IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5335 OF 2018

Nameetha Nikhil … Petitioner
Vs.
Nikhil Chandy Thomas Thonipara … Respondent

Mr. Anil D'Souza for Petitioner.
Mr. Narayan B. Suvarna a/w. Ms Radhika Mehta for Respondent.

CORAM : R. G. KETKAR, J.
DATE : MAY 2, 2018

P.C. :

Heard Mr. D'Souza, learned Counsel for petitioner and Mr. Suvarna, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 07.10.2017 passed by the learned Principal Judge, Family Court, Mumbai in Interim Application No.59 of 2015 (exhibit-19) in Petition No.A-986 of 2014. The petitioner is aggrieved only in respect of clause 3 of the operative part of the impugned order, which is to the following effect:

> "3. The numbers of night for overnight access in Mumbai will be increased for Christmas and Summer Vacation."

3. Mr. D'souza submitted that instead of access in Mumbai, petitioner wants access at Kerala. He submitted that petitioner will collect the children from Mumbai and will have overnight access at Kerala in terms of clause 3 of the operative part of the impugned order instead of Mumbai. He submitted that in paragraph 2 of the impugned order, the learned trial Judge noted the submission of the respondent husband that he is not against the access in Mumbai but he is not ready to allow the petitioner herein to take the children to Kerala. Though the learned trial Judge noted the submission of the respondent herein in

paragraph 2, no finding is given on this aspect. He, therefore, submitted that the impugned order may be set aside thereby directing the learned trial Judge to reconsider the prayer made by the petitioner in that regard.

4. On the other hand, Mr. Surana has supported the impugned order. He has invited my attention to -

a. Consent terms dated 16.06.2016.

b. Child Interview Report dated 19.10.2016;

c. Orders dated 21.10.2016 and 22.12.2016 on the application below exhibit-19;

d. Paragraph 5 of the impugned order; and

5. He submitted that time and again, petitioner has prayed for the relief of granting access at Kerala and the same was turned down earlier. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the consent terms dated 16.06.2016 shows that both the minor daughters namely, Johanna Elizabeth Nikhil, aged about 8 ½ years and Rianna Rose Nikhil, aged about 5 years as on 16.06.2016 were / are residing with the respondent. Clause 3 thereof provided that the petitioner herein shall have access of both minor daughters once in a month i.e. second Thursday of every month between 5.00 p.m. and 7.00 p.m. at Diamond Garden, Chembur (East), Mumbai - 400 071. Clause 5 thereof recorded that respondent-father will handover both the minor daughters to the petitioner-mother on the date / place as mentioned earlier. After the access is over, petitioner-mother will handover both the minor daughters to the respondent-father at the same venue

mentioned in clause 3.

7. A perusal of the Child Interview Report of the Marriage Counsellor dated 19.10.2016 shows that the daughters expressed their willingness to go to Kerala with their father, grand parents and uncle and they unanimously stated that they did not wish overnight access with the mother. The elder daughter Johanna further clarified that if they have to meet the petitioner, they will meet her in Diamond Garden. The observation of the Marriage Counsellor shows that both the daughters were firm in joint meeting and stated that they would not stay with the petitioner. It is in that context, the Marriage Counsellor observed that regular access might help in developing relation between daughters and the petitioner. A perusal of the order dated 22.12.2016 shows that if the petitioner is willing to stay in Mumbai for access then 50% day access needs to be given to her on the working days in Children's Complex of the Family Court. Accordingly, the learned Judge of the Family Court directed the respondent to give day access to the petitioner on working days to the extent of 50%, thereby meaning, four days from 24.12.2016 to 31.12.2016. If these days are working days, the place of access shall be in the Children's Complex of the Family Court from 12.00 noon till 4.00 p.m. and if it falls on holidays, at the time and place stated by the petitioner in Mumbai. The learned trial Judge also noted that the petitioner stated that she wants to take daughters to Kerala and is not willing to take access in Mumbai. Considering this aspect, the learned trial Judge observed that no access shall be held during this period.

8. Thus, consistently, the learned trial Judge permitted access of the daughters in Mumbai and not in Kerala. It is in that context, in paragraph 5 of the impugned order, the learned trial Judge observed that petitioner is pressing for the same reliefs again and again. In view thereof, I do not find merit in the submission of Mr. D'Souza that the

learned trial Judge did not deal with the submission made by the respondent-father in paragraph 2 of the impugned order. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab