

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9834 OF 2014

Amee Sharan Desai. ..Petitioner.

Versus

Sharan Sanjeev Desai. ..Respondent.

Mr. Rohan Cama and Ms. Sapna Rachure for the Petitioner.
Mrs. Manjula Rao for the Respondent.

Coram : RANJIT MORE, J.

Date : **April 24, 2015.**

P. C. :

1. Heard Mr. Cama, learned Counsel appearing for the Petitioner and Mrs. Rao, the learned Counsel appearing for the Respondent. By this petition filed under Articles 226 and 227 of the Constitution of India, the Petitioner is challenging the order dated 19th September 2014 passed by the learned Judge, Family Court at Bandra, Mumbai, rejecting the Petitioner's application below Exhibit-D in Petition No.D-15/2014.

2. In the Family Court at Saket, Delhi, the Respondent filed petition bearing G.P. No. 62 of 2013 under section 25 of the Guardians & Wards Act, 1890 [for the sake of brevity, hereinafter referred to as "*the said Act*"] read with section 151 of the Code of Civil Procedure, 1908 seeking following reliefs :

- “(a) Grant the Petitioner free and peaceful access to his daughter in Mumbai including the freedom to bring her to Delhi.*
- (b) Direct a co-parenting plan, granting the Petitioner free access to his daughter and ensuring continuance of her schooling in Modern school.*
- (c) Direct the Respondent not to remove the child from India.*
- (d) Pass any other order/s or direction/s which this Hon'ble Court may deem fit and proper may be passed.”*

3. When the said proceeding was transferred to the Family Court at Mumbai, the same has been numbered as Petition No.D-15 of 2014. In the said petition, the Respondent also filed an application seeking interim reliefs similar to the final reliefs sought in the main petition, namely, D-15 of 2014. The Petitioner objected the maintainability of petition as well as the jurisdiction of the Family Court by filing an application at Exhibit-D in Petition No.D-15 of 2014, on two grounds, namely, that child being citizen of U.K., the family Court in India has no jurisdiction to decide the relief claimed by the the Respondent in the main petition and; secondly that the Petitioner being mother is the natural guardian and therefore application at the instance

of Respondent under section 25 of the said Act is not maintainable. This application was opposed by the Respondent by filing reply. The learned Judge of the Family Court, by the impugned order has dismissed the Petitioner's application at Exhibit-D. Hence, this petition.

4. At the outset, Mr. Cama, learned Counsel appearing for the Petitioner submitted that he is not challenging the maintainability of Respondent's petition on the ground of territorial jurisdiction. He submitted that however in view of provisions of the said Act, the petition is not maintainable. He also submitted that since there is no final relief of custody claimed by the Respondent, petition seeking simplicitor access is not maintainable.

5. On the contrary, Mrs. Manjula Rao, learned Counsel appearing for the Respondent - father supported the impugned order. She submitted that the Respondent has already filed an application seeking to amend his petition under section 25 of the said Act. She further submitted that normally amendment application is required to be allowed, and in the eventuality of

such application being allowed, the Respondent's application would be perfectly maintainable.

6. Having considered rival submissions advanced on behalf of both sides and having gone through the relevant provisions of the said Act, I find merit in the petition. At the outset, it must be mentioned that matter was placed for admission on 11th November 2014. On that day, at the request of both sides, matter was adjourned. Thereafter, matter appeared on board on 17th November 2014 and 24th November 2014, however, it could not reach for hearing. In the meanwhile, on 13th November 2014, the Respondent filed an application before the Court below seeking to amend his main petition. On 18th December 2014, when the petition was placed for admission, Mr. Cama appeared for the Petitioner, however, none appeared for the Respondent. Mr. Cama made a grievance that despite pendency of writ petition, an amendment application has been moved by the Respondent before the Court below. After hearing Mr. Cama, petition was adjourned to 16th January 2015 and till next date all further proceedings of petition No.D-15 of 2014 came to be stayed. Therefore, as of

today, the Respondent's application for amendment is not decided. No orders are yet passed on the said application. Therefore, I have to decide this writ petition on the basis of pleadings of the Respondent as they stand as on today.

7. Section 25 of the said Act reads as follows :

“25. Title and guardian to custody of ward.- (1) if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882). ”

8. Perusal of the above provision makes it abundantly clear that in order to file a petition under section 25 of the said Act, two conditions are required to be satisfied. Firstly, the ward is in the custody of the guardian seeking relief and secondly, the ward has been removed from the custody of such guardian. If these two conditions are fulfilled, then, the aggrieved guardian is entitled to file an application for return of the

custody under section 25 of the said Act. Undoubtedly, in his petition before the Family Court, the Respondent has not sought custody of the ward.

9. Mr. Cama pointed out that custody of the ward was given to the Petitioner and the Respondent has filed affidavit to that effect in a proceeding under the Domestic Violence Act. I have perused the said affidavit. In the said affidavit, the Respondent has admitted that custody of the child was with the Petitioner. I, therefore, find substance in the submission of Mr. Cama. Thus, custody of the ward was not with the Respondent on the date on which he filed petition under section 25 of the said Act. If that be so, the Respondent cannot claim custody of the ward from the Petitioner, resorting to the provisions of section 25 of the said Act. What is important to note is that the Respondent did not claim custody of the ward. What has been claimed by the Respondent is the access of the ward. In my considered view, petition simplicitor for access is not maintainable under section 25 of the said Act.

10. The Respondent's petition is also not maintainable

on the ground that there is no final relief claimed in the petition. The final reliefs in the petition are about the access only. Undoubtedly, that prayers are of interlocutory nature. It is settled principle of law that in the absence of final relief, petition for interim relief would not be maintainable.

11. I have perused the impugned order. the Petitioner's objection to the maintainability of the Respondent's petition under section 25 was discussed in paragraph 14 of the said order, which reads thus :

"As regards the maintainability of the petition as the Petitioner has preferred an application for interim access of minor Samara Shree in her divorce petition, it is also to be noted that the husband has filed a petition for restitution of conjugal rights which is also pending before this Court. hence, I do not see any reason as to why this petition D-15/2014 is not maintainable before this Court. Hence, I hold that it is maintainable."

12. I find that the learned Judge of the Family Court has not discussed the Petitioner's objection at all. No cogent reasons are given in support of the order. Such order, therefore, cannot be sustained and the same deserves to be quashed and set aside.

13. Before parting with the matter, it is necessary to deal with the submission of Mrs. Rao that the Respondent has filed an application seeking amendment to his petition so as to incorporate the relief for the custody of the ward and normally, amendment application is required to be allowed and if amendment is allowed, the Respondent's petition would be maintainable. The fact remains that as on today that application is not decided. Even assuming for a moment that the Respondent is entitled to amend his petition, in that case also the same will not come to the rescue of Respondent in view of the fact that custody of the ward as on the date of filing of petition was with the Petitioner.

14. Taking into consideration all the facts and circumstances of the case, in my opinion, the impugned order cannot be sustained. It is accordingly quashed and set aside. The Petitioner's application challenging the maintainability of Respondent's petition under section 25 of the said Act is allowed. Consequently, petition No.D-15 of 2014 pending on the file of Family Court at Bandra, Mumbai stands dismissed.

[RANJIT MORE, J.]