

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6943 OF 2016

Vikram Kamal Jagtiani .. Petitioner
vs.
Anupama Sharma .. Respondent

Ms Radhika Mehta for the Petitioner.
Mr. S.R. Nachan i/b Bhawe and Co. for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 6 SEPTEMBER 2016.

P.C. :-

1] Heard Ms Radhika Mehta, learned counsel for the petitioner and Mr. Nachan, learned counsel for the respondent.

2] The challenge in this petition is to the order dated 15 March 2016 made by the Family Court, Bandra, Mumbai dismissing the petitioner's application at Exhibit-46 seeking a review of the order dated 1 December 2015 made by the Family Court, Bandra, Mumbai dismissing the petitioner's application at Exhibit-43 in Petition No.D-97 of 2013.

3] By the application at Exhibit 43 in Petition No. D-97 of 2013, the petitioner, who is the respondent in the said petition, had questioned the jurisdiction of the Court to entertain the petition under the Guardians and Wards Act, 1890 (said Act). The objection

was mainly on the ground that the minor child, in respect of whom the guardianship was applied for, was ordinarily a resident of United States of America (USA) and therefore, in terms of Section 9 of the said Act, the Family Court at Mumbai, lacked jurisdiction to entertain such a petition.

3] Ms Radhika Mehta, learned counsel for the petitioner, submitted that before the order dated 1 December 2015 was made by the Family Court at Exhibit-43, no opportunity of hearing was afforded to the petitioner. According to Ms Mehta, this is clear from the Roznama dated 17 November 2015. The entries against the said date did not record any opportunity of hearing was afforded to the petitioner in the matter of application at Exhibit-43 in Petition No.D-97 of 2013. Ms Mehta submitted that hearing was afforded to the petitioner in the matter of application at Exhibit-13 in Petition No. A-3118 of 2013, which petition pertains to the Hindu Marriage Act, 1955. Since the order dated 1 December 2015, insofar as Exhibit-43 is concerned, was made without afford of opportunity of hearing to the petitioner, the same is vitiated by a serious error, which is apparent on face of record. In such circumstances, the Family Court was duty bound to exercise review jurisdiction. Failure to allow

review petition virtually amounts to failure to exercise review jurisdiction.

4] Mr. S.R. Nachan, learned counsel for the respondent, at the outset objected to maintainability of the present petition by submitting that since this is an issue relating to jurisdiction, the petitioner should be relegated to avail remedy of appeal under Section 19(1) of the Family Courts Act 1984. In any case, Mr. Nachan submitted that the material on record amply establishes that the application at Exhibit - 13 and 43 in the two petitions, which were admittedly tagged together were taken up for consideration together. According to Mr. Nachan, this is evident from the circumstance that a common order was made disposing of both the application on 1 December 2015. Further, Mr. Nachan pointed out that the petitioner, in his affidavit dated 8 December 2015 filed before this Court in Notice of Motion No. 3373 of 3015 in Suit No. 885 of 2015 has not only admitted that both the applications were heard together, but in any case, not raised any grievances with regard to alleged non-afford of hearing in application at Exhibit-43. For these reasons, Mr. Nachan submitted that there is no case made

out to interfere with the impugned order, particularly taking consideration the restricted scope of review jurisdiction.

5] Having heard learned counsel for the parties and perused the record, in my judgment, no case is made out to entertain the present petition.

6] In this petition, this Court is not concerned with merits or otherwise of the order dated 1 December 2015 made by the Family Court, since the said order has not been challenged by the petitioner on merits. This position has been made clear by Ms Mehta, learned counsel for the petitioner. The challenge in this petition is restricted to the order dated 15 March 2016, by which, the Family Court has declined to exercise review jurisdiction and review the order dated 1 December 2015.

