

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 95 OF 2017**

MRS. ROXANN SHARMA., Petitioner

Versus

MR. ARUN SHARMA., Respondent

Ms. Maria Caroline Collasso, Advocate for the Petitioner.

Shri A. Viegas with Ms. Uma Prabhudessai, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 13th FEBRUARY, 2017

PRONOUNCED ON: 20th FEBRUARY, 2017

ORDER:

The present petition involves the issue about execution of an order, granting visitation rights to the respondent.

2. The parties were married in the year 2005 and were blessed with a son named, Thalbir, who was born on 18.04.2012. Unfortunately, the marriage ran into rough weather and the parties are litigating in various proceedings before different Courts. The litigation has a chequered history, however, the facts necessary for the present purpose, shorn of minor details, may be stated thus:

(i) The respondent filed an application under Section 6 of the Hindu Minority and Guardianship Act, 1956 (Act of 1956, for short), being Matrimonial Petition No. 59/2013/II, which is pending before the learned Civil Judge Senior Division at Margao. The dispute about grant of interim custody had travelled to the Hon'ble Supreme Court, in Civil Appeal No. 1966/2015 and Civil Appeal No. 1967/2015. That, was decided by judgment and order dated 17.02.2015. It would be necessary to reproduce para 20 of the judgment of the Hon'ble Supreme Court as under:

"20. We transfer the temporary custody of Thalbir to the Appellant/ Mother with the direction that both of them shall reside in the address given by her, viz, House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa and will not leave that territorial jurisdiction of the Trial Court without prior leave. We further direct that the Respondent/ Father shall have visitation rights between 2.30 p.m. and 6.00 p.m. on every Tuesday and Thursday, and from 2.30 p.m. to 9.00 p.m. on Saturdays. These orders are purely temporary in nature. The Civil Judge should decide the Petition/ Application pending before him with expedition, as directed by the High Court, without being influenced by any observations made by us hereinabove."

(ii) This order was clarified on the same day as under:

"After the pronouncement of this judgment it has been pointed out to us that the passports of both the parties have been deposited in this Court. The Thalbir's passport is with the Trial Court in Goa. These will not be released to any of the parties without the explicit leave of the Court. It also transpires that House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa has been sold by the Father-Respondent. The Petitioner-Mother will, therefore, stay in Goa, as already indicated, until explicitly permitted by the Competent Court. The said address will be mentioned to the Civil Court."

3. The petitioner filed an application (Exhibit-93), before the Trial Court suggesting various options where visitation rights, could be granted, while the respondent filed an application (Exhibit-72), seeking a direction to the petitioner to allow the respondent to exercise the visitation rights, as contemplated under the order of the Hon'ble Supreme Court. Both these applications were disposed off by the learned Trial Court by separate orders dated 24.07.2015 and while dismissing application (Exhibit-93), the Trial Court directed that the visitation rights are to be given as per the orders of the Hon'ble

Supreme Court. This was unsuccessfully challenged by the petitioner before this Court in Writ Petition No. 621/2016, which was decided on 08.07.2016.

4. It appears that the petitioner thereafter, approached the Hon'ble Supreme Court in I.A. No. 1/2015 in Civil Appeal No. 1966/2015, in which the following order was passed on 03.07.2015:

"After hearing learned Senior Counsel for the Applicant we are of the view that the prayers made in the Application should be addressed before the Competent Guardian Court i.e. the Civil Judge (Senior Division) at Margao, Goa who is in seisin of the dispute between the parties. Needless to clarify, the said Court should decide the Application without being influenced by any observations made by this Court in the Judgment dated 17th February, 2015."

5. The petitioner again approached the Hon'ble Supreme Court in I.A. No. 3/2016 in Civil Appeal No. 1967/2015, wherein the following order is passed on 26.08.2016:

"Heard Mr. Colin Gonsalves, learned Senior Counsel for the applicant-appellant and Mr. Huzefa Ahmadi, learned Senior Counsel for the

respondent.

