

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

WRIT PETITION NO.12555 OF 2016

**Cyrus Noshir Devgadhwala : Petitioner.
versus
Mrs. Armin Cyrus Devgadhwala : Respondent.**

**Ms. Sanober Nanavati for the Petitioner.
Ms. Shirin Merchant i/by Mr. Hitesh P Vyas for the Respondent.**

**CORAM : R. M. SAVANT, J.
DATE : 14th March 2017**

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 17/10/2016 passed by the learned Principal District Judge, Pune by which order the application filed by the Respondent- wife for interim custody of the child Arish came to be allowed and the directions as contained in the operative part of the impugned order came to be issued. The said directions for the sake of ready reference are reproduced herein under :-

“Pending the decision of Civil Suit No.10 of 2016, interim custody of child Arish shall be handed over to plaintiff from today i.e. 17th October, 2016.

The defendant shall hand over custody of child Arish to plaintiff.

The plaintiff shall take utmost care of Arish by all means.

The Plaintiff shall allow the defendant to have access to Arish on every 2nd and 4th Sunday of each English

Calender month for the whole day at Pune between 10.00 a.m. to 6.00 p.m.

He shall deliver custody of Arish to plaintiff on every 2nd and 4th Sunday before 6.30 p.m.

The defendant is at liberty to have full access of Arish along with his parents, if he so desires.

The defendant shall not take away Arish under any pretext to Surat or at his native place.

The plaintiff shall allow free access of Arish to the defendant without imposing any conditions and creating hurdles.

The plaintiff and the defendant shall not make any attempt to tutor or brain wash Arish against each other.

During visits on 2nd and 4th Sunday of each month, the defendant shall be in continuous contact with the plaintiff confirming his location in the city of Pune.”

2 The Petitioner herein and the Respondent herein would be referred to as per their status in Civil Suit No.10/2016 filed by the Respondent-wife for divorce.

3 The Defendant husband and the Plaintiff -wife were married on 05/12/2011 at Surat according to Parsi rites and rituals. Out of the said wedlock son Arish was born on 07/05/2013. The Plaintiff and the Defendant are presently estranged. The Plaintiff has filed a Petition i.e. Civil Suit No.10 of 2016 for divorce under Section 32(dd) of the Parsi Marriage and Divorce Act, 1936 (for short “the said Act”). The grounds made out by the Plaintiff are of

physical and mental torture at the hands of the Defendant. In the said Civil Suit the wife has filed the instant Application (Exhibit 5) seeking interim custody of the child Arish and interim maintenance of Rs.50,000/- per month from the Defendant-husband. However, at the hearing of the said Application (Exhibit 5) the learned counsel appearing for the Plaintiff – wife made a statement that at present the Plaintiff wife does not press for grant of interim maintenance but would only prosecute the Application in so far as the custody of son Arish is concerned. The case made out by the Plaintiff wife in the said Application (Exhibit 5) was that child Arish was forcibly taken away from her custody by the Defendant husband and the child Arish being a suckling child needs breast feeding as well as natural love and affection of the mother. It was also the case of the Plaintiff wife that the Defendant husband did not allow Arish to talk to the Plaintiff ever since she had come to Pune to her parents house for urgent medical treatment.

4 The case of the Plaintiff was denied by the Defendant husband. The allegations made by the Plaintiff were denied as hearsay, false, baseless, without any substance.

5 It seems that the Defendant husband has filed an Application in the said Civil Suit for transfer of the proceedings to Surat on the ground mentioned therein namely that the Jury is available at Surat. In the said

application filed on 15/10/2016, the jurisdiction of the Court of the learned Principal District Judge, Pune to entertain the said Civil Suit as well as the interim application filed by the Plaintiff wife was not questioned. The Defendant husband has also filed his Written Statement on 15/10/2016 in which Written Statement also the jurisdiction of the Court at Pune to entertain the proceedings was not questioned.

6 The Trial Court i.e. the learned Principal District Judge, Pune, which is the designated Court, considered the said interim application for the custody of child Arish filed by the Plaintiff and allowed the same by the impugned order dated 17/10/2016. A reading of the said order discloses that the Defendant husband has been directed to hand over the custody of the child Arish to the Plaintiff. The Trial Court has thereafter modulated the access granted to the Defendant husband in respect of the days and time on which the said access is to be granted. Hence though the interim custody of the child is granted to the Plaintiff – wife, the Defendant – husband has also been granted access to the child.

7 The principal contention of the learned counsel for the Petitioner herein i.e. the Defendant-husband Ms. Nanavati is that the Court at Pune i.e. the learned Principal District Judge, Pune did not have jurisdiction having regard to Section 29 of the said Act and therefore the order passed by the

learned Principal District Judge, Pune is one which is passed without jurisdiction. The learned counsel for the Petitioner - husband sought to highlight the conduct of the Respondent – wife in so far as child Arish is concerned. It was the submission of the learned counsel for the Petitioner that the said child Arish has been abandoned by the Plaintiff.

8 Per contra, the learned counsel appearing on behalf of the Respondent – wife Ms. Merchant would contend that the issue of jurisdiction was neither raised in the application filed for transfer of the proceedings nor in the Written Statement. It was the submission of the learned counsel for the Respondent that if the Petitioner husband wanted to question the jurisdiction of the Court at Pune, then an application analogous to an application under Section 9A of the Code of Civil Procedure was required to be filed by the Petitioner husband questioning the jurisdiction of the Court at Pune.

9 Having heard the learned counsel for the parties, I have considered the rival contentions. In my view, having regard to the nature of the order that is passed by the Trial Court, there is no merit in the above Writ Petition. In so far as the question of jurisdiction is concerned, as indicated above, neither in the application filed by the Defendant – husband for transfer of the proceedings nor in his Written Statement, the jurisdiction of the Court at Pune was questioned on the touchstone of Section 29 of the said Act. If the

jurisdiction were to be questioned on the touchstone of the said provision, then the need for the Respondent wife i.e. the original Plaintiff would have arisen to file an application on the ground that the Court at Pune has jurisdiction. By not raising the ground of jurisdiction before the Trial Court, the Defendant husband can be said to have submitted to the jurisdiction of the Court at Pune in so far as the adjudication of the interim application for custody is concerned.

10 The issue that arises is, whether the custody of child Arish was required to be granted to the Plaintiff. As indicated above the child Arish is born in the year 2013 and is therefore around 4 years of age. The application was founded on the ground that the child Arish is a suckling child and that the Plaintiff mother is required to breast feed him as also that the child Arish should get the love and affection of the mother which is very necessary at the said tender age. The learned Principal District Judge has also observed that the Plaintiff is a well qualified woman and can take good care of Arish. Having regard to the said factors, the impugned order passed by the Trial Court granting interim custody of the child Arish to the Plaintiff i.e. the Respondent wife who is the natural guardian cannot be said to suffer from any illegality or infirmity for this Court to exercise its writ jurisdiction. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]