

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1845 OF 2018

Mr. Dinesh Sunder Sajnani

...Petitioner

Versus

Mr. Hisha Dinesh Sajnani

...Respondent

....

Ms. Tauban F. Irani, Advocate for the Petitioner.

Mr. R.T. Lalwani i/b. Prakash Mahadik, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 07th JUNE, 2018

PC.

1. Heard Ms.Tauban Irani, learned counsel for the petitioner and Mr.R.T. Lalwani, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner-husband has challenged the judgment and order dated 9.8.2017 passed by the learned Principal Judge, Family Court, Mumbai below Exhibit-68 in Petition No.A-258/2015. By that order, the learned trial Judge rejected the application made by the petitioner *inter alia* praying for

- (a) grant of 50% overnight vacation access and audio/video calls via Skype on every 2nd and 4th Fridays between 1:00 p.m. to 2:00 p.m. to the petitioner;
- (b) grant of 50% overnight summer vacation access in Mumbai; &

- (c) direction to the respondent-wife to bear the costs of the travel of the children, namely, Mahira born on 28.10.2005 and Dhrishti born on 29.8.2009, both in Dubai, to Mumbai subject to such terms and conditions as deemed fit in the interest and welfare of the daughters.

3. In support of this Petition, Ms. Irani strenuously contended that the learned trial Judge did not accede to the request made by the petitioner in terms of prayer clause (b) of the application Exhibit-68 for grant of 50% overnight summer vacation access in Mumbai, but, granted 50% summer vacation access in Dubai. She submitted that summer vacations in Dubai are for 62 days and generally every year it commences from 1st July and ends on 31st August. The learned trial Judge failed to appreciate that it is too much to expect the petitioner to continuously reside in Dubai for 31 days at a stretch to avail overnight summer vacation access. It is neither physically nor financially feasible. Even it will cause immense inconvenience to the daughters. She submitted that insofar as access in Diwali and Christmas vacations is concerned, the petitioner is ready and willing to avail this access in Dubai. However, as far as summer vacation access is concerned, the impugned order may be modified by directing the respondent to grant 50% summer vacation access in Mumbai.

4. Ms. Irani submitted that the petitioner has no residence in

Dubai. He is residing along with his family members in Mumbai. She submitted that while the parties were living in Dubai, they were supposed to visit India on 30.6.2014. The respondent along with daughters surreptitiously left for Mumbai on 26.6.2014. The petitioner came to Mumbai on 28.6.2014. On 2.8.2014, the respondent gave notice seeking divorce. The petitioner gave reply on 7.8.2014. On 31.1.2015 the petitioner filed proceedings before the Family Court, Bandra seeking divorce. The respondent filed counter-claim in that proceedings. On 18.3.2015, the petitioner filed application at Exhibit-10 for access of the daughters. On 26.5.2015, the petitioner filed application Exhibit-11 for summer vacation access. On the same day, the respondent filed application Exhibit-13 for maintenance. On 30.7.2015, the respondent filed application Exhibit-19 under the provisions of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act'). On 16.6.2015, the Marriage Counseller submitted report Exhibit-14 to the effect that the counseling has failed and referred the parties to the Court. The respondent-wife filed reply Exhibit-15 resisting application Exhibit-11. The petitioner filed reply Exhibit-16 to the respondent's application Exhibit-13 for maintenance. She submitted that the respondent in fact accepted and submitted to the jurisdiction of the Family Court, Bandra. The respondent stays in her father's flat at

Colaba, Mumbai. On 30.7.2015, the learned trial Judge passed order below Exhibit-19 asking the respondent to show cause as to why contempt proceedings should not be initiated against her for leaving India without permission of the Family Court during pendency of the Petition. She submitted that the show-cause notice was required to be issued to the respondent as she had left India along with daughters to Dubai though she had submitted to the jurisdiction of the Family Court at Bandra. Said show cause notice is pending till date.

5. Ms.Irani submitted that the petitioner has secured admission of daughters in Arya Vidya Mandir School at Khar. The respondent secured admissions of daughters in B.D. Somani School at Colaba. Though the respondent challenged the show cause notice by instituting Writ Petition in this Court, the same was withdrawn. She has taken me through the applications made by the petitioner, replies filed by the respondent in the Family Court as also reply of the respondent in the present Petition. She submitted that the impugned order may be modified by directing 50% summer vacation access in Mumbai instead of Dubai.

6. In support of her submissions, she relied upon the decision of this Court dated 22.9.2017 in Notice of Motion No.6/2017 in Parsi Suit No.8/2017 [Nahida Rishad Cooper v. Rishad Darayas Cooper]. She also

relied upon the photographs showing that the daughters are comfortable with the petitioner and his family members.

