

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10559 OF 2015

Mrs. Sarjana Naresh Bhandari .. Petitioner
VS.
Mr. Naresh Bala Prasad Chaurasia .. Respondent

Mr. Vijay Chavan i/b. Mr. A. D. Sarwate for Petitioner.
Ms Seema Sarnaik and Mr. Ameya Tamhane for Respondent.
Mrs. Sarjana Naresh Bhandari – Petitioner present in person.
Mr. Naresh Bala Prasad Chaurasia – Respondent present in person.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 28 June 2016

Date of Pronouncing the Judgment : 22 July 2016

JUDGMENT :-

1] On 21 April 2016, this petition was heard finally and closed for orders. However, since the parties were exploring the possibility of an amicable settlement, the matter was taken up from time to time, with a view to assist the parties, in arriving at an amicable settlement. This Court, as well as, the counsel appearing for the parties agreed that such amicable settlement would be in the best interests of the parties, including in particular, in the best interests of minor son Ishan, since, the issues of custody and access arise in the main matter pending before the Civil Judge, Senior Division at Pune (trial court).

2] Even before, the matter was taken up for final hearing, this Court, from time to time, made orders in the matter of interim

access, keeping in mind, the apprehensions expressed by both the parties, including in particular, the apprehensions expressed by the petitioner – mother, in the matter of access to Ishan.

3] On 21 October, 2015, this Court, made the following order:

“1] Not on board. Upon production, taken on board.

2] Place this matter for further consideration on 26/11/2015 (on Supplementary Board).

3] The parties shall abide by the following interim arrangement till then:-

(a) On 07/11/2015, the respondent shall be entitled to supervised access between 11.00 a.m. to 2.00 p.m. in the Family Court Child Care Centre. On this date, the petitioner or her mother shall be entitled to remain present outside the centre. In case the child is required to visit the toilet, the petitioner or her mother to accompany the child to the toilet.

(b) Similarly, the respondent shall be entitled to supervised access on 09/11/2015 and 13/11/2015 between 2.30 p.m. to 5.00 p.m. at Sr. Chrispines, Karve Road, Nal Stop. This access shall also be subject to the aforesaid arrangement with regard to toilet etc.”

4] Considering the allegations made by the petitioner, it was suggested that the parties consult some doctor / counsellor and obtain some advise / guidance in the matter. Accordingly, on 26 November 2015, it was recorded that the parties have agreed to approach Dr. Sharda Barve, KEM Hospital, Pune. On 18 December 2015 such order was modified as Dr. Barve declined to counsel the

parties in this matter. Liberty was granted to consult some other suitable doctor at Sankalp Clinic, Pune.

5] On 20 January 2016, Dr. P. N. Kadam, Counsellor & Behavioural Psychotherapist of Sankalpa Human Resource Development Corporation and Sankalpa Treatment Center for Body & Mind, Pune, has submitted his report. A perusal of the report indicates that the same is on the basis of substantial thorough examination of the parties and Ishan. Learned counsel for the parties were given access to the reports and they appear to have made their submissions by taking into consideration the contents of such reports.

6] Mr. Chavan, whilst assailing the order dated 12 August 2015 below Exhibit '118' in M.P. No. 1001 of 2012 submitted that no proper opportunity was granted to the petitioner and her counsel to put forth their case and on this ground itself, the impugned order is liable to be set aside. Mr. Chavan further submitted that the impugned order has been made in the purported exercise of review jurisdiction. He submitted that there was no error apparent on face of record in the earlier order dated 17 December 2014 and therefore, the trial court, exceeded jurisdiction in reviewing the same. Finally, Mr. Chavan by reference to certain material

submitted that there is serious apprehension that the company of the respondent would be harmful to the interests of the minor child, particularly considering the age of the child and the nature of apprehension expressed by the petitioner. For all these reasons, the learned counsel for the petitioner submitted that the impugned order warrants interference under Article 227 of the Constitution of India.

