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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6345 of 2017
WITH
WRIT PETITION No. 6349 of 2017.

Ms Anupama Sharma ..Petitioner/Orig.Petitioner

Vs

Vikram Kamal Jagtiani ..Respondent.

Mr Shorique Nachana i/by Bhawe & Co. for the petitioner in both writ petitions.

Mr S.M. Gorwadkar, i/by Ms Radhika Mehta for Respondent in both the writ petitions.

CORAM : SMT.BHARATI H.DANGRE, J.
27th March, 2018.

P.C. :

1 The present petition is filed by the petitioner who is aggrieved by the impugned order dated 23/5/2017 passed by the Judge, Family Court in the proceedings under the Guardianship Petition bearing No. D-97 of 2013 under the Guardianship Act. The petition revolves around several facts

and events. However, in order to determine the controversy arising to the impugned order, this Court need not go into the details of the events which resulted into filing of the proceedings.

It would be suffice to mention that the proceedings were initiated by the petitioner on 16/11/2013 in the Family Court seeking permanent and sole custody and guardianship of the minor daughter in India. It is the specific case of the petitioner that she and her husband are citizens of USA and the marriage between the parties was solemnized on 4/10/2008. A girl child was born out of the wedlock on 9/8/2009 and the petitioner thereafter makes allegations about harassment, both physical and mental at the hands of the respondent and the chronology of the events mention about filing of the complaints by her in the USA.

In September 2009 the petitioner returned to India along with daughter and since then she is residing in India on the address mentioned in clause title of the petition and it is the specific contention of the petitioner that she is residing on the

said address since her return to India and that has become her ordinary and permanent place of residence. The petitioner has also instituted proceedings under the provisions of the Protection of Women on Divorce Act, 2005 in the Metropolitan Magistrate's Court, Girgaon at Mumbai where she had sought several interim reliefs.

2 The respondent/husband had raised the issue of jurisdiction of Family Court, Mumbai, to entertain, try and dispose of the Guardianship Petition and the Family Court by order dated 1/12/2015 had passed an order, holding that it has the jurisdiction to entertain the guardianship petition. Against the said order, review petition came to be preferred which came to be rejected and subsequent thereto writ petition has been instituted before the High Court by the respondent-husband which is pending for adjudication.

3 The present petition, however, arises out of an application being preferred in Petition No. D-97/13 in the Family Court of Bandra. An application marked Exh.69 was preferred by the respondent husband with the following

contents.

“1. Today the above matter is on board of this Hon'ble Court for say to exhibit.

2. That as the petitioner failed to furnish her detail address till date, therefore, New York, U.S.A. Court through Ministry of law and Justice Dept. of legal affair Judicial section) unable to serve upon the proceeding filed by the Respondent before New York, U.S.A. Court. The Bailiff attempted thrice to serve upon the petitioner, however, the petitioner could not be served because she was not available on given address. The respondent therefore pray that this Hon'ble Court be pleased to allow the Respondent through his Advocate to serve the proceeding of New York, U.S.A. Court upon the petitioner in Court.”

The said application was moved on 25th April, 2017.

The specific case of the respondent is that he had instituted proceedings in the Court at New York, U.S.A. and he made several attempts to serve the respondent in the said proceedings, however, the service of notice was not effected on the petitioner, which constrained him to move such an application before the Family Court, Mumbai. On the said application the learned Family Court passed the following order :-

“Heard both side. Considering the statement of both parties, it appears that this Court has granted status-quo till decision of application below Exh.48.

Nature of status-quo is specific, i.e. relating to the custody of child.

It appears that this Court has directed to the petitioner to file her registered address but till date she has not filed the same.

In above circumstances, petitioner is directed to remain present before the Court and filed his registered address as well as she shall accept the summons of USA Court.

Matter be kept for hearing on next date.”

By virtue of the said order, the petitioner has been directed to remain present before the Family Court and file registered address of the petitioner and she is also directed to accept the summons of the proceedings of the USA Court. It is this order which hurts the petitioner and the present petition has been instituted. The learned counsel for the petitioner has argued the petition extensively and he would submit that the methodology adopted by the Family Court for service the

summons to the petitioner of the proceedings which are pending in the Court outside India is unknown to law and since under the Family Courts Act, the Court is duty bound to follow the procedure as prescribed in the Civil Procedure Code and the proceedings are to be carried out in accordance with the procedure contained in the said Code. He would submit that the procedure adopted by the Family Court is not germane to the provisions contained in the said Code of Civil Procedure.

