

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.12347 OF 2018

Nilesh Rode	]	Petitioner
Vs.		
Suvarna Nilesh Roade	]	Respondent

WITH

WRIT PETITION NO.2 OF 2019

Suvarna Nilesh Rode	]	Petitioner
Vs.		
1. State of Maharashtra	]	
2. Nilesh Balkrishna Rode	]	Respondents

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Mr. Mohan Pillai i/b Mrinal Pillai, Advocate for the Petitioner in W.P. No.12347 of 2018 and Respondent No.2 in Writ Petition No.2 of 2019.

Mr. B.M. Ganu, Advocate for the respondent in Writ Petition No.12347 of 2018 and for Petitioner in W.P. No.2 of 2019.

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CORAM : R.G. KETKAR, J.

DATE : 1st MARCH, 2019.

P.C.

Heard Mr. Mohan Pillai, learned Counsel for the Petitioner Nilesh Balkrishna Rode (for short 'Nilesh') in W.P. No.12347 of 2018 and for Respondent No.2 in Writ Petition No.2 of 2019 and Mr. B.M. Ganu, learned Counsel for the respondent Suvarna Nilesh Rode (for short 'Suvarna') in Writ Petition No.12347 of 2018 and for Petitioner in W.P. No.2 of 2019 at length.

2. Both these Petitions are directed against the judgment and order dated 7th September, 2018 passed by the learned Principal Judge, Family Court, Mumbai below Exhibits 18 and 22 in Petition No.A-302 of 2018. Nilesh

had filed application at Exhibit 18 for grant of regular access and custody and half of the vacations of the School during festivals such as Ganpati, Diwali and Christmas and Summer Vacation and overnight custody of the daughter Aananya.

3. Suvarna has filed application Exhibit 22 for permanent discontinuation of access granted to Nilesh by the impugned order. The learned Judge partly allowed the application Exhibit 18 filed by Nilesh and directed that the regular access of daughter Aananya on the first Saturday of every month between 3.00 p.m and 5.00 p.m at Children's Complex, Family Court, Mumbai will continue till further orders. The other reliefs of custody during festivals of Ganpati, Diwali, Christmas and overnight custody were rejected. Application Exhibit 22 filed by Suvarna was rejected. It is against this order, Nilesh instituted Writ Petition No.12347 of 2018 and Suvarna instituted Writ Petition No.2 of 2019.

4. Rule. Learned Counsel for the respective respondent waive service. Having regard to the narrow controversy raised in these Petitions as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

5. By order dated 21st April, 2018 below Exhibit 12 in Petition No.A-302 of 2018, the learned Judge directed Suvarna to give regular access of the minor daughter Aananya to Nilesh for two hours on the first Saturday of every month at Children Complex, Family Court, Mumbai between 3.00 p.m and 5.00 p.m.. For ensuing summer vacation of May, 2018, she was directed to give access of child Aananya to Nilesh for one week on every day from 15th May, 2018 to 19th May, 2018 between 3.00 p.m and 5.00 p.m at Children Complex, Family Court at Mumbai. The learned Judge, however, did not deal with the

other prayer made by Nilesh regarding custody of half of the vacations of the school during festivals such as Ganapati, Diwali, Christmas and Summer vacation and overnight custody of daughter Aananya.

6. Aggrieved by the order dated 21st April, 2018, Nilesh instituted Writ Petition No.6153 of 2018 in this Court. That Petition was disposed of on 28th June, 2018 after recording the statement of Mr. Pillai that Nilesh will file fresh application within one week from the date of the order for access, custody during Ganpati festival falling in September, 2018, Diwali vacation of November, 2018 and Christmas Vacation of December, 2018/January, 2019 within one week and serve copy on the other side. Suvarna was given liberty to file reply within one week from the receipt of the application. The learned Judge was requested to decide the application well in advance before Ganpati festival. All contentions of the parties in the proposed application were kept open. The Petition was accordingly disposed of.

7. In pursuance thereof, Nilesh filed application Exhibit 18 on 2nd July, 2018. Suvarna filed reply dated 17th July, 2018 opposing that application. Suvarna also filed application Exhibit 22 on 17th July, 2018 for permanent discontinuation of access granted to Nilesh. Nilesh filed reply dated 27th July, 2018 opposing the said application.

8. After hearing both the sides, by the impugned order, the learned trial Judge partly allowed application Exhibit 18 and rejected application Exhibit 22. It is against this order, the Cross Petitions are filed.

