

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3623 OF 2017

Aditi Dinesh Chandel ...Petitioner

Versus

Dinesh Chandel ...Respondent

....

Mr.Abhijit D. Sarwate, Advocate for the Petitioner.

Ms. Saloni M. Ghule, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 26th APRIL, 2017

P.C.

1. Heard Mr.Abhijit Sarwate, learned counsel for the petitioner and Ms.Saloni Ghule, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 20.3.2017 passed by the learned Judge, Family Court No.2, Pune below Exhibit-95 in P.A. No.1414/2015. By that order, the learned trial Judge allowed the application made by the respondent at Exhibit-95 and directed the petitioner herein to provide access to child Karishni, aged about 10 years, to the respondent from 25.3.2017 to 28.3.2017. The respondent was

permitted to pick up the child from the gate of the petitioner's building at 8:00 a.m. on 25.3.2017 and to drop back the child at same place at 6:00 p.m. on 28.3.2017. If the respondent wishes to take the child out of Pune during the access time, the petitioner was permitted to accompany the child subject to the respondent making arrangement for accommodation, food, travel etc. of her. The respondent was also directed to provide detailed itinerary to the petitioner well in advance before starting the journey. The learned trial Judge also issued other directions.

3. Rule. Ms.Ghule waives service on behalf of the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. In support of this Petition Mr.Sarwate submitted that the respondent had filed application Exhibit-34 seeking 50% of the Diwali Vacation to daughter Karishni. By order dated 27.10.2016, the learned trial Judge directed the petitioner to provide access to the respondent from 2.11.2016 to 5.11.2016

between 10:00 a.m. and 5:00 p.m., amongst other directions. In paragraph-11, the learned trial Judge referred to the allegations that the respondent has compelled the child to consume vibhiti/sacred ash provided by the tantrik baba, it would not be appropriate at this stage to ask the petitioner to provide overnight access to the child. The learned trial Judge further recorded that the petitioner is ready to provide regular access on 1st and 3rd Saturday in the Children Complex, Family Court, Pune.

5. Mr.Sarwate submitted that by order dated 23.12.2016, the learned trial Judge allowed the application Exhibit-46 made by the respondent for Christmas vacation access. In paragraph-5 of that order, the learned trial Judge considered the transcriptions of the conversation of the respondent with the child which was produced along with Exhibit-55 showing that the child was taken to Mr. R.P. Singh at Air Force Station. He submitted that the child was taken to a third unknown person. The respondent also produced the photographs, transactions, SMS to show that even the petitioner follows one astrologer. Reliance was also placed upon the photographs along with list Exhibit-56 to show that the child was happy with the father. The

trial Court refrained to go into details of this aspect as the petitioner pointed out her readiness to provide access during the day time. The learned trial Judge observed that “let the respondent establish bonding with the child in a proper way and also create faith in the mind of the petitioner that the daughter is safe during access time, then overnight access can be considered.” The learned trial Judge though did not interview the child, allowed the application and directed the petitioner to provide access from 10:30 a.m. to 6:00 p.m. on 27.12.2016 to 29.12.2016 subject to condition that he shall not take the child to any stranger during the access time, he shall spend quality time with the child and he shall see that pending disputes between him and his wife are not discussed in the presence of the child, with child or within an ear shot of the child.

6. Mr.Sarwate submitted that while passing the impugned order, the learned trial Judge did not interview the child. He relied upon Section 26 of the Hindu Marriage Act, 1955 (for short, 'Act') in support of this submission.

7. Mr.Sarwate submitted that in paragraph-8 of the impugned order, the learned trial Judge referred to the order

dated 27.10.2016 wherein it was observed that overnight access cannot be granted. The learned trial Judge observed that in the earlier order the Court did not allow over night access. Since that order till this date the time has changed, some access has happened and, therefore, the Court has to consider today's position and accordingly overnight access was granted. The learned trial Judge, however, did not refer to any change in circumstances. He submitted that Karishni have summer vacations from 6.5.2017 to 6.6.2017. The petitioner is ready and willing to offer access for first 15 days commencing from 6.5.2017 between 10:00 a.m. and 5:00 p.m. Mr.Sarwate has taken me through email dated 23.3.2017 sent by the respondent attaching therewith itinerary. As per the itinerary of the second day i.e. 26.3.2017 the respondent proposes horse-riding at Armoured Center. He submitted that that said place is opposite to Abid Kadri's Clinic in Ahmednagar. He has invited my attention to the chat between the parties of 23.9.2012 and in particular from 8:12 a.m. onwards.

8. Mr. Sarwate submitted that for the sake of safety of the child, overnight access should not be given to the respondent. He further submitted that the respondent has not paid the

maintenance as ordered by the trial Court. He, therefore, submitted that the impugned order deserves to be set aside or in any case deserves to be modified.

