

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.12078 OF 2018

Swati Sanjay Jadhav	]	Petitioner
Vs.		
Sanjay Daulat Jadhav	]	Respondent
.....		

Ms. Rukmini Khairnar, for the Petitioner.

Mr. D.P Adsule, for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 25th OCTOBER, 2018.

P.C:

Heard Ms. Rukmini Khairnar, learned counsel for the petitioner and Mr. Adsule, learned counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 9th October, 2018 passed by the learned Judge, Family Court, Nashik below Exhibit-9 in D. Petition No.22 of 2018. By that order, the learned trial Judge allowed the application made by the respondent and directed the petitioner to handover temporary custody of children (son aged about 14 years and daughter aged about 09 years) to the respondent on 3rd November, 2018 at about 5:00 p.m. in the Court. The respondent is directed to return the custody of the children to the petitioner on 7th November, 2018 at 11:00 a.m. He is also directed to look after the children properly during the stay with him and allow them to talk with the respondent everyday on cell-phone. The respondent is directed to keep children with him at Ankaleshwar and without creating any dispute return the custody of children to the petitioner safely.

3. Rule. Mr. Adsule waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. In support of this Petition, Ms. Khairnar submitted that the marriage between the parties was solemnized in the year 2001. Son is born in 2003 and the daughter is born in the year 2008. She submitted that from 8th October, 2010 the parties are staying separately. In the year 2011, the petitioner has instituted the proceedings under the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act'). The respondent has instituted the Petition seeking divorce in the year 2016 and the custody Petition is instituted in the year 2018. She invited my attention to the Rozanama of the proceedings. She submitted that the Rozanama dated 24th August, 2018 records the presence of the petitioner and absence of the respondent. The matter was adjourned to 9th October, 2018 for filing written statement. On 9th October, 2018, the respondent filed application Exhibit-9 praying for ten days access in Diwali Vacations. On the same day, the petitioner filed;

- [1] application for adjournment for engaging Advocate,
- [2] application seeking time for filing reply to application Exhibit-9 and
- [3] pursis at Exhibit-11.

She submitted that though applications for adjournment as also for filing reply were adjourned, the learned trial Judge proceeded to decide the application Exhibit 9 on the same day and passed the impugned order. The learned trial Judge also did not ascertain wishes of the children who are 14 and 9 years old respectively. She, therefore, submitted that impugned order deserves to be set aside.

5. On the other hand, Mr. Adsule supported the impugned order. He submitted that though the respondent claimed custody for 10 days, the learned trial Judge gave custody of the children for a period of 4 days. The learned trial Judge also observed that the apprehension expressed by the petitioner that there is danger to the lives of the children is not convincing. He further submitted that the learned trial Judge has permitted the respondent to take children at Ankaleshwar. Though the petitioner has expressed her willingness to accompany children to Ankaleshwar so as to enable the respondent to take custody for 4 days, in view of the reasons set out in paragraph 6 of the custody Petition, it is not feasible for the respondent to take the petitioner to Ankaleshwar. He submitted the respondent's parents are residing in Manmad and instead of Ankaleshwar, he may be permitted to take the children to Manmad without accompanying the petitioner.

6. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the respondent has filed custody Petition on or about 17th August, 2018. A perusal of Roznama shows that on 24th August, 2018, the petitioner herein was present and the respondent was absent. The matter was adjourned for filing written statement to the Petition to 9th October, 2018. On 9th October, 2018, the respondent filed application for custody of the children between 10th November, 2018 and 20th November, 2018. The petitioner filed application on the same day for engaging Advocate. That was allowed by the learned trial Judge. On the same day, i.e on 9th October, 2018, she also filed application seeking time to file reply to Exhibit 9. That was too granted by the learned trial Judge. On the same day, the petitioner also filed pursis dated 9th October, 2018. The learned trial Judge treated her pursis as her say and proceeded to decide Exhibit 9.

7. In my opinion, approach of the learned trial Judge is wholly perverse. Having granted the applications for adjournment on the ground of engaging Advocate as also for filing reply to application Exhibit 9, the learned trial Judge was not justified in proceeding to decide the application Exhibit 9. That apart, the learned trial Judge also did not consider whether to ascertain the wishes of the children while passing the impugned order. As there was fundamental flaw in the procedure adopted by the learned trial Judge, impugned order cannot be sustained and as such is liable to be set aside and accordingly set aside.

8. Application Exhibit 9 is restored to the file of the learned trial Judge. The petitioner shall file reply to the application on or before 31st October, 2018. The parties shall appear before the learned trial Judge on 31st October, 2018. The learned trial Judge is requested to decide application Exhibit 9 afresh on or before 2nd November, 2018. Rule is made absolute in the aforesaid terms with no order as to costs. All contentions of the parties are expressly kept open. If the petitioner does not file reply on or before 31st October, 2018, the learned trial Judge will proceed to decide application Exhibit 9 regardless her reply.

[R.G. KETKAR, J.]