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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.56 OF 2017 IN
FAMILY COURT APPEAL NO.127 OF 2009

Mr.Nimesh Harkisandas Topiwala ...Applicant
vs.
Ms Deepa Dalpatram Topiwala& Anr. ...Respondents

Mr.Narendra Chandrakant Walimbe for the applicant
Shri A.C.Singh, ASG i/b Mr.Pradeep Jetly and
Mr.Dushyant Kumar for the respondent No.2 (UOI)

CORAM : A.S.OKA, & SMT.ANUJA PRABHUDESSAI, JJ.
DATE ON WHICH JUDGMENT IS RESERVED: MARCH 17, 2017
DATE ON WHICH JUDGMENT IS PRONOUNCED: MAY 5, 2017

ORDER: (PER A.S.OKA,J.)

1 This is an application made by the appellant in Family Court Appeal No.127 of 2009. The applicant is the husband and the respondent is the wife. The challenge in the Appeal is to the Judgment dated 30th April 2009 passed by the learned Judge of the Family Court at Pune by which the application made by the applicant for grant of permanent custody of minor child Mihir was rejected.

2 The marriage between the applicant and the respondent was solemnised on 10th September 1999 at London, U.K. Thereafter, the applicant and the respondent came back to India and another marriage ceremony was performed on 1st February 2000 as per Hindu Vedic rites. Mihir was born on 16th June 2002 at Carry, North Carolina State in United States of

America ("USA").

3 From 24th June 2001 the applicant and the respondent started residing at Raleigh in North Carolina in USA. However, the applicant and the respondent were involved in constant fights and therefore, they decided to stay separately. The applicant is relying upon the agreement dated 17th September 2003 under which the custody of the minor son Mihir was kept with him. Subsequently, the respondent preferred an application for custody in USA Court. The applicant has alleged that an exparte order of the custody of the minor son Mihir was passed by the said Court. Subsequently, the applicant brought his minor son to India for performing religious ceremony. He came to India on 22nd October 2002. In the meanwhile, the respondent filed a petition for divorce in which exparte decree was passed. The applicant could not go back to USA as certain criminal proceedings were initiated by the respondent.

4 In June 2007, the respondent came to India and filed a petition for Habeas Corpus seeking custody of the child in the High Court of Judicature at Gujrat. Under the order of the Gujarat High Court, the applicant handed over the custody of his son to the respondent. However, the applicant was permitted to file a petition for custody which was filed by him at Navsari, Gujarat which came to be dismissed on 25th October 2007. Thereafter, an application was filed by the applicant in the Family Court at Pune

in which the impugned order has been passed.

5 In Civil Application No.386 of 2014 taken out by the applicant, this Court passed order by disposing of the application which reads thus:

"9 Hence, we pass the following order:

(I) We direct that the applicant shall be given temporary custody of his minor son Mihir from 10th August 2016 till 19th August 2016 (both days inclusive);

(II) The respondent is directed to bring the minor son Mihir to India for the purpose of implementation of the aforesaid directions.

(III) In addition, we grant prayers 22.4, 22.5 and 22.6 which read thus:

"(22.4) The opponent may please be directed to allow the applicant and his parents to call son Mihir during every weekends;

22.5) The opponent may please be directed to provide her telephone number and skype id to the applicant;

22.6) The applicant may please be allowed to register an order of this honourable court in this case in the Court of North Carolina or where son Mihir is residing at the moment"

(I) We direct the Registry to forward a true copy of this order to the Ministry of Law and Justice of the Government of India;

(II) It will be also open for the applicant to submit a certified copy of this order to the Ministry of Law and Justice of the Government of India. On receiving a copy of the order from the office of this Court or on production of a certified copy of this order by the applicant to the Ministry of Law and Justice, necessary steps shall be taken in accordance with law by the Government of India;

(III) For the time being, we adjourn this application till 27th June 2016 under the caption of `Directions'."

6 The orders passed in the said Civil Application will show that due to various reasons, notwithstanding several orders of this Court, the said order could not be implemented.

7 The Deputy Registrar of this Court received a communication from the Department of Legal Affairs (Judicial Section) in August 2016 in which it was stated that as per the Hague Convention of 1965 in civil and criminal matters, Central Authority in United States of America has authorized an agency by the name Process Forward International, having address at 663, Yesler Way, Seattle, WA 98104, USA. Therefore, the Department of Legal Affairs stated

that notices/summons be sent directly by the Courts to the said agency Process Forwarding International.

8 With a view to ensure that the order passed in the earlier Civil Application is implemented, we sought the assistance of the learned Additional Solicitor General of India who has placed on record several documents including a copy of "the Treaty with India on Mutual Legal Assistance In Criminal Matters" signed at New Delhi on 17th October 2001. The circular dated 30th April 2010 was also placed on record which records that as per the business Rules of the Government of India, the Ministry of Home Affairs is the Central Authority for seeking and providing mutual assistance in criminal law matters. It is stated therein that the cases pertaining to civil and commercial matters are required to be taken up with the Ministry of Law and Justice.