7] By the impugned order dated 12 August 2015, the trial court has allowed the respondent to meet his son Ishan between 11 a.m. to 2 p.m. on every first and third Saturday at the Family Court Child Welfare Centre, under the supervision of concerned authority, or the mother of the child. For this purpose, the respondent father is required to move application to the Principal Judge, Family Court at Pune and further, bear necessary expenses for the same. The petitioner however contests this order by contending that even the grant of such minimal relief to the respondent father, is not in the interests of the minor son.

8] There is no substance in the contention based upon denial of adequate opportunity. From the record it is quite clear that sufficient opportunity was granted to the petitioner and her lawyer before, the impugned order dated 12 August 2015 came to be made. The perusal of the order also indicates that directions were also issued

to the petitioner to produce the minor son before the court, so that, the trial judge could interact with the minor son and make the assessment of the situation. Both the parties, through their respective Advocates were heard and have made their submissions in the matter. From the perusal of the impugned order, it is quite apparent that neither the petitioner nor her Advocate were either taken by surprise or denied any opportunity of putting forth their case. Accordingly, there is no case made out to interfere with the impugned order on the ground that the petitioner was denied adequate opportunity in the proceedings.

9] In matters of custody or access, it is necessary to go by the substance of the order or proceedings rather than the very form. It is true that the respondent in his application at Exhibit '118' had applied for review of the order dated 17 December 2014. However, strictly speaking, if the substance of the application is taken into consideration, then, the plea was not for review but rather, for variation. In matters of access, there is no question of applying the strict principles of review as prescribed under Order XLVII Rule 1 of the CPC. The orders in relation to custody and access, by their very nature, can never be rigid or final. Upon change in circumstances, such orders can always be and in fact, should be suitably varied from time to time. Therefore, I am satisfied that this is not a case

where the trial court has exceeded its jurisdiction in entertaining the application for review or variation of the earlier order dated 17 December 2014.

10] The petitioner has made serious allegations against the respondent for the sake of the minor son Ishan, such allegations are not transcribed in the course of this order. Such allegations are a matter of record. The allegations are, no doubt, serious. On the basis of such serious allegations, the petitioner, it appears has succeeded in denying even the minimal access, which has from time to time been granted to the respondent father. However, it must be noted that making of serious allegations is one thing but producing any material in support thereof is quite another. The petitioner, perhaps, encouraged by her initial successes, seems to be under the impression that it is sufficient to make allegations of this nature and on the basis of the same, deny access to the respondent, until the veracity of such allegations is verified. The petitioner has also realised that no sooner she or her Advocate, no doubt upon instructions makes such allegation, the respondent husband gets agitated and the focus of the matter stands deflected. The petitioner therefore, persists in making such allegations. This is by no means a proper approach on the part of the petitioner, who must realise that the very making of such

allegations, involves very serious repercussions upon the interest of her minor son as well. In jurisdiction of this nature, interest of the minor son is paramount. Therefore, it is the duty of both the parents to act with utmost responsibility and not make use of the minor child, in order to settle the differences between themselves.

11] Since, such serious allegations were made by the petitioner against her own husband, involving the minor son, naturally, the courts have also proceeded with utmost caution. But for these allegations, there was really nothing on record to deny the respondent father substantially greater access. In fact, the material on record indicates that there is no serious problem between the respondent and the minor son. The minor son is quite attached to both the parents and, it appears, enjoys spending time with both the parents. However, considering the nature of allegations, it is but natural that the trial court as well as this court proceeds with extreme caution. The petitioner, it appears, is quite aware of this position and has therefore, sought to exploit the same and on such basis denied even the minimal access which the courts had granted to the respondent.

12] Nevertheless, considering the allegations, even this Court, did not, to begin with, insist upon the compliance with the order

impugned in this petition even though, no case had been otherwise made out for grant of any interim relief. Instead, certain confidence building measures were directed after adoption of suitable cautionary measures. The record as well as the interviews with the parents now indicate that there were no serious issues in the course of access as directed by this Court during the pendency of the proceedings. The petitioner, however, did attempt to raise the same issues though this time, she was quite restrained, realising perhaps that the opinion of the doctors / counsellors also did not support the allegations made by her. As noted earlier, it is easy to make allegations of this nature, but, the petitioner has not really established the said allegations. At this stage, it is true that there is no requirement of establishing such allegations beyond any reasonable doubt. However, even if we have to go by the most relaxed standards of proof, it must be noted that the petitioner has failed in achieving such standards, in the matter of allegations made by her.

