

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6226 OF 2018

Bhawna Singh	...Petitioner
<i>Versus</i>	
Badal Singh And Anr	...Respondents

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Ms. Prachi Desai i/b. Sanjiv Punalekar i/b. PRS Legal, for the Petitioner.
Mr. S.G. Deshmukh i/b. S.S. Bijlani, Advocate for Respondent No.1.
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CORAM : R. G. KETKAR, J.

DATE : 12th JUNE, 2018

P.C.

1. Heard Ms. Prachi Desai, learned counsel for the petitioner and Mr.S.G. Deshmukh, learned counsel for respondent No.1, at length. At the request of Ms.Desai respondent No.2 is allowed to be deleted. Amendment shall be carried out forthwith.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 20.4.2018 passed by the learned in-charge 4th Jt. Civil Judge, Senior Division, Thane below Exhibit-18 in Marriage Petition No.260/2018. By that order, the learned trial Judge directed the petitioner herein (respondent No.1 before the trial Court) to hand over interim custody of son Yajat aged about 08

years and daughter Yana aged about 06 years to the first respondent (petitioner before the trial Court) till further orders on application Exhibit-18. The trial Court gave liberty to the petitioner herein to accompany the first respondent, Yajat and Yana if she thinks it necessary for educational purpose of children. The learned trial Judge rejected the prayer made by the first respondent directing Vashi police station to provide necessary assistance to him to implement the order.

3. Rule. Mr. Bijlani waives service on behalf of the first 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, Ms. Desai submitted that the impugned order was passed without hearing the petitioner and without even supplying copy of the application. As the copy was not supplied to the petitioner, she had no opportunity to file reply. In short she submitted that the impugned order is passed in gross violation of principles of natural justice. Ms. Desai further submitted that the learned trial Judge passed order principally on two grounds. The first ground was that respondent No.1 had placed on record list of documents at Exhibit-13 which contained a purported suicide note of

the petitioner. The learned trial Judge was, therefore, of the opinion that it is necessary to pass interim order for the safety, custody and education of the children. The other ground that weighed with the learned trial Judge was that son Yajat was to appear in the school on 23.4.2018 for paper of English Literature of Goldcrest High School, Grade-III. The learned trial Judge, therefore, directed the petitioner herein to hand over interim custody of Yajat and daughter Yana to the first respondent till further orders on application Exhibit-18.

5. Ms. Desai further submitted that in paragraph-9 of the impugned order, the learned trial Judge noted that the mother of the first respondent is able to look after the grand-children if the petitioner herein does not turn-up. She submitted that respondent No.1 along with his mother is working with B.P. Marine Academy. In other words she submitted that the mother of the first respondent will not be in a position to devote her time to look after the children. She further submitted that while granting mandatory ad-interim order, the learned trial Judge has not considered where the welfare of the minor children lies. In support of her submission, she relied upon following decisions :

- [i] **Rosy Jacob vs. Jacob A. Chakramakkal, (1973) 1 SCC 840;**
- [ii] **Prabhati Mitra vs. D.K. Mitra, 25(1984) DLT 186** [Delhi High Court], and in particular paragraphs-16,

29, 38 and 45 thereof;

- [iii] **Athar Hussain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654**, and in particular paragraphs-30, 31, 35 to 37 and 39 thereof; and
- [iv] **Mohan Kumar Rayana vs. Komal Mohan Rayana, (2010) 5 SCC 657**, and in particular paragraphs-25 to 28 thereof.

6. On the other hand, Mr. Deshmukh supported the impugned order. He submitted that the petitioner is avoiding to appear before the trial Court. Though she had agreed to appear before the Mediator, instead of appearing before the Mediator she left Navi Mumbai on 19.4.2018. Till date she has not filed written statement in answer to the petition instituted by the first respondent. Not only that she had filed transfer petition before the Apex Court for transferring the proceedings filed by the first respondent in the trial Court to Bareilly Court. The Apex Court had dismissed the Transfer Petition. He submitted that some how the petitioner is avoiding to appear before the Court. He submitted that in the trial Court the petitioner had given undertaking dated 11.4.2018 at Exhibit-8 to the effect that she will file reply within two months to the Marriage Petition. However, despite being given undertaking to the trial Court, till date she has not filed reply to the Marriage Petition. Apart from that she has also given undertaking to the trial Court that she will produce the children on 13.6.2018.