He has specifically referred to the Order VI Rule 14 (a) of the Code and he would also invite my attention to Order V Rule 22 by which he would argue that in case of any summons to be served within the Presidency Town of Calcutta, Madras and Bombay are to be served within any such limit, it is the Small Cause Court through which the summons are required to be served. He would also invite my attention to the Hague Convention of Service of Extra-judicial documents in civil and commercial matters. He would specifically place reliance on Article no.5 and Article 6 of the said Convention and he would

submit that since India is signatory to the said Convention along with USA, the Convention binds both the countries and in such circumstances the Article 2 which requires every contracting State to designate a Central Authority who would undertake to receive request for service coming from the other State and provisions of Article 3 to 6 have to be strictly followed. He would further place reliance on Article 5 which provides the manner in which the Central Authority of the State shall serve the documents or shall arrange the service by an appropriate agency. In the backdrop of the said convention, it is the argument of learned counsel for the petitioner that in the light of the said convention which is binding on the Courts in India, the method of service by the Family Court thereby coercing the petitioner to accept the summons by securing her presence in the Court on the date of hearing is not the manner in which summons are permitted to be served and specifically in respect of summons from the Court outside the country. He would, thus, submit that the order impugned did not respect the said convention and adopts methodology which is clearly in

contravention to the International Convention as well as the provisions contained in the Civil Procedure Code, applicable to the courts in the country and in such circumstances he would pray for quashing and setting aside of the said order being unsustainable in law.

4 Per contra, the learned Senior Counsel Mr Gorwadkar appearing for the respondent would not dispute about the existence of International Convention. But he would submit that it is permissible for the Family Court to adopt a procedure which is convenient to the parties and he would emphasize on Section 10 of the Family Courts Act and specifically makes a reference to Section 3 which empowers the Family Court to devise its own procedure notwithstanding sub-Section (1) and (2), while for deciding the matters before the Family Courts. The learned counsel for the respondent would argue that the petitioner has failed to demonstrate any prejudice and in the absence of any prejudice the claim cannot be entertained. He also refers to a judgment of this Court

delivered by the Division Bench in Writ Petition (L) No. 119/2014, in the petition filed by the petitioner wife where the Court had rejected the claim of the petitioner. He would take this Court through the said judgment and he would submit that the said Court had referred to the Hague Convention and specifically to Article 3 of the said Convention which is ratified by India and though he did not dispute about applicability of the said Convention, he would specifically place reliance on Article 10 which carves out a proviso to the effect that if the State of destination does not object present function shall not interfere with a) freedom to send judicial documents, by postal channels, directly to persons abroad, b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination and c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination.

In this backdrop, he would submit that in India the mode of service by personal service is well accepted mode and he did not find any fault in the order passed by the learned Judge, directing the wife to remain present and accept the service of summons from US Court.

5 The Family Court Act of 1984 provides for the procedure to be followed by the Family Court and by virtue of sub-Section (1) of Section 10 of the Act of 1984, provisions of the Code of Civil Procedure and of any other law for the time being in force are applicable to the suits and proceedings before the Family Court and for the purposes of said provisions of the Code, a Family Court is deemed to be a Civil Court and possesses all the powers of such Court. Only exception is carved out in respect of proceeding of Chapter IX of the Code of Criminal Procedure before a Family Court where the Code of Criminal Procedure is applicable. The Code of Civil Procedure enumerates the procedure which is to be followed while trying the proceedings falling within the jurisdiction of the Family

Court and all these proceedings are governed by the procedure enumerated in the Code.

6 Section 27 of the Code deals with the service of summons to the defendant and it provides wherever suit is instituted a summons may be issued to the defendant to answer the claim and it may be served in the manner prescribed. The Code of Civil Procedure also contains the provision for CPC where the defendant reside in another State and Section 29 of the Code provides for service of foreign summons. The Order V specifically deals with mode of service and Order V Rule 21 to Rule 25 specifically deals with service of summons where the defendant reside within the jurisdiction of another Court. Reliance placed on Rule 22 of Order V assumes significance. Rule 22 of Order V reads thus :-

22. Service, within presidency towns, of summons issued by courts outside.- Where a summons issued by any court established beyond the limits of the towns of Calcutta, Madras and Bombay is to be served within any such limits, it shall be sent to the

court of small causes within whose jurisdiction it is to be served.