Having heard learned Counsel for the parties, we are inclined to modify the earlier order to the extent that the appellant shall not leave the State of Goa without the permission of the concerned Court."

6. It is undisputed that the respondent had earlier filed an application for execution being Regular Execution Application No. 74/2015/II, which was rejected by the Trial Court on 08.09.2015. The respondent has now filed Civil Miscellaneous Application No. 41/2016/II in Matrimonial Petition No. 59/2013/II, under Order XXI, Rule 11(2) of the Code of Civil Procedure (CPC, for short), for execution of the order granting visitation rights. The learned Trial Court by an order dated 17.12.2016, has dismissed the application inter-alia on the ground that the earlier application for execution was dismissed on 08.09.2015. The respondent challenged the said order before the learned District Judge in Miscellaneous Civil Appeal No. 104/2016. The learned District Judge by the impugned judgment and order has allowed the appeal in the following terms.

"The appeal is allowed and the impugned Order dated 17.12.2016, of the Learned Adhoc

IIIrd Additional Senior Civil Judge at Margao, in charge of Adhoc IInd Additional Senior Civil Judge, Margao, is quashed and set aside.

Civil Misc. Application No.41/2016/II, that was filed before the lower Court, is allowed. In terms of prayer 9(e), the respondent is directed to remain present with the child, within the jurisdiction of the lower Court and at House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa, on every Tuesday and Thursday, between 2.30 p.m. and 6.00 p.m. and on every Saturday from 2.30 p.m. to 9.00 p.m.

If the respondent does not remain present as aforesaid, the Learned IInd Additional Senior Civil Judge, at Margao, is to issue the warrant through the Bailiff, to bring the respondent before the Court with all convenient speed, so that the respondent remains present with the child, within the jurisdiction of the Court and at House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa, on the aforesaid dates and timings.”

It is this order which is subject matter of challenge in this petition.

7. I have heard Ms. Collasso, the learned Counsel for the petitioner and Shri Viegas, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned order

passed.

8. Ms. Collasso, the learned Counsel for the petitioner has submitted that the order dated 08.09.2015, dismissing the earlier execution has not been challenged by the respondent and as such, the second attempt to execute the order would be hit by principles of res judicata. The learned Counsel also raised certain submissions on the question whether, the provisions of the Act of 1956, would apply to the parties in as much as the petitioner is a U.S. National, professing Christianity. It is submitted that the learned District Judge erred in interfering with the order of the learned Trial Court where application for execution was rightly dismissed.

9. The learned Counsel has made certain alternate submissions, which need to be noticed at this stage. It is submitted that as of now, the visitation rights are granted for three days from 2:30 p.m. to 6:00 p.m., on every Tuesday and Thursday and 2:30 p.m. to 9:00 p.m. on every Saturday. The learned Counsel has pointed out that the child has been enrolled in a music class and a art and drawing class at Canopy Azure, and the present visitation timings are interfering with the music

and drawing classes. She therefore submitted that the visitation rights be granted two days a week i.e. on Wednesday and Sunday and in order to compensate for the third day, the visitation timings may appropriately be increased. Insofar as the venue is concerned, it is submitted that it would preferably be granted at her residence, as normally the visitation is granted at the normal/ordinary residence of the minor and not at some different place. The learned Counsel submitted that there is an apprehension to her life and limb, if the visitation is granted at the flat at Betalbatim. She further submitted that in the event, the present venue at Betalbatim is maintained, the visitation may be granted in the presence of a Social Worker.