9. On the other hand, Ms.Ghule supported the impugned order. She submitted that insofar as the argument about child's safety is concerned, the impugned order itself permits the petitioner to accompany the respondent and the child. The respondent is ready and willing to make arrangement for accommodation, food, transport etc. for the petitioner. She submitted that the learned trial Judge, after considering the order dated 27.10.2016 and having regard to the fact that after that order access had taken place, thought it appropriate to give overnight access to the respondent. She further submitted that the reliance placed on the conversation dated 23.9.2012 is not the subsequent development. She has also invited my attention to the conversation between the parties to contend that the petitioner wanted to live with the respondent and the petitioner loves her husband and she wants blessings from her father. Though the application Exhibit-95 was made on 8.3.2017 and on the same day the learned trial Judge passed order 'Other side to say', the say was filed on 17.3.2017. In application

Exhibit-95 the prayer was made for granting temporary custody from 11.3.2017 to 2.4.2017. By the time, the application was decided on 20.3.2017, substantial period, namely, half of the vacation, was over. She further submitted that the respondent made application for certified copy on 24.3.2017 and received the certified copy on the same day. As against this, though the certified copy was received by the respondent on the very day of making application, the petitioner claims to have made application for certified copy on 21.3.2017 and claims to have received the same on 30.3.2017. She further submitted that she made attempts to move this Court for vacating ad-interim order passed on 24.3.2017 on the ground that the reasoned order is available. She, however, not succeeded in obtaining appropriate order. She submitted that having regard to the conduct of the petitioner, no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The matter was heard on 10.4.2017 and was placed on 12.4.2017 at 2:35 p.m. in Chamber so as to interview the child Karishni. Accordingly I have interacted with

Karishni as also the respondent and their Lawyers on that day. I have also interviewed the petitioner and the respondent today at 10:00 a.m. and it is transpired that the petitioner is not ready and willing to co-habit with the husband.

11. Section 26 of the Act reads thus :

“26. Custody of children.-- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

12. A perusal of Section 26 shows that the Court is empowered to pass such interim orders and make such provisions as it may deem just and proper with respect to the

custody among others, consistently with the wishes of the child, wherever possible. During the course of interview with the child, I found that Karishni is a bright and intelligent child. She is 10 years old. After interviewing the child, I found that she has reservations in meeting the father. Even if I accept the submission of the respondent that there is some element of tutoring the child, it cannot be ignored that Karishni is 10 years old and is capable of expressing her opinion freely. Apart from that a perusal of the impugned order shows that the learned trial Judge did not consider the order dated 23.12.2016 passed on application Exhibit-46 made by the respondent for Christmas Vacation access. In paragraph-5 of the order dated 23.12.2016, the learned trial Judge has observed thus :

“5. I think let the respondent establish the bonding with child in a proper way and also create faith in the mind of petitioner that daughter is safe during access time, then overnight access can be considered.”

13. A perusal of the impugned order does not indicate that the learned trial Judge has ascertained whether the respondent has established bonding with the child so as to create faith in the mind of the petitioner that the daughter is safe during

access time and then only overnight access can be considered. The impugned order is totally silent as regards the order dated 23.12.2016. That apart, the learned trial Judge also did not interview the child as per Section 26 of the Act. The learned trial Judge also did not discuss the changed circumstances after the access order on 23.12.2016. In view thereof as also considering the totality of the circumstances, I do not find that the learned trial Judge was justified in giving overnight access of the child to the respondent. As observed by the trial Court in paragraph-5 of the order dated 23.12.2016 let respondent establish bonding with the child. Let the child feel confident that she is safe in the company of her father. This will also create faith in the mind of the petitioner that her daughter is safe during access time. For that purpose, it is necessary to give access during Summer Vacation. Mr. Sarwate states that the petitioner is present in the Court and she has no objection for providing access for 15 days during Summer Vacation commencing from 6.5.2017. In view thereof, the impugned order is set aside and stands substituted in the following terms:

- (i) The petitioner shall provide access to child Karishni to the respondent from 6.5.2017 to 20.5.2017. The

respondent shall pick up the child Karishni from the gate of building of the petitioner at 10:00 a.m. on 6.5.2017 and shall drop back the child at the same place at 5:00 p.m. on 6.5.2017. This arrangement shall continue from 7.5.2017 to 20.5.2017.

- (ii) Both the parties are advised not to discuss any pending issues with child, in the presence of the child, or within the earshot of the child.
- (iii) Both the parties shall see that the access will be an enjoyable, cherishable for the child.
- (iv) The petitioner shall prepare the mind of child for the access.
- (v) Application Exhibit-95 stands disposed of.
- (vi) Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)