the appeals, in terms of the following directions:

(i) The impugned judgment and order of the High Court dated 11 July 2019 is set aside;

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(ii) The appellant is permitted to take the child, Sattik, with her to Singapore where she is employed and resides;

(iii) The appellant is permitted to make suitable arrangements to facilitate the travel to and admission of the child in a school in Singapore;

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(iv) The respondent shall, within a period of 48 hours from the receipt of this judgment, handover the passport of the child to the appellant;

(v) The appellant shall be exclusively entitled to take necessary steps for renewing the passport of the child or, if required, for obtaining a fresh passport in his name;

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(vi) Should the appellant be required to relocate for employment outside Singapore, to any other country (except India) necessitating the relocation of Sattik, she shall file a miscellaneous application before this Court seeking prior permission to do so;

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(vii) In order to facilitate the grant of access and visitation rights to the respondent, the following arrangement shall hold the field in supersession of all previous orders of the Family Court and the High Court:

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(a) The respondent would be at liberty to engage with the child on a suitable video-conferencing platform for one hour each on every Saturday and Sunday and for five to ten minutes on other days;

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- A (b) Should the respondent desire to travel to Singapore during the school vacations of Sattik, he would be entitled to have visitation rights over half of the vacation between 10 am and 6 pm. He may meet the child on any other day subject to the mutual convenience of the parties and the child;
- B (c) The appellant will ensure the presence of the child in Bengaluru during the course of the child's summer vacations in 2021 for a period of at least two weeks with prior intimation to the respondent and during the course of the visit, the respondent shall be entitled to meet the child and/or take him out between 11:00 am and 7:00 pm;
- C (d) The appellant shall bring the child to India at least twice a year during which the respondent shall have access to and visitation with the child on the terms set out in (c) above;
- D (e) The appellant shall file an undertaking before this Court to abide by the conditions imposed by this order. The undertaking shall specifically provide that the appellant shall (i) not relocate the child to any other country, unless permitted by this Court; (ii) ensure the presence of the child during the summer vacations of 2021 unless prevented by the travel restrictions imposed by the government of either country; and (iii) furnish the contact details of the child in Singapore to the respondent. Clarified that (e)(i) above shall not prevent the appellant from taking the child out for holidays outside Singapore. A copy of the undertaking shall be placed on the record of the Family Court.
- F 21. The above arrangement shall continue to govern, subject to the final orders as may be passed in the Guardianship proceedings which have been, or may be instituted, by either of the parties.
22. The appeals are accordingly disposed of.
23. Pending application(s), if any, shall stand disposed of.