

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6193 OF 2016

Dr. Viren Bhagwandas Asher Petitioner

Vs.

Damyanti Hemant Matani & Anr. Respondents

Mrs. Manjula Rao alongwith Ms. Kalpana Asher, Ms. Chhaya Asher, Ms. Pranali Adangale i/by M/s K. Asher & Co. for the Petitioner.

Ms. Firdaus Moosa i/by Prakash Mahadik, for Respondent no.1.

Coram : Smt. R.P. SondurBaldota, J.

Date : 22nd July, 2016

P.C.

1 The petitioner, father of the child aged 8 years and respondent no.1, the maternal grandmother of the child are in dispute over custody of the child. The present petition arises out of the order dtd. 25th April, 2016 passed by the Family Court on the application at Exhibit 49 filed by the petitioner.

2 The petitioner is a Consultant Gynaecological Oncologist attached and practising at the Royal Derby Hospital at

Derby Nottingham, United Kingdom. He belongs to a family of doctors, who run a nursing home and practice at Nasik. The petitioner married the daughter of respondent no.1 on 7th April, 2002 in Mumbai. She is also a Gynaecologist and was employed and working with Queens Medical Centre Hospital, governed under the rules framed by the National Health Services in England. She was working with that hospital during the period 2006 to 2009. The petitioner, his wife and the child are British citizen. The child was born on 20th November, 2007 at Queens Hospital in Nottingham. At the birth, he had Undescended testes and needed corrective surgery known as Orchiopexy. Until December, 2011, the petitioner and his wife regularly resided at the address stated in the cause title of the petition.

3 Somewhere in November, 2008, wife of the petitioner was diagnosed with Post-Natal Depression by the doctors under whom she was working in Queens Medical Centre Hospital. She was therefore immediately kept under observation and treatment started for her. Since then she was in continuous treatment and supervision of National Health Services Rules until October, 2011. In January, 2012, she had come to India and was at Nasik until August, 2013, when she expressed desire to be with the respondent. Therefore, the petitioner purchased flat at Dahisar, where she started residing with the respondent and the child. On 2nd January, 2015, the wife came to Nottingham to complete her assessment formalities with the National Health Services and her

medical assessment as required by the General Medical Council in the United Kingdom to enable her to resume her work in the hospital. The child had stayed back with the respondent in Mumbai as the wife expected to return to Mumbai after the assessment. The wife has since been in England, receiving treatment there. When the petitioner desired to take his son to England, the respondent refused to handover the child to him and filed the petition under the Guardian and Wards Act for being appointed as his guardian.

4 By way of the condition of Orchopexy suffered by the child, he has to undergo multiple surgeries to rectify the defect. The first surgery was performed at Queens Medical Centre at Nottingham, where he was born, at that time, his age was two years. The second surgery was performed on 27th March, 2012 at Lilavati Hospital, Mumbai because at that time, the wife had come to Mumbai with the child. At the time of operation, the petitioner was present alongwith the wife.

5 According to the petitioner, the third surgery is required to be performed before the child completes the age of 9 years and therefore he filed the application at Exhibit 49 for custody of the child for the purpose of operation. The petitioner desires that the third surgery be performed in the hospital at Nottingham. The application was strongly opposed by the respondent, who contended that the surgery can be conveniently

performed in Mumbai and that there is no one at Nottingham to look after the child during the course of the surgery. According to her, if the surgery is performed at Mumbai, her second daughter who is also a doctor, can be available to take care of the child. The petitioner, on the other hand claimed that his mother, who is herself a qualified doctor, would be accompanying the child to England and be with him throughout the time of surgery. The Family Court dismissed the application with observation that since the child was already operated once at Lilavati Hospital for the same problem and there was no complication in the child's health, the third operation can be performed at the same hospital. It also accepted the claim of the respondent that the child's other requirements would be taken care of by the respondent and her second daughter. It further observed that the petitioner can remain present at Lilavati Hospital, at the time of operation and thereafter he can remain in contact with the child. In the opinion of the Family Court for the purpose of medical treatment, there was no need to grant the custody of the child to the respondent. The Family Court also believed the anxiety expressed by the respondent that under the guise of medical treatment, the petitioner would take away the child and her petition would become infructuous. On that basis, it observed that there was no bonafide intention on the part of the petitioner in seeking custody of the child.

6 Mrs. Rao, the learned advocate for the petitioner submits that there is no dispute as regards the medical condition of the child and the fact that the cure for that is multiple surgeries. Two surgeries have already been performed, one at England and another at Mumbai. She vehemently submits that as the father and natural guardian of the child and also as a qualified doctor, it is for the petitioner to decide as to where the child should receive medical treatment and the respondent can have no say in the matter. She also points out that the petitioner's wife is presently at England though receiving treatment in the hospital. Ms. Moosa, the learned advocate for respondent no.1, on the other hand strongly argued that the petitioner has not pointed out any deficiency in the medical treatment received by the child at Lilavati Hospital and that there is no need for the child to be taken to England. She has reiterated the apprehension felt by the respondent that the petitioner after taking away child to England may not return.

7 In my opinion, Mrs. Rao is correct in her submission that as the father and natural guardian of the child, it is for the petitioner to decide as to where his child should receive medical treatment. He is a qualified doctor himself, practising in England. The child is a British citizen and may be entitled to certain facilities as a British citizen. Respondent no.1 as the maternal grandmother can at the highest may offer her advice to the petitioner. There are two anxieties expressed on behalf of

respondent no.1, one is the arrangement for taking care of the child while at England and the other is that the petitioner may not return the child after the medical treatment. In view thereof, the petitioner was directed to file an affidavit stating the tentative duration of the medical treatment and the arrangement made to look after the child. He has accordingly filed an affidavit through his mother. As per the affidavit, the petitioner's own mother i.e. the child's paternal grandmother will be helping the petitioner to care of the child while at England. Further the total time taken for the treatment would be if the child reaches Nottingham on 30th/31st July, 2016 until the end of November, 2016. Mrs. Rao has also stated that the petitioner undertakes to bring the child back to Mumbai and handover custody to respondent no.1 thereafter until the hearing of the main petition. Mrs. Rao informs that the petitioner shall immediately arrange to book for the flight for the child to arrive at England and communicate the date of departure to respondent no.1. Accordingly she shall handover custody of the child to the petitioner one day in advance to the date and time of travel. After completing the treatment, the petitioner shall bring the child back to Mumbai by end of November, 2016. In the event, the medical treatment requires any longer time, the petitioner shall get the time of custody extended by making appropriate application to the Family Court for the purpose.

8 In the circumstances, the petition is allowed. The impugned order is set aside. The application at Exhibit 49 is

allowed to grant custody of the child to the petitioner for the duration as described above. The parties, in the meantime are at liberty to proceed with the hearing of the main petition.

The parties to act on the authenticated copy of the order.

(Smt. R.P. SondurBaldota, J)