9 As the earlier order dated 5th May 2016 could not be implemented, the present application is filed for modification of the said order.

10 The learned counsel for the applicant pointed out that the respondent has not complied with the order dated 5th May 2016. He submitted that as the minor son will have school vacation from July 2017 to August 2017, earlier order will have to be suitably modified and served as per the prayers made in the present application.

11 Notice of Civil Application No.386 of 2014 as

well as the order dated 5th May 2016 was served to the respondent. However, there is a non compliance with the said order by her.

12 We propose to direct that the temporary custody of the minor son Mihir should be given to the applicant from 10th August 2016 to 19th August 2016.

13 Considering the material placed on record and the submissions made by the learned Additional Solicitor General of India, we propose to direct service of Order through various modes.

14 In the earlier paragraph, we have referred to the circular dated 10th April 2010 issued by the Joint Secretary of the Ministry of External Affairs, New Delhi on 30th April 2010. The copies of the circulars have been forwarded to the Registrars of various High Courts in the country including the Registrar of this Court. Paragraphs 2 to 5 of the said circular read thus:

"2 It is reiterated here that service of judicial processes outside India including summons/show cause notices etc., in criminal matters is regulated by reciprocal arrangements with foreign countries finalized and notified by the Ministry of Home Affairs, as per statutory provisions in the Criminal Procedure Code (Section 105). In the absence of such notified arrangements, the question of service of judicial processes outside

India would require to be examined and decided by the Ministry of Home Affairs, in view of the relevant Indian Municipal laws.

3 As per Allocation of Business Rules of the Government of India, the Ministry of Home Affairs to nominate nodal Ministry and Central Authority for seeking and providing the mutual legal assistance in criminal law matters. The Ministry of Home Affairs receives all kind of such requests, examines and takes appropriate action.

4 Similarly, the cases pertaining to civil and commercial matters are required to be taken up with the Ministry of Law and Justice finalizes and notified treaties and arrangements with other countries as per the relevant statutory provisions in the Code of Civil Procedure.

5 It is, therefore, requested that all requests for seeking assistance from a foreign country including the service of all judicial processes or other documents be directly submitted to the Ministry of Home Affairs in criminal law matters and to the Ministry of Law and Justice in the civil and commercial matters."

15 We find that in large number of matters

notices/processes are sent by this Court to foreign countries either through the Ministry of Home Affairs or through the Ministry of Law and Justice. However, there is no arrangement made by the said Ministries to communicate to the respective Registrars of the High Courts about the progress made in service of notices/orders. We, therefore, propose to direct both the Ministries to appoint Nodal Officer so that the Registrars or Courts can contact the said Nodal Officer to get the requisite information about the service of process/notice.

16 We dispose of the application by passing the following order:

(I) The respondent shall hand over the temporary custody of the son Mihir to the applicant from 10th August 2017 to 19th August 2017 (both days inclusive) by bringing him to India;

(II) Certified copy of this order along with a true copy of the Civil Application shall be forwarded by the Registrar (Judicial-I) to the agency of the Central Authority, U.S.A at following address:

Process Forward International
633, Yesler Way, Seattle, WA 98104, USA

(II) If any fees are required to be paid, the applicant shall pay the same;

(III) Notices be issued to the respondent

along with a true copy of this order at the addresses mentioned in the cause title of this Civil Application returnable on 7th August 2017 calling upon the respondent to remain present in this Court along with minor son Mihir at 11.00 on that day. Notice along with a certified copy of this order be forwarded immediately by the Registry to the Ministry of Law and Justice, Department of Legal Affairs, Government of India with a request to the Department of Legal Affairs to take necessary steps as per the circular dated 30th April 2010;

(IV) We direct the Department of Law and Justice of the Government of India to take up the matter with the Central Authority of the North Carolina State, USA in terms of Article 5 of the Treaty signed on 17th October 2001 between the Government of the United States of America and the Government of the Republic of India on mutual legal assistance in criminal matters in as much as the Article 5 in the Treaty applies to the execution of requests. The Central Authority be requested to execute this order;

(V) The applicant is free to take up the matter directly with any authority in USA for implementation of the order;

(VI) We direct the Union of India to nominate Nodal Officers in the Ministry of Home

Affairs and the Ministry of Law and Justice who will be responsible for ascertaining the progress made in service of notices/ processes sent by various Courts in India. He will be responsible for providing information to the Registrars of various High Courts as regards progress made in service of notices/ processes/ summonses / orders. The names of the Nodal Officers be communicated to the Registrars of all the High Courts within one month from today;

(VII) Compliance with these directions shall be reported by the Union of India on 14th August 2017;

(VIII) Civil application is disposed of on above terms.

(ANUJA PRABHUDESSAI, J.)

(A.S.OKA, J.)