7] The only ground upon which review was pressed was the alleged absence of opportunity of hearing to the petitioner at the stage of disposal of application at Exhibit 43 in Petition No. D-97 of 2013. The Family Court, in the impugned order, has recorded categorical finding that the applications at Exhibit - 13 and 43 in the

two petitions i.e., Petition No. A-3118 of 2013 and Petition No.D-97 of 2013 (which two petitions had been tagged together in order to avoid any conflicting decisions), the petitioner was duly heard and the order dated 1 December 2015 made thereon. In the impugned order, the Family Court has itself explained the ambiguity insofar as the entry in Roznama is concerned. Upon such a factual matter as to whether opportunity of hearing was indeed afforded or not, the record made by the Family Court will have to be accepted.

8] Even otherwise, there is really no reason to proceed on the basis that opportunity of hearing was declined to the petitioner. Though, the scope of proceedings under the said Act and the Hindu Marriage Act, 1955 may be different, the objection as to jurisdiction, at least, insofar as under Petition No. D-97 of 2013 under the said Act was premised on the basis that the minor child is not ordinarily a resident of the place where the Court exercise jurisdiction.

9] Admittedly, the petitioner had submitted a synopsis of written arguments on 20 October 2015. The synopsis refers to Petition No. A-3118 of 2013 and there is no reference to Petition No. D-97 of 2013, presumably because on 20 October 2015 the application at

Exhibit - 43 had not yet been filed. However, upon perusal of the synopsis of written arguments, including in particular, the submissions at paragraphs 3 and 4, it is quite clear that the objections to jurisdiction, even insofar as Petition No.D-97 of 2013 is concerned, had been sufficiently articulated therein.

10] Besides, in the affidavit dated 8 February 2016, filed by the petitioner in this Court, the petitioner at paragraph 'II' has stated as follows:

*“(II) She also filed Divorce proceedings before the Family Court at Bandra, bearing Petition No. A-3118 of 2013. This Defendant No.1 moved 2 Applications in both the aforesaid proceeding in the Bandra family Court, raising preliminary issues on the ground of maintainability and Jurisdiction of the Court. The said Application came to be heard by the Hon'ble Family Court, which passed an order on 01st December, 2015 holding that , as the marriage between the parties has been registered at USA and the parties cohabited as husband and wife at USA, the Family Court at Bandra, Mumbai has no jurisdiction to entertain the Divorce proceedings and accordingly dismissed the said petition. However, the Family Court further held that, the said Court has jurisdiction to here custody case, hence it rejected the prayer of the Defendant No.1 to dismiss the Petition filed under Guardians and Wards Act, 1890. This Defendant therefore has filed a review application before the Family Court at Bandra, which is due for hearing. A copy of the order dated 01st December, 2015, passed by the Bandra Family Court is filed, as **Exhibit “J”** in compilation of documents filed separately by Defendant No.1.”*

11] From the aforesaid, it is quite clear that the petitioner has accepted that the applications objecting to jurisdiction of the Family Court in both the petitions came to be heard by the Family Court and the same were disposed of by the order dated 1 December 2015.

12] In the aforesaid circumstances, it cannot be said that the order dated 1 December 2015, insofar as the same relates to application at Exhibit-43 in Petition No. D-97 of 2013 was made without afford of opportunity of hearing to the petitioner. In such circumstances, it cannot be said that the order dated 1 December 2015 was vitiated by any error apparent on face of record.

13] There is accordingly, no jurisdictional error to interfere with the impugned order. The finding of fact to the effect that the petitioner was duly heard is well borne out from the material on record.

14] This petition is therefore, dismissed. There shall however, be no order as to costs.

15] Ms Mehta, learned counsel for the petitioner, prays for a stay upon the order now made. By the order dated 1 December 2015, the Family Court has ruled that it has jurisdiction to entertain the petition instituted by the respondent. The said order has not been challenged by the petitioner in this Court. The challenge in this petition was to the order dated 15 March 2016, by which, the Family Court declined to review the order dated 1 December 2015. In this petition as well, there was no interim relief obtained to stay further proceedings before the Family Court. Now that this petition is being dismissed, there is no case made out, at this stage, to grant a stay on further proceedings before the Family Court.

(M. S. SONAK, J.)

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