7 The accepted mode of service under the CPC which is enumerated in the Order V do not recognize manner and method of service as adopted by the Family Judge. The perusal of the impugned order would reveal that the Judge, Family Court has observed that the Court has directed on the earlier date, the petitioner to file a registered address but till date she has not filed address. It is not in dispute that pursuant to the said order, the petitioner has filed affidavit before the Court submitting her address and the said affidavit has been placed before the Family Court on 3/8/2017 itself. In the said affidavit, the petitioner had mentioned her address “ C/o Ms. Shumona Goel, Apt. No. 6, Sargent House, J.A. Allana Road, Colaba, Mumbai 400 005”. The Family Court therefore had the address of the petitioner before it and at the most in the absence of such address being supplied, the Family Court could have issued orders to comply with directions. However, the Family Court takes a step ahead and directed her to remain present in the

Court and accept the summons of USA Court. As it is already stated above, the Code of Civil Procedure, specifically in Order V do not permit such a mode of service and this is not acceptable mode of service. It rather amounts to the petitioner being coerced to accept the said summons. Once address of the petitioner is on record, the Family Court could not have pressurized the petitioner to secure her presence and accept the summons. By doing so, the learned Judge of the Family Court has completely ignored the Hague Convention on the service of abroad, judicial and extra-judicial documents in civil or commercial matters.

8 The convention of service abroad of judicial and extra judicial documents in civil or commercial matters is binding on the courts in the country since India is a signatory to the said convention and it had only expressed its reservations on Article 10, 15 and 16 of the said Convention. Being a signatory to the convention, which desires to create appropriate means to ensure that the judicial and extra judicial

documents to be served abroad and desiring to improve organizations of mutual judicial assistance by simplyfying and expediting the procedure, the courts in the country are duty bond to respect the said convention.

9 Perusal of the Article 2 to Article 10 of the said Convention would reveal that it has recognized a designated Central Authority which is assigned with the task to receive the request for service coming from other Contracting States and to proceed in conformity with the provisions of Article 3 to 6. It is permissible for every State to designate a Central Authority in conformity with its own law. Article 3 then proceeds and sets out that the Authority or the Judicial Officer competent under the law of the State in which the documents originate shall forward it to the Central Authority of the State addressed a request conforming to the model annexed to the convention, without any requirement of legislation or equivalent formality.

Article 5 then proceeds to set out the manner in which the documents are required to be served and on

tendering a proof thereof, it would be considered to be a valid service of the judicial and extra-judicial documents in any civil or commercial matter. Though reliance has been placed on article 10 which carves out a proviso in favour of the State of destination, to the effect that the Convention would not interfere in the circumstances mentioned in the clause, it cannot be construed and read that this completely surpasses the procedure and the mechanism that has been prescribed in Article 2 to 5 of the Convention. The Article 10 at the most would be construed as to permit service of such judicial document by postal channels directly to the person abroad and the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination. In any case, India has raised an objection and has not accepted Article 10 of the Convention.

This would at the most make service of summons through the direct postal service acceptable. However, in any

contingency or by no stretch of imagination it would justify compelling a party to appear before the Court and accept the summons. If an International Convention prescribe mechanism to serve summons, in that contingency said procedure has to be strictly followed and coercion by any authority nonetheless it be a judicial authority, cannot be said to be sustainable in the light of the detail procedure prescribed binding on every country who is signatory to it.

10 Reliance placed by the learned counsel for the respondent on the judgment dated 12/2/2014 is not of any assistance. In the said judgment the petitioner had objected that the summons having been received from the New York Family Court and therefore it was prayed that no coercive action should be taken in respect of the summons issued by the Family Court New York and the agencies should be restrained from executing this summons. In this backdrop, when the Court specifically referring to Article 13 of the Hague Convention specifically observed that Article 3 and 5 clearly state that the

authority or the judicial officer competent under the law of the State in which the documents including summons and this refer to Article 5 where the Central Authority shall serve documents in the manner clause (a) and (b). The court then proceed to observe that the petitioner objected the service of the summons on the ground that it is not originated from the authority of the judicial officer, then, it was open for the petitioner to approach the Court in New York and on this count petition was not found to be sustainable and the submission advanced on behalf of the petitioner did not find favour with the court. Resultantly, the petition came to be dismissed. However, in the present controversy arising out of the impugned order, the said situation is not applicable. The petitioner is not objecting to the service of summons. The petitioner is aggrieved by the manner in which summons are attempted to be served by the impugned order which is mode unknown to Indian law and not binding on the courts in the country. The learned counsel also submitted that the exception carved in Article 10 is not applicable since India has reserved

its objection specifically qua Article 10, 15 and 16. In such circumstances, he would submit that the said mode of service by postal channel directly to a person is not recognized mode as far as India is concerned.

11 In such circumstances, the impugned order passed by the Family Court cannot be sustained. In any contingency, the correct address of the petitioner is on record and the said address being available to the respondent can be brought to the notice of USA Court so that by adopting proper mode of service, the summons can be duly served on the petitioner by following the procedure mentioned therein.

In such circumstances, the writ petitions are allowed. The impugned order is quashed and set aside.

[SMT.BHARATI H.DANGRE, J.]