7. Mr. Deshmukh submitted that the mother of the first respondent is one of the Trustees of the Trust and she can certainly look after the grand-children if the impugned order is maintained. In other words, he submitted that there is no merit in the submission of the petitioner that respondent No.1's mother will not be in a position to devote her time for looking after her grand-children.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that copy of the application Exhibit-18 was not supplied to the petitioner. A perusal of paragraph-1 of the impugned order shows that at the request of the first respondent, the matter was taken up on the board. The urgency for taking up the matter on board was that on 19.4.2018 the petitioner herein left Navi Mumbai along with children to Dilbis, Uttar Pradesh and examination of son Yajat was due on 23.4.2018. During the course of hearing, it transpired that son Yajat who was studying in Grade-III is promoted to next standard. Thus that exigency and/or urgency is no more in existence. A perusal of the impugned order also shows that as the copy of the application Exhibit-18 was not served on the petitioner, she had no opportunity to file reply. As she had already left Navi Mumbai, she was also not heard before passing the impugned order. A perusal of the

impugned order and in particular clause (1) of the operative order shows that by that clause, the learned trial Judge issued ad-interim mandatory directions to the petitioner to hand over custody of son Yajat and daughter Yana. The learned trial Judge, in my opinion, was not justified in passing mandatory direction at interlocutory stage without service of application on her, without giving an opportunity to the petitioner to file reply as also without hearing her. The learned trial Judge could not have arrived at a conclusion as regards welfare of the minor children without hearing both the parties.

9. Ms. Desai submitted that one of the reasons given by the learned trial Judge was that respondent No.1 had submitted a suicide note dated 11.4.2018. She invited my attention to the complaint dated 8.4.2018 lodged by her with Station In-Charge of Vashi Police Station, wherein she has alleged that respondent No.1 is forcibly recording her false statements. In other words, the submission of the petitioner is that the suicide note is written by her under duress and compulsion. Be that as it may, at this stage, I am not inclined to go into this aspect. As the application Exhibit-18 is still pending, it is required to be heard expeditiously having regard to the allegations and counter allegations made by the parties against each other as also having regard to the fact that issue of custody of children is involved.

10. Ms. Desai states that the petitioner is present in the Court.

Upon taking instructions from her, she states that the petitioner undertakes that

- [i] She will not leave the jurisdiction of the Court of Civil Judge, Senior Division, Thane without prior written permission of the Court.
- [ii] She will not remove the children from Navi Mumbai and from the school where presently they are taking education without obtaining prior written leave of the Court.
- [iii] She will also not admit the children to any other school, without prior leave of the Court.
- [iv] She will cancel the admission of the children secured by her in Dilbis, Uttar Pradesh.
- [v] She will produce the children in the trial Court tomorrow i.e. 13th June, 2018.

11. Ms. Desai, upon instructions, further states that respondent No.1 and his parents will be given visitation rights that may be mutually agreed between the parties before the trial Court. Undertakings given by the petitioner to this Court are accepted.

12. Mr. Deshmukh states that respondent No.1 is present in the Court. Upon taking instructions from him, he assures that respondent No.1 will suggest alternate accommodation where the petitioner and

children can reside. The petitioner is at liberty to inspect the premises suggested by the first respondent. Mr. Deshmukh has handed over copy of the application Exhibit-18 to Ms. Desai in the court today.

13. Ms. Desai assures that within two weeks from today, the petitioner will file reply to application Exhibit-18 and serve copy in advance on the other side. Mr. Deshmukh states that within one week from receipt of the reply of the petitioner, respondent No.1 will file reply, if any, and serve copy on the other side during that period.

14. In the light of aforesaid discussion, clause (1) of the operative part of the impugned order is set aside. The learned trial Judge is requested to decide application Exhibit-18 within two weeks from completion of the pleadings. It is made clear that the observations made in this order are *prima facie* and tentative. The learned trial Judge will decide the application Exhibit-18 uninfluenced by the observations made herein and in accordance with law. All contentions of the parties are expressly kept open. Rule is made absolute in aforesaid terms with no order as to costs.

15. All concerned parties, including the trial Court, to act upon an authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)