

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13507 OF 2017

Mrs. Malika Nirmal Parekh

...Petitioner

Versus

Mr. Nirmal Manoj Parekh

...Respondent

Mr.Suresh Chandrashekhar with Ms.Li Shu Fen, Mr.Siddharth Chandrashekhar and Mrs.Suchitra Ramani, for the Petitioner.

Ms.Nirmal Parekh – Respondent in person present.

CORAM : G.S.KULKARNI, J.

DATE : 11th JANUARY, 2018

P.C. :

1. Heard learned Counsel for the petitioner and Mr.Nirmal Parekh - respondent in person.

2. Though on earlier occasion the respondent Ms.Irani Advocate had stated that she would represent the respondent, however, Ms.Irani who is present in the Court informs that respondent intends to appear in person as also she has not filed vakalatnama on behalf of the respondent. The respondent thus intends to argue in person. Accordingly I have heard the respondent in person.

3. Challenge in this petition is to the order dated 6 October 2017 passed by the learned Judge, Family Court, Bombay, rejecting the application of the petitioner-wife praying for a direction that the respondent-husband should co-operate for enabling change of school of the minor daughter from SVKM J.V.Parekh International School, Vileparle (for short "SVKM School") to JBCN International School or Don Bosco International School at Matunga.

4. The case of the petitioner in the application was that the petitioner and respondent were separated on 4 July 2016. The child is today six years of age and is in the first standard. The case of the petitioner is that the petitioner alongwith the child are presently staying with the parents of the petitioner at Matunga. The child however had continued to take education in the SVKM School, Vileparle. The child is required to travel every day to the school from Matunga to Vileparle which requires more than an hour. The school timings being between 1 p.m. to 5.30 p.m., the petitioner is required to substantially travel every day alongwith the child to drop her to the school. Again in the evening traveling from Vileparle to Matunga is also time consuming and tiring

due to the heavy traffic, sometimes taking more than two hours. It is adversely affecting the minor daughter as also the petitioner and so much of traveling is not conducive for the girl child who is six years of age and who is in the first standard. In view of these insurmountable difficulties, an application was made before the trial Court making the following prayers:-

“(a) this Hon'ble Court be pleased to direct the Respondent to co-operate with the Petitioner for enabling a change of school of the minor child from SVKM J.V.Parekh International School to JBCN International School or Don Bosco International School.

(b) such other and further reliefs as may be deemed fit and proper by this Hon'ble Court.”

5. The above application was resisted by the respondent-husband basically on two grounds that the child is pursuing education from nursery in the existing school for last about four years. It is the respondent's case that it is one of the best school and therefore, there are better prospects of education in future than the school which is being suggested by the petitioner. The other ground on which the application was opposed was that he can make available premises nearer to the existing school at Vile-parle, namely at Santacruz or at Khar, which would

be in or about three kilometers from the school. It is his case that one of these premises can be exclusively made available to the petitioner for her residence alongwith the daughter, till disposal of the matrimonial proceedings.

6. By the impugned order learned judge of the family court, though in paragraph 3 of the order has clearly observed that the child is not expected to travel for such a long distance for attending the school. It is also observed that for the reason of the dispute between the parties, the child is suffering, however the learned Judge has surprisingly rejected the application. This basically on the reason that the offer which is given by the respondent-husband ought to have been accepted by the petitioner. The observations to that effect can be seen in paragraph 4 of the impugned order.

7. Learned Counsel for the petitioner in assailing the impugned order would submit that the approach of the learned Judge of the Family Court is completely erroneous. It is submitted that though the offer for the accommodation at Santacruz or Khar was made, the same was totally not acceptable to the petitioner inasmuch as the petitioner is not inclined

to stay separately alongwith the minor daughter in any separate/independent premises, in the facts and circumstance of the dispute between the parties. It is submitted that the petitioner by all means is more comfortable and happy to reside in her parents house and therefore, such an offer which is not acceptable to the petitioner, being made by the respondent, cannot be foisted on the petitioner. It is submitted that the learned trial Judge on one hand has appreciated the suffering of the child however on the issues which are completely non germane and irrelevant, has rejected the application of the petitioner for change of the school of child.