10. The learned Counsel for the respondent submitted that the petitioner has not been complying with the order granting visitation rights and thus, the execution cannot be said to be barred by principles akin to *res judicata*. It is submitted that every time, the visitation is not granted, a different cause of action would accrue. The learned Counsel has taken me through the judgment of the learned District Judge, in order to point out that this aspect has been properly considered. It is submitted that on reading of the various orders passed by the

Hon'ble Supreme Court, it is evident that the Hon'ble Apex Court, has only relaxed the condition about the petitioner staying within the jurisdiction of the Trial Court and it is now directed that she shall not leave the State of Goa. However, it is pointed out that there is no change, so far as the venue where the visitation rights are to be given. Insofar as the change of the date, time and venue are concerned, it is submitted that no such case was made out before the Courts below. It is submitted that the change sought on the basis of the music and art/drawing classes, is not justified. It is submitted that there is no material to support the apprehension expressed, on behalf of the petitioner about the danger to her life and limb, if visitation rights are granted at Betalbatim.

11. The learned Counsel for the petitioner, in reply has referred to the reports of the Social Worker, in order to show that there is hostile atmosphere during grant of visitation rights, which is sufficient to give rise to a reasonable apprehension.

12. I have given my anxious consideration to the rival circumstances and the submissions made. It is significant to note that the main application seeking custody, is still pending

before the learned Trial Court and the present dispute, is only regarding execution of the order granting visitation rights. The learned District Judge has referred to the observations of the Hon'ble Supreme Court in the judgment and order dated 17.02.2015, which read as under:

"Section 3 of the HMG Act clarifies that it applies to any person who is a Hindu by religion and to any person domiciled in India who is not a Muslim, Christian, Parsi or Jew unless it is proved that any such person would not have been governed by Hindu law. In the present case, the mother is a Christian, but inasmuch as she has not raised any objection to the applicability of the HMG Act, we shall presume that Thalbir is governed by Hindu Law. Even in the proceedings before us, it has not been consented by the Learned Senior Advocate that the HMG Act does not operate between the parties."

13. In view of this findings, the learned District Judge has held that the parties cannot re-agitate the question about non-applicability of the Act of 1956. The Hon'ble Apex Court has clarified by order dated 03.07.2015 that the Trial Court should decide the application without being influenced by the observations made by the Hon'ble Supreme Court, in the order

dated 17.02.2015. However, at this stage, the petitioner cannot be permitted to raise the question about the non-applicability of the Act of 1956, in order to resist the order granting visitation rights.

14. The learned District Judge has found and to my mind rightly so, that the order can be executed under Order XXI, Rule 11(2) of CPC. The order granting visitation rights has to be complied with, by permitting the respondent to have visitation rights for three days a week. The learned District Judge in para 35 of the impugned judgment has considered the reasons on account of which, the earlier application for execution was dismissed and in my considered view, looking at the nature of the order of which, execution is sought, the petitioner is not justified in raising the issue of res judicata. It is evident that the order has to be complied at regular intervals i.e. three days in a week, as such, the cause of action, in the event of breach, would be of a recurring nature.

15. This takes me to the alternate submissions on behalf of the petitioner, which is the change of venue and the date and time of the visitation rights. At the outset, it is necessary to mention that no such prayer was made before the Court below.

Still I had made an attempt to see whether the parties can arrive at a mutual acceptable alternate arrangement. However, no consensus emerged, as such, law has to take its own course. As noticed earlier, the petitioner having not raised any such contention or not having made a prayer for change of the venue, date and the timings before the Trial Court, it would be difficult to consider the same for the first time in this petition. The learned District Judge after considering the various orders by the Hon'ble Supreme Court has rightly come to the conclusion that the only relaxation is in respect of the earlier condition where, the petitioner was required to stay within the jurisdiction of the Trial Court. Now, the only condition is that the petitioner shall not leave the State of Goa. Insofar as the apprehension expressed on behalf of the petitioner, there are rival claims made, which involve disputed questions of facts, which cannot be gone into at this stage. I have carefully gone through the order passed by the learned District Judge and I do not find that any exception can be taken to the same, with the only rider that the visitation rights shall be granted in the presence of the Social Worker, as may be appointed by the learned Trial Court.

With this, the petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

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