

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION (ST) NO. 15136 OF 2018**

Ujwala Appaji Bongale	]	Petitioner
Vs.		
Appaji Maruti Bongale	]	Respondent

Mr. A.B. Tajane, for petitioner.
Mr. Uday Warunjikar, for respondent.

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CORAM : R.G. KETKAR, J.

.....
DATE : 4TH JUNE, 2018.

P.C.

Heard Mr. Tajane, learned Counsel for the petitioner and Mr. Warunjikar, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner/wife has challenged the judgment and order dated 21st May, 2018 passed by learned I/C Principal Judge, Family Court, Solapur below Exhibit 27 in D. No. 4 of 2018. By that order, the learned trial Judge has directed the petitioner herein to hand over custody of the minor son Nisarg to the respondent/father for a limited period i.e from 22nd May, 2018 to 11th June, 2018.

3. In support of this Petition, Mr. Tajane strenuously contended that the impugned order is not in the interest of minor son Nisarg. The learned trial

Judge while passing the impugned order has not considered that welfare of the child is paramount consideration in such type of matters. He has invited my attention to medical treatment given to the minor son and in particular KEM Hospital's TDH Rehabilitation Centre, Morris Child Development Centre;

- [1] dated 16th July, 2017 showing the problem of Nisarg of poor attention span, difficulty in reading and writing.
- [2] dated 9th November, 2016 dealing problem namely fearfulness, poor attention, unclear speech, very sensitive.
- [3] Medical certificate dated 26th September, 2017 issued by Dr. M.R. Bhalerao showing that minor son Nisarg is suffering from phobia.

He submitted that in the criminal proceeding the learned Magistrate has recorded a finding that the petitioner/wife is treated with cruelty by the respondent/husband. He further submitted that by order dated 11th May, 2017, the respondent is directed to pay maintenance of Rs. 10,000/- per month to the petitioner/wife and Rs. 3,000/- per month to the minor son Nisarg from the date of the order. Till date, he is in arrears of Rs. 1,23,000/-. He submitted that in the Petition, it is specifically asserted that the findings recorded by the learned trial Judge in paragraph 7 of the impugned order are incorrect. In fact, minor child Nisarg is not ready and willing to go to the respondent/father. For all these reasons, he submitted that impugned order requires to be set aside.

4. On the other hand, Mr. Warunjikar submitted that by the impugned order, the learned trial Judge directed the petitioner to give custody of the child Nisarg to the respondent for the period from 22nd May, 2018 to 11th June, 2018. Till date, she has not complied the said order. He submitted that

the order also records that the School where Nisarg is studying is re-opening on 15th June, 2018. Order also records that there is no dispute regarding the same. He submitted that for last six months respondent has not even met his son Nisarg. He submitted that prior to six months, the petitioner was also residing in Pune and child was studying in Pune. She, however, abruptly left Pune and got son Nisarg admitted in School at Solapur. He submitted that though the custody was to be given between 22nd May, 2018 and 11th June, 2018, much portion of that period is over. In fact, the respondent had filed application on 21st May, 2018 i.e on the same date when impugned order was passed alleging that the respondent will not properly look after the child. As she has to comply the order, the petitioner insisted that the respondent should give undertaking to the effect that he will return the child to her on 11th June, 2018. He, therefore, submitted that the petitioner having accepted the impugned order cannot challenge the same. He submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the learned trial Judge directed the petitioner herein to give custody of the minor son Nisarg from 22nd May, 2018 to 11th June, 2018. Today, we are on 4th June, 2018. In other words, the petitioner has not handed over custody of the child from 22nd May, 2018 to 4th June, 2018. Hardly, one week's period is left. A perusal of paragraph 7 of the impugned order shows that the learned trial Judge had interacted with the child in her chambers. She also took the child in confidence and inquired from the child if he would like to spend remaining vacation with his father. The child has shown his readiness to go to the father. The respondent being father is also having equal right over the child and the child needs love, care and affection of both the parents. Every child has a fundamental right to get the love and affection from both the parents

engaged in a marital discord. Depriving a child of the love and affection of both parents is not in the interest of the child. The learned trial Judge has considered interest of the child and at the same time has permitted the petitioner to contact the child on phone once in the morning and once in the evening. Learned trial Judge has also permitted the petitioner to meet the child during this period, once or twice for two hours by giving prior intimation to the respondent.

6. Mr. Tajane submitted that son Nisarg is under treatment. Even the same treatment can be given by the respondent/father at Pune. I, therefore, do not find any merit in the submission of Mr. Tajane that the impugned order is not in the interest of the minor son Nisarg and that welfare of the minor child is not taken care of by the learned trial Judge. Mr. Tajane submitted that findings recorded by the learned trial Judge in paragraph 7 are not correct. It is not possible to accept this submission. The learned trial Judge has recorded that she had interacted with the child in her chambers where child has shown his willingness to go to the father. If at all, the petitioner was of the view that the findings recorded in paragraph 7 of the impugned order are not correct, appropriate course open to the petitioner was to file Review Petition. Having chosen not to file Review Petition, the petitioner cannot be allowed to contradict the findings recorded by the learned trial Judge in paragraph 7 of the impugned order.

7. In so far as order of maintenance is concerned, Mr. Warunjikar upon instructions from the respondent, who is present in the Court assures that on or before 15th June, 2018, the respondent will deposit Rs. 1,23,000/- in Family Court, Solapur under intimation in writing to the petitioner and her Advocate. Statement made on instructions is recorded.

8. In view thereof, for the reasons recorded in paragraph 7 of the impugned order, no case is made out by the petitioner. Petition fails and the same is dismissed. Parties to act upon an authenticated copy of this order

9. List the Petition for reporting compliance on 19th June, 2018.

[R.G. KETKAR, J.]