8. On the other hand respondent-Mr.Niramal M. Parekh in opposing the submissions as made on behalf of the learned Counsel for the petitioner has principally reiterated the submission which are made before the trial Court. He submits that it is in the interest of the minor daughter that she remains in the same school, as this would be important for the future prospects in education. Mr.Parekh submits that the offer as made by him of making available either the accommodation at Santacruz or Khar would take care of all the anxiety of the petitioner, as also suffering of the minor child from traveling between Matunga to Vileparle

every day. Mr.Parekh would submit that refusing this alternate accommodation on the part of the petitioner is not innocuous. He submits that there are some motives and there is conspiracy of the petitioner in so refusing. In making this submission, he intends to delve on the merits of the matrimonial dispute. Mr.Parekh has drawn my attention to what accordingly to him are the hidden motives of the petitioner which he sets out at page 430 of his reply affidavit and are listed at 13-A to 13-D. Mr.Parekh has also drawn my attention to the benefits of the child continuing in the said school as set out by him at page 434 of the reply affidavit by pointing out the merits of the present school and perils in the proposed schools where the petitioner-mother intends to admit the daughter. It is therefore his submission that the order as passed by the learned trial Judge needs no interference.

9. After having heard the learned Counsel for the petitioner and the respondent-in-person, as also having perused the impugned order and the documents as placed on record, including the exhaustive reply affidavit of the respondent and the documents annexed thereto, I am of the opinion that the learned trial Judge has misdirected himself in passing the impugned order. As seen from the observations in paragraph

3 of the order, it is quite clear that the learned Judge has recognized that the child is of tender age of six years and that she is in first standard. Further, there is an observation made that the child is unnecessarily suffering because of the dispute between the petitioner and respondent. The learned Chief Judge has also recognized that child is not expected to travel for such a long distance for attending the school. However, very peculiarly the learned Judge of the Family Court appears to have some reservation of the petitioner leaving matrimonial house alongwith the child. On the basis of such edifice the learned Judge in paragraph 4 has considered that the offer as made by the respondent to the petitioner to avail of one of the accommodation either at Khar or Santacruz, ought to have been accepted by the petitioner. Further on the petitioner refusing to accept this offer, the learned Judge considering such an offer to be sacrosanct and in the welfare of the child, has proceeded to reject the application. In my considered opinion, such approach of the learned trial Judge is wholly erroneous to say the least. The learned Judge in considering the issue in hand and the limited scope of the prayers, was surely not expected to foist upon the petitioner the respondent's choice of residence. It very well an admitted position that the petitioner lives with the minor child at her parents house at Matunga, which is a place in the

circumstances of the case, the petitioner has asserted to be more secure, comfortable and happy. Thus, in my opinion, any offer made by the respondent against the willingness of the petitioner and her psychological needs which she feels to be fulfilled in the company of her parents and more particularly in a situation of such matrimonial discord and turmoil, it was completely within the wishes of the petitioner, not to accept the offer made by the respondent. It is the petitioner who is concerned with her own welfare as also concerned of the welfare of the minor daughter who is today in her custody.

10. It is not in dispute between the parties that the distance to be traveled between Matunga and Vileparle, by any standard, for a child in the first standard is a substantially long distance. The minor girl child is required to be accompanied by the petitioner-mother to travel such long distance. It can be very well be noted as pointed out on behalf of the petitioner that the child is required to travel and meet the time schedules of the school. Further the time to travel in the evening after the school hours after 5.30 p.m. would certainly cause more suffering inasmuch as it is not in dispute that these are peak hours and return journey from Vileparle to Matunga would take substantial time, sometimes more than

two hours. All these eventualities are not conducive and in the interest and welfare of the child who is six years of age and in the first standard. It is a suffering to the child as also to the petitioner, as also observed by the learned Judge of the Family Court. However what is surprising is that when the learned Judge recognized such suffering and difficulties of the minor child, the learned Judge ought to have permitted the change of school as prayed by the petitioner-wife. Learned Judge of the Family Court considering the circumstances in hand was required to be more sensitive and ought to have considered the issue rationally and with a humane approach in dealing with such application. I find complete absence of such sensitivity of the issue in the learned Judge passing the impugned order.

11. Taking overall view of the matter, it is in the interest of justice that the impugned order be quashed and set aside. It is accordingly quashed and set aside. The application as made on behalf of the petitioner below Exhibit 22 is allowed in terms of prayer clause (a). Needless to observe that as the academic year would come to an end by March, 2018, the petitioner would be entitled to shift the school from SVKM J.V.Parekh International School, Vileparle to JBCN International School or Don Bosco International School at Matunga, with effect from

the academic year 2018-19.

12. Petition is disposed of in the above terms. No costs.

13. All other issues on merits of the principal dispute are expressly kept open.

(G.S.KULKARNI, J.)