9. In support of the Petition filed by Nilesh, Mr. Pillai submitted that last access was given to Nilesh on 2nd June, 2018 in pursuance of the order dated 21st April, 2018 passed by the learned Judge. He submitted that

aggrieved by the order dated 21st April, 2018, Nilesh instituted Writ Petition No.6153 of 2018. That was served on Suvarana through Courier Vichare Express and Logistics Private Limited on 4th June, 2018. By e-mail dated 12th June, 2018 sent to Suvarana's Advocate, it was informed to her that the Petition will be taken up for admission before this Court on 14th June, 2018. He has invited my attention to F.I.R No.168 of 2018 dated 13th June, 2018 lodged under section 9 (n) of the the Protection Of Children From Sexual Offences Act, 2012 (for short 'POSCO Act') and section 354 Indian Penal Code, 1860 (for short 'I.P.C'). Statement of Suvarna was recorded on 13th June, 2018. In the statement so recorded, she made reference to access of Aananya at Children Complex, Family Court, Mumbai at 3.00 p.m on 2nd June, 2018. It is alleged that on 5th June, 2018, Aananya informed her as to what transpired during the access on 2nd June, 2018. She consulted her Advocate on 6th June, 2018 who advised her to lodge a case in Police Station and accordingly, F.I.R was registered on 13th June, 2018 when the case was due to come up for admission on the next day i.e on 14th June, 2018.

10. Mr. Pillai submitted that during the course of access Marriage Counsellor was present apart from Ms. Gayatri, representative of Muskan. He submitted that C.C.T.V footage on 2nd June, 2018 does not disclose such incident. The access was given to Nilesh at a place which is not an isolated area. In short, he submitted that solely with a view to depriving Nilesh access of daughter Aananya, F.I.R is lodged against him on 13th June, 2018. He, therefore, submitted that the impugned order deserves to be set aside.

11. On the other hand, Mr. Ganu submitted that in view of the F.I.R lodged against Nilesh under section 9 (n) of the POSCO Act, the learned Judge was not justified in giving access. The learned Judge ought to have allowed application Exhibit 22 and permanently discontinued access of Aananya to

Nilesh.

12. Mr. Ganu submitted that after following procedure laid down in the POSCO Act, statement of daughter was recorded between 6th June, 2018 and 13th June, 2018. He has taken me through the statement of daughter Aananya and submitted that the statement was recorded at the residence of Suvarna. In view of this statement, *prima facie*, it is evident that Nilesh is involved in serious offence under section 9 (n) of the POSCO Act read with section 354 I.P.C. He, therefore, submitted that the impugned order deserves to be set aside, thereby dismissing the application Exhibit 18 and allowing application Exhibit 22.

13. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, by order dated 21st April, 2018 below Exhibit 12, the learned trial Judge has granted access of two hours on first Saturday of every month at Children Complex, Family Court, Mumbai between 3.00 p.m and 5.00 p.m. The learned Judge also gave access for one week on every day from 14th May, 2018 to 19th May, 2018 between 3.00 p.m and 5.00 p.m at Children Complex Family Court, Mumbai and for summer vacation of May, 2018. It is material to note that Suvarna did not challenge the order dated 21st April, 2018. The learned trial Judge did not consider other reliefs claimed by Mr. Nilesh namely; regular access and custody and half of the vacations of the school during festivals i.e Ganpati, Diwali, Christmas and Summer Vacation, he, therefore, took out application Exhibit 18 for these reliefs.

14. As noted earlier, Exhibit 18 was filed on 2nd July, 2018, that is to say, after access of 2nd June, 2018 in the Children Complex, Family Court, Mumbai. Suvarna filed reply to this application on 17th July, 2018. She has

enclosed copy of F.I.R along with reply. On the same day, she filed application Exhibit 22 for permanent discontinuation of the access.

15. While dealing with these applications, the learned Judge noted filing of F.I.R by Suvarna in paragraph 15. In paragraph 16, the learned Judge observed thus;

“I have seen the CCTV footage of 02.06.2018 in presence of both the Advocates and the respondent. In the CCTV footage, no such incident is seen. As per the contention of Ld. Advocate for the petitioner, the incident had happened outside the Children's Complex room behind the cupboard. However, that spot was also seen in presence of both the Advocates. It is to be noted that at the time of access one Marriage Counsellor and one social worker Gayatri from Muskan were also present. So, it was not the isolated area. It is also to be noted that on the same day no such incident was reported by the petitioner herself to the Marriage Counsellor. So also Marriage Counsellor also did not report any such incident. The matter is subjudice before the Sessions Court and therefore it will be decided by the concerned Court about the genuineness of the allegations. We are concerned with only whether to continue the access or not. So, in my opinion, merely on the basis of allegations it will not be proper to discontinue the access in the Children's Complex. We can take precaution to allow the access in the Children's Complex which is under CCTV surveillance. We can consider the safety and security of the daughter. So, in such circumstances, in my opinion, it will not be proper to give overnight access/custody or claimed access to the respondent at his home. To strike the balance between two, in my opinion, regular access shall be continued at the Children's Complex. Otherwise, it will be very easier for other side to make allegations and to cancel the order of access. The Sessions Court will take much time to decide the matter before it. During that time if regular access is discontinued, definitely the child will be deprived of the love and affection of her father. So also, father will not have access of his daughter on merely such allegations. Hence, in my opinion, application filed by the petitioner at Exh.22 for discontinuation of access on the ground of her

allegations cannot be considered. Hence, her application at Exh.22 is liable to be rejected”.

