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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 172 OF 2013

WITH

CIVIL APPLICATION NO.262 OF 2013

WITH

CIVIL APPLICATION NO.364 OF 2013

WITH

CIVIL APPLICATION NO.201 OF 2014

Esmeria D'Souza

..Appellant / Applicant

Vs.

Mr. Alessandro Portioli and Another

..Respondents

WITH

CIVIL APPLICATION NO.202 OF 2014

WITH

CIVIL APPLICATION NO.363 OF 2013

Mr. Alessandro Portioli and Another

..Applicant

Vs.

Mrs. Esmeria D'Souza

..Respondent

Mr. Rohaan Cama a/w Mr. Shanay Shah, Mr. Harish Adwani I/b Jalaja Nambiar, for the Appellant.

Mr. Rui Rodrigues a/w Dushyant Kumar, for Union of India.

CORAM:-K. K. TATED & B. P. COLABAWALLA,JJ.
DATE :- JULY 9, 2018.

P. C.:

This matter has a quite chequered history.

2 The dispute in the present case is between the Appellant Esmenia D'Souza and the Respondent- Mr. Alessandro Portioli. Though the Appellant is an Indian citizen, the Respondent is a citizen of Italy. The two were married and had adopted an Indian girl child named Puja alias Emanuela. Since disputes arose between the parties, the Appellant filed a petition for custody of the child under Section 25 of the Guardian and Wards Act being P. D. No.20 of 2012. This application of the Appellant was dismissed by the trial court vide its order dated 30th July, 2013. This is the subject matter of Family Court Appeal No.172 of 2013.

3 In contrast, the Respondent had also filed a Petition seeking the guardianship of the minor child and to exclude the Appellant from guardianship by filing P. D. No. 86 of 2011. This Petition of the Respondent was also dismissed by the Trial Court vide its order dated 28th June, 2013.

4 Both being aggrieved by these two orders both parties approached this Court by filing their respective Family Court Appeal No. 172 of 2013 (filed by the Appellant herein) and Family Court Appeal No.146 of 2013 (filed by the Respondent herein). Initially, there were several orders passed in this Appeal. On 24th August, 2015, a Division Bench of this Court recorded that despite the Respondent giving the undertaking to this Court that he shall not take the child (Puja alias Emanuela) out of the jurisdiction of this Country, he flagrantly violated that undertaking. From this order, it is also seen that the Respondent has obtained some orders from the Juvenile Court of Justice at Venice in Italy granting him sole custody of the minor child. All this has further been discussed by this Court in its order dated 14th September, 2015 and also directed the CBI (Interpol) to issue a red-corner notice to the Respondent-husband and yellow-corner notice to the child so that interpol can be alerted throughout the World.

5 We are informed that this yellow-corner and red-corner notices have already been issued. This Court has further recorded in the said order that the proceedings which were pending before us were not brought to the notice of the Italian Court which has granted the order of sole custody to the Respondent husband. This Court has recorded

that *prima facie* it appears that the Respondent has played a fraud on this Court by posing that he is submitting to the orders of this Court though on the other hand he has made systematic plot to take the child out of this country. Despite all this, to ensure that the child be brought back to this Court, in paragraph 4 of its order dated 14th September, 2015 this court recorded that in the event the Respondent husband comes back to India along with the child and submits to this Court, no coercive steps will be taken against him. This order was passed primarily in view of the fact that the Court was concerned only with safety and welfare of the child. The Respondent-husband was accordingly directed to remain present in this Court along with the minor child on the next date which was on 29th September, 2015. Obviously, the Respondent husband was not present.

6 Finally, this Appeal was disposed of by this Court on 29th October, 2015. This order clearly records that the order passed by the Family Court in P. D. No. 86 of 2011 (filed by Respondent husband) and which was the subject matter of Family Court Appeal No.146 of 2013 was already dismissed since the Respondent- husband had not complied with the undertaking given by him to this Court. This Court further set aside the order passed by the Family Court in P. D. No. 20 of 2012 filed

by the Appellant herein and directed that the minor child be brought back to India and the custody be handed over to the Appellant wife. The Appeal filed by the Appellant wife was therefore accordingly allowed and was only kept pending for compliance of this order passed by this Court.

7 Thereafter, several further orders have been passed to try and ensure that the minor child is brought back and the order of this Court dated 29th October, 2015 is complied with. In this regard, the Ministry of External Affairs were also asked to intervene in the matter to see how it can be resolved. We find that the Ministry of External Affairs has filed several affidavits including the last one dated 23rd April, 2018. This affidavit in detail sets out the steps taken by the Ministry of External Affairs to ensure that the girl child is brought back to India and if that is not possible at least to ensure that the Appellant wife gets to see the girl child through Video conferencing or through Skype / Face time or IMO.

8 On perusing the affidavit filed on behalf of Respondent No.2 (Union of India) dated 23rd April 2018, we find that the Government has taken all possible steps to try and ensure that the Appellant wife at least gets to speak with her adopted child either through Video Conferencing

or through / Skype etc. The Ministry of External Affairs made several requests to the Ministry of Foreign Affairs and International Co-operation of the Government of the Republic of Italy through Indian Embassy in Rome. These requests have ranged from 2nd May, 2017 to the last one being on 19th April, 2018. Even before 2nd May, 2017 several requests were made by the Ministry of External Affairs for locating the child and the Respondent husband.

9 On going through these requests, we find that the Ministry of External Affairs has done everything possible to try and ensure that the Appellant wife would get at least Skype or Video Conferencing access to the child. However, it appears that there has been no response from the Italian Authorities. This being the case, we find that there are no further directions that we could pass that force the Union of India in ensuring that the order of this Court dated 29th October, 2015 can be complied with.

10 In these circumstances, we finally dispose of this Appeal by granting liberty to the Appellant wife to take whatever recourse she has in law including going to Italy and taking whatever steps she requires for having the order passed by the Juvenile Court of Justice at Venice

vacated. In this regard, we would request the Ministry of External Affairs to assist the Appellant wife at her own cost. We make it clear that the red-corner notice issued against the Respondent husband and Yellow-corner notice issued against the minor child shall continue to operate and any other proceedings that have been filed by the Appellant wife against the Respondent-husband shall be decided on its own merits and in accordance with law being uninfluenced by the order passed by this Court today.

11 In view of the order passed earlier, no further purpose will be served in listing this matter before this Court anymore and is therefore finally disposed of.

12 In view of disposal of the Family Court Appeal, nothing survives in all the Civil Applications, if any pending or also disposed of, and the same are accordingly disposed of.

(B. P. COLABAWALLA, J.)

(K. K. TATED, J.)