

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7413 OF 2015

Joseph Mendonca

.. Petitioner

vs.

Mrs. Annie Menezes & ors.

.. Respondents

Mr. Ranvir Shekhavat a/w. Mr. Jagdish Choudhary i/b M/s Raj Legal
for the Petitioner.

Mr. Vijay S. Thakur Singh for Respondent Nos.4 and 5.

CORAM : M. S. SONAK, J.

DATE : 17 DECEMBER 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned
counsel for the parties, Rule is made returnable forthwith.

2] The challenge in this petition is to the order dated 29 June
2015, by which the Petitioner's application at Exhibit-48 seeking
custody of minor child Elizabeth has been rejected by the Family
Court at Bandra.

3] The Petitioner, is the father of Elizabeth and therefore, her
natural guardian, particularly considering that the Petitioner's wife
and Elizabeth's mother expired some time in the year 2013. The
Petitioner, is presently working in Gulf. The Petitioner has three sons
and one daughter. One of the son Elroy stays at Vikhroli alongwith

the Petitioner's mother and sister in an apartment, which is in the same building complex where the Petitioner owns an apartment. Presently, the custody of Elizabeth is with Respondent No.4, who is the Petitioner's late wife's brother and therefore, maternal uncle of both Elizabeth and Elroy. The Petitioner's two sons are staying with their other maternal uncles.

4] By the impugned order, the Family Court has dismissed the Petitioner's application for custody of Elizabeth. The dismissal is upon the basis that the Petitioner does not ordinarily reside in Mumbai and the custody, is really beneficial to the Petitioner's mother and sister and not to himself. The second reason recorded by the Family Court is that Elizabeth, in the course of her interview has stated, that she wants to stay with her maternal uncle, who pamper her a lot.

5] The learned counsel for the Petitioner has submitted that the Respondent No.4 had instituted Guardianship Petition (L) No. 79 of 2013 before this Court. The same was disposed of by this Court by the judgment and order dated 20 August 2014. Therein, this Court has expressed the categorical opinion that Respondent No.4 will not

be a fit and proper person to be appointed as a guardian of the children, in place of their natural and legal guardian, i.e., the Petitioner herein. The learned counsel for the Petitioner points out that this aspect has not been considered by the Family Court in making the impugned order. That apart, the learned counsel for the Petitioner submits that the impugned order ignores the vital circumstance that Elroy is already living with the Petitioner's mother and sister and that it would be in the interest of Elizabeth that her custody is restored to the Petitioner, so that Elizabeth can live with Elroy. The learned counsel for the Petitioner further submitted that no undue emphasis ought to have been led upon statement of Elizabeth, particularly, considering the Elizabeth has been in the custody of Respondent No.4 for some period. That apart, learned counsel for the Petitioner submits that mere circumstance that Respondent No.4 pampers Elizabeth, is certainly not a ground to permit Respondent No.4 to retain custody. Pampering any child, is not at all interest of the child itself.

6] On the other hand, Mr. Vijay Thakur Singh, learned counsel for Respondent Nos.4 and 5, submitted that the plea for restoration of custody was made by the Petitioner by Notice of Motion No. 497

of 2015 in Guardianship Petition No. 15 of 2014. However, this Court by order dated 23 April 2015, directed the Family Court to consider such plea and the Family Court, upon taking into consideration all the relevant facts and circumstances has rightly denied the custody to the Petitioner. Mr. Vijay Thakur Singh submitted that the wishes of Elizabeth are paramount and since the Elizabeth has indicated that she would like to stay with her maternal uncle, there is no question of restoration of the custody to the Petitioner, particularly, since he ordinarily resides in the Gulf.

7] Mr. Thakur also submitted that Elizabeth is enrolled in a School at Mulund, which is the place where Respondent No.4 resides. Elizabeth has the company of other Respondent No.4's two children. At this interim stage, any disturbance to the school schedule will not be in the interest of the child. He submits that even the Petitioner, in the alternative, has applied for directions for expeditious disposal of Petition No. D-31 of 2013 before the Family Court. He submitted that the interest of justice would be met if such directions for expeditious disposal are issued, rather than make any ruling at the interim stage, which might have effect of disturbing Elizabeth's school schedule.

8] Having heard the learned counsel for the parties and perused the record, in my judgment, the impugned order dated 29 June 2015 is unsustainable and is required to be set aside. However, there is also merit in the submission of Mr. Thakur that interests of justice, will be best served if the Family Court is directed to expeditiously dispose of the main proceedings on merits, than disturb custody at interim stage.

9] If the impugned order is perused, it is clear that the Family Court has given no credence whatsoever to the judgment and order of this Court made on 20 August 2014 in Guardianship Petition No. 15 of 2014. This Court had noted that Respondent No.4 is not a fit person to be appointed as a guardian of the children, which include Elizabeth, in place of their natural and legal guardian, i.e., the Petitioner. Further, this Court had noted that it would not be in the interest of children that they are segregated. This means that as far as as possible efforts should be made to see that all the children stay together. If this is not possible, at least some of the siblings stay with each other. This was a vital circumstance, which the Family Court was duty bound to take into consideration, but which the Family Court has failed to take into consideration.

10] The impugned order, no doubt notes that the Petitioner ordinarily resides abroad. However, the Petitioner's son Elroy stays with his sister and mother in the same building complex, where the Petitioner has apartment. The Petitioner states that, from time to time, has been making arrangements for the financial upkeep of the children, including Elizabeth. This position is however disputed by Respondents. The Respondent No.4 also, has two sons and is required to look after their upkeep. In these circumstances, the custody could not have been rejected on the sole ground that the Petitioner ordinarily does not reside in Mumbai.

11] Insofar as, the interview with child is concerned, no doubt, the same is an important parameter. However, it is not uncommon that children are tutored, particularly by the person, in whose custody they are at the time of interview. At the request of learned counsel for Respondent Nos.4 and 5, even I had an occasion to interview Elizabeth.

12] In the course of interview, I found that Elizabeth is an intelligent child, who is quite sensitive to what is happening around

herself. She however, had no apprehension whatsoever with regard to either the Petitioner or the Petitioner's sister and mother. Elizabeth had no apprehension whatsoever about living with Elroy. At the same time, Elizabeth was very respectful towards her maternal uncle, who have obviously taken good care of her. In the circumstances, Elizabeth appears to be attached to both sides of the family. Undoubtedly, Elizabeth is a victim of unfortunate circumstances, which are certainly not her creation. It is in these circumstances, that the answers given by Elizabeth in the course of her interview are required to be appreciated. There is no question of award of custody on the basis that custodial relative pampers the child. That is, certainly an irrelevant consideration. The interest of child is paramount not merely the wishes of child, as expressed in the course of interview.

13] Although, the impugned order is being set aside, in my judgment, in the interest of Elizabeth herself, it will not be proper to grant her custody directly to the Petitioner, at this stage. This is because such custody would be only interim custody, that is during the pendency and final disposal of Petition No. D-31 of 2013. Further, Elizabeth is already enrolled in a School at Mulund. The

academic year will conclude some time by mid-April 2016. It will perhaps not be in the interest of Elizabeth that her school schedule is disturbed, at this stage. This, notwithstanding, the letters produced by the Petitioner from the School at Vikhroli that School of Vikhroli is ready to admit the Elizabeth even at this stage.

14] Instead, pending disposal of main Petition No. D-31 of 2013, some suitable orders can be made with regard to access, particularly during the Christmas week. The interest of justice will be met, if the proceedings in Petition No.D-31 of 2013 are directed to be expedited and disposed of finally one way or other before 31 March 2016.

15] Accordingly, even though, the impugned order is being set aside, the relief in Petitioner's application at Exhibit-48 cannot be granted in its entirety, at this stage. Instead, the Family Court at Bandra is directed to expeditiously dispose of Petition No. D-31 of 2013, on or before 31 March 2016. Such disposal shall be on its own merits and in accordance with law.

16] The Petitioner is due to arrive at Mumbai on 24 December 2015 and will be available upto 1 January 2016. The Petitioner, has

already filed his affidavit in lieu of examination-in-chief. The Petitioner has stated that besides himself, he has no other witnesses to examine in this matter. In these circumstances, the Family Court is requested to fix some suitable date between 24 December 2015 and 1 January 2016 for cross-examination of the Petitioner. The learned counsel appearing for Respondent Nos.4 and 5 has assured this Court that on the fixed date, without any excuse whatsoever they will conclude cross-examination of the Petitioner. In case, Respondent Nos.4 and 5 avoid completion of cross-examination during the said dates, it is made clear that the Family Court shall be entitled to make appropriate orders, including orders forfeiting their right to cross-examine the Petitioner.

17] From time to time, the access was granted to the Petitioner. The Petitioner will be entitled to have access to Elizabeth from 25 December 2015 till 1 January 2016. The Petitioner will be entitled to pick-up Elizabeth from Mulund on 25 December 2015, soon after the mass, i.e., by approximately at 11.00 a.m. The Petitioner to ensure that Elizabeth is returned to her present custody at Mulund on 1 January 2016 latest by 3.00 p.m.

18] Rule is made absolute to the aforesaid extent. There shall, however, be no order as to costs.

19] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)