A perusal of the above extracted paragraph clearly shows that the learned Judge had seen C.C.T.V footage of 2nd June, 2018 in the presence of both the Advocates and the respondent. In the C.C.T.V footage, no such incident is seen. The learned Judge also dealt with the submission advanced on behalf of Suvarna that incident had happened outside the Children's Complex behind the cupboard. That spot was also inspected by the learned trial Judge in the presence of both the Advocates. The learned trial Judge further observed that at the time of access, one Marriage Counsellor and one social worker Gayatri from Muskan were also present and that it was not an isolated area. No such incident was reported by Suvarna to Marriage Counsellor, so also Marriage Counsellor also did not report any such incident. It is also material to note that Gayatri, representative of Muskan was also present. The learned trial Judge observed that since the matter is *sub judice*, it will not be proper to give overnight access custody to Nilesh at his home and to strike balance, regular access shall be continued at Children's Complex.

16. In my opinion, once having denied overnight access to Nilesh in view of pendency of case under the POSCO Act, the learned Judge should have granted access of daughter Aananya on first, third and fifth Saturday of every month between 3.00 p.m and 5.00 p.m at the Children's Complex, Family Court, Mumbai in the presence of Marriage Counsellor and whenever possible in the presence of representative of Muskan. The Marriage Counsellor and representative of Muskan whenever present will submit the report about access to the learned Judge of the Family Court. In so far as other reliefs claimed by Mr. Nilesh are concerned, the learned trial Judge dealt with this in paragraph 17 which reads thus;

“The overnight custody of vacation during festivals i.e Ganapati, Diwali, Christmas and summer vacation will not be granted, but regular access granted to the respondent on 1st Saturday of every month between 3.00 p.m to 5.00 p.m at Children's Complex, Family Court, Mumbai, will be continued”.

17. The learned trial Judge rejected overnight custody during the festivals namely Ganapati, Diwali, Christmas and summer vacation, however, granted regular access on 1st Saturday of every month between 3.00 p.m to 5.00 p.m at Children's Complex, Family Court, Mumbai. In my opinion, this also requires to be modified by directing Suvarna to give regular access to Nilesh on every first, third and fifth Saturday between 3.00 p.m and 5.00 p.m at Children's Complex, Family Court, Mumbai and during festivals i.e Ganapati, Diwali, Christmas and summer vacation.

18. Mr. Ganu strenuously contended that in view of pendency of Criminal case against Nilesh even regular access should not be given to Nilesh. It is not possible to accept this submission. If this submission is accepted, I will have to disbelieve CCTV footage of 2nd June, 2018 which was seen by the learned Judge in the presence of both the Advocates and Nilesh. I will have to disbelieve Marriage Counsellor who was present during access. I will have to disbelieve Gayatri, representative of Muskan. That apart, I will also have to disbelieve the learned Judge who has recorded findings in paragraph 16 extracted hereinabove.

19. If at this stage, contentions advanced by Mr. Ganu based upon filing of F.I.R are accepted, it will amount to convicting Nilesh without trial. Case is pending before the Sessions Court and therefore, at this stage, one cannot proceed on the premise that Nilesh has committed offence which is alleged against him. At the same time, to strike the balance, it is necessary that

regular access is given to father on every first, third and fifth Saturday of every month between 3.00 p.m and 5.00 p.m at Children's Complex, Family Court, Mumbai during festivals i.e Ganapati, Diwali, Christmas and summer vacation.

20. At this stage, Mr. Ganu submits that Suvarna had shifted to Nashik and residing with her parents. In view thereof, access shall be given in the Children's Complex at Nashik in the presence of Marriage Counsellor on first, third and fifth Saturday of every month between 3.00 p.m and 5.00 p.m and during festivals i.e Ganapati, Diwali, Christmas and summer vacation during pendency of Petition No.A-302 of 2018. Access of the child shall also be given on her birthday falling on Wednesday, the 6th March, 2019 in Children's Complex at Nashik in the presence of Marriage Counsellor between 3.00 p.m and 5.00 p.m or for two hours subject to adjusting examination of Aananya. Hence, the following order.

:O R D E R:

- [1] Impugned order dated 7th September, 2018 is modified.
- [2] Suvarna shall give regular access to Nilesh on first, third and fifth Saturday of every month between 3.00 p.m and 5.00 p.m at Children's Complex, Family Court, Nashik and during festivals i.e Ganapati, Diwali, Christmas and summer vacation during pendency of Petition No.A-302 of 2018.
- [3] Rule is made absolute in Writ Petition No.12347 of 2018.
- [4] Rule is discharged in Writ Petition No.2 of 2019.
- [5] Liberty is reserved to Nilesh to apply for change of venue from Family Court, Nashik to Family Court, Mumbai for availing access.

21. All the parties including the Family Court, Nashik and Family Court, Mumbai to act upon the authenticated copy of this order.

[R.G. KETKAR, J.]