7. On the other hand, Mr. Lalwani supported the impugned order. He submitted that earlier the petitioners had instituted application Exhibit-26 before the Family Court at Bandra. By order dated 15.12.2015, the learned trial Judge gave liberty to the petitioner to have access for half of vacations including overnight access at Dubai. The petitioner filed Petition seeking review/modification of said order. Review Petition was dismissed by the Family Court on 22.7.2016. The petitioner instituted Writ Petition No.11320/2016 in this Court challenging the order dated 22.7.2016. The petitioner was withdrawn on 19.6.2017. He submitted that the petitioner filed present application Exhibit-68 *inter alia* praying for (a) grant of 50% overnight vacation access and audio/video calls via Skype on every 2nd and 4th Fridays between 1:00 p.m. to 2:00 p.m. to the petitioner; (b) grant of 50% overnight summer vacation access in Mumbai; and (c) direction to the respondent-wife to bear the costs of the travel of the children, namely, Mahira born on 28.10.2005 and Dhrishti born on 29.8.2009, both in Dubai, to Mumbai subject to such terms and conditions as deemed fit in the interest and welfare of the daughters. He submitted that there is no change in circumstances warranting interference with the impugned

order.

8. Mr. Lalwani invited my attention to the following :

- [i] Paragraph-30 of the respondent's affidavit dated 11.2.2018 wherein the respondent has given chart giving details of the petitioner's close family members and relatives residing in Dubai.
- [ii] Order dated 15.12.2015 passed by the Family Court below Exhibit-26.
- [iii] Order dated 10.7.2017 passed by the Family Court below Exhibit-58.

9. Mr. Lalwani submitted that in paragraph-3 of the order dated 15.12.2015, the learned Family Court Judge has noted that both the minor daughters are admittedly living with the respondent in Dubai. Under what circumstances the respondent has taken the daughters to Dubai is a question of fact. It needs oral evidence to come to the conclusion whether she deliberately went or she was compelled to go there. He submitted that in the year 2014, the respondent along with daughters came to Mumbai for meeting the parents of the petitioner for resolving the matrimonial disputes between the parties. The respondent got the daughters admitted in B.D. Somani School at Colaba. He empathetically submitted that though the petitioner claims to have admitted the daughters in Arya Vidya Mandir School at Khar in fact the petitioner has not secured admission in said school. He submitted that after the marriage between the parties was solemnized on 1997 till

2002 the parties were living in United States of America. The parties shifted to Dubai in the year 2003. Both the children are born in Dubai where admittedly family of the respondent is residing and carrying on business. The daughters are born and brought-up in Dubai. They are not accustomed to Mumbai and because of the harassment meted out by the petitioner, she had left to Dubai. The daughters are studying in Gems School in Dubai. He submitted that while opposing application Exhibit-68, the respondent had offered to send home-cooked food for the petitioner. He reiterated that in the event of the petitioner availing 50% summer vacation access in Dubai, the respondent is ready and willing to send home cooked food to him. As the petitioner has several relatives in Dubai, it will also not cause inconvenience or hardship to the petitioner. He, therefore, submitted that no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. I have already referred to the prayers made by the petitioner in application at Exhibit-68. A perusal of the impugned order shows that the learned trial Judge has permitted 50% summer vacation access to the petitioner at Dubai. The contention of the petitioner that it is not possible to stay in Dubai for 31 days at a stretch on account of

physical as well as financial difficulties. This aspect is taken care of by the learned trial Judge in paragraph-8 by observing that four weeks vacation can always be divided into alternate weeks. Instead of staying for 31 days at a stretch, the petitioner is at liberty to stay in Dubai for 15 days, return back and then again travel to Dubai for meeting his daughters. The tender age of daughters does not permit them to travel to Mumbai only for the sake of access.

11. Ms. Irani submitted that in paragraph-8, the learned trial Judge has wrongly recorded the ages of daughters as 9 years and 5 years instead of 12 years and 9 years respectively. Be that as it may, I do not find that the petitioner has made out any case of change in circumstances. As noted earlier, the daughters are born and brought-up in Dubai. The parties were staying in Dubai from 2003 till 2014. It is also not in dispute that by order dated 15.12.2015 below Exhibit-26, the learned trial Judge has given access for half of the vacations including access in Dubai. It is matter of record that the petitioner filed application for review / modification of that order, which came to be rejected on 22.7.2016. Aggrieved by that decision, the petitioner instituted Writ Petition in this Court which was also withdrawn.

12. In view thereof, I do not find that any case is made out for interfering with the impugned order. Ms. Irani relied upon the decision

of this Court in Nahida Rishad Cooper (supra). In the present case, the Family Court in the order dated 15.12.2015 below Exhibit-26 and the order dated 10.7.2017 specifically observed that the question whether the respondent left the jurisdiction of Family Court or was constrained to go to Dubai to return to her parent's house can be decided on the basis of oral evidence. In the case of Nahida (supra), it was held that despite giving oral undertaking before the learned Principal District Judge as also making representations in paragraphs-3, 4, 5, 8 and 10(h) of the reply dated 21.4.2017 at Exhibit-13 to the application Exhibit-5, Nahida has surreptitiously removed Marc (her son) and shifted to Mumbai. In view thereof, the facts in Nahida's case are materially different from the facts obtaining in the present case. In my opinion, said decision is not applicable to the facts of the present case. Hence, Petition fails and the same is dismissed. Parties are at liberty to apply for expeditious disposal of the proceedings pending in the Family Court. If such application is made, the learned trial Judge will pass appropriate orders. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)