13] The Psychiatrist / Counsellors have given detailed reports. The reports in unequivocal terms state that the child is attached to both the parents, however, the mother is resisting free access to the child's father. The counsellors have commented that both the parents act immaturely and have developed a habit of pre occupied

and directive perception which has led to confrontations and this situation. The reports state that the child was playing comfortably with the respondent father but the petitioner was trying to keep the child in her custody. The report has commented upon marital mal adjustment, stress and inter personal conflicts.

14] Both the petitioner and the respondent are qualified software professionals. Both of them are suitably employed and earn quite sufficiently. Both hail from quite stable family background. Both are quite young and if things were to work out, could always begin anew, so that Ishan has a stable future. Despite efforts however, the parties state that the differences between themselves are quite irreconcilable. The next best option is that the parties end their marriage gracefully, but offer all the requisite love and security to their son Ishan, at least to the extent, their position permits them. Keeping this in view, efforts were made to achieve some amicable settlement, if possible.

15] It is possible that the petitioner is extremely hurt with perhaps, what she perceives as neglect by her husband and his family members. The respondent husband also has his own complaints against the petitioner wife. This is really not the stage to decide which of the parties are right and what is the relief that they finally

deserve. However, whatever the hurts or the perceived hurts, allegations of the nature made by the petitioner against her husband cannot be permitted to prevail, unless, the same are made with utmost sense of responsibility and backed by at least some minimal proof. This is because such allegations, involve the relationship between a minor child and his biological father. Such allegations cannot be sustained, merely by contending that minor child is hyper active or does some acts, which normally children of his age would not or should not indulge in. At least, the doctors and counsellors have not found any merit in such allegations. Even, assuming what the petitioner states is, to a certain extent, the position, we must realise that these are quite traumatic times for the minor child. The child, is perhaps a victim of the irreconcilable differences between his parents, which differences, the parents have no qualms to violently express in front of the child. The parties were referred to seek professional help. The doctors / counsellors have made their reports which do not support the allegations made by the petitioner. There is no reason not to accept such the reports. At least, the petitioner has not made out any case warranting non acceptance of such reports.

16] There is really no case made out by the petitioner to interfere with the impugned order. In fact, the relief granted by the trial court

to the respondent, is quite minimal and in case, the respondent applies for greater access, there is no doubt that the trial court will consider such application, in accordance with law and after afford of opportunity to the petitioner. It is perhaps at the insistence of the petitioner that access has been granted only in the Family Court Child Welfare Centre and that too under supervision of the concerned authority or the mother of the child.

17] The parties in fact agree that access in the Child Welfare Centre, is not very fruitful, considering location, lack of space and the presence of several other children and parents. Possibly, the impugned order was made, taking into consideration the serious apprehensions expressed by the petitioner. It is necessary to note that on the basis of material on record there does not appear to be any reason to sustain such apprehensions. It cannot be ruled out that such apprehensions have been expressed only to deny the respondent quality access with the minor son. In the bargain, the petitioner perhaps does not realise the impact of the allegations upon her own son. In the course of pendency of the proceedings before this court, access was directed to be given at places other than the Child Welfare Centre in the Family Court, e.g. access was given on one occasion at the Season's Mall at Pune and on another occasion, access was given at Phoenix Mall. Access was

also given at Imagica at Khopoli. The material on record indicates that such access arrangements have worked out well. There is no doubt that access that is required to be given, has to be quality access, where, both the parents as well as the child are quite comfortable with each other. No doubt, these are all matters which the trial court will take into consideration, in case the respondent applies for greater access and change of location.

18] In view of the aforesaid, there is no case made out to interfere with the impugned order. This petition is dismissed. There shall be no order as to costs.

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

(M. S. SONAK, J.)

Chandka