

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Misc. Civil Application No.278/2018

Rishaddarayas Cooper Applicant

Vs.

Nahida Rishad Cooper Respondent

Mr. Sanjay Bhojwani for the Applicant

Ms. T. F. Irani for the Respondent

CORAM: K.K.TATED, J.
DATED : SEPTEMBER 3, 2019

P.C.

1 Heard. By this Application under section 24 of the Code of Civil Procedure, 1908 the Applicant husband is seeking to transfer of Parsi Suit No.8/2017 filed by the Respondent wife for dissolution of marriage u/s.32(dd) of the Parsi Marriage and Divorce Act 1936 (said Act) in the Parsi Matrimonial Court, Mumbai to the Principal District Judge Pune (Parsi Matrimonial Court) for hearing and final disposal on merits along with Suit no.10/2017 filed by the Applicant u/s.32(dd) and 32(g) of the said Act for decree of divorce before the Principal District Judge on 22.02.2017 for following reliefs.

“a. The Hon'ble Court be pleased to dissolve the Marriage between the Plaintiff and the Defendant by a Decree of Divorce under the Parsee Marriage and Divorce Act, 1936.

- b. If for any reason the Divorce is not to be granted, then a Decree for judicial separation may please be passed.
- c. The custody of the minor son MARC be given to the Plaintiff.
- d. The Defendant be restrained from taking Marc out of Pune for taking admission to any school or institution out of Pune.
- e. any other just and equitable orders in the interest of justice may please be passed.
- f. Interim orders in terms of prayer clause (d) may please be passed.”

2 The learned counsel for the Applicant submits that subsequently the Respondent wife has filed Parsi Suit No.8/2017 in Parsi Matrimonial Court at Mumbai for dissolution of marriage under the said Act on 28.06.2017 for following reliefs :

“(a) That this Hon'ble Court may be pleased to dissolve the marriage solemnized on 24th May 2008 u/s.32 (dd) of the Parsi Marriages & Divorce Act, 1936.

(b) That this Hon'ble Court may be pleased to grant sole custody of minor son Marc to the Plaintiff as envisaged under section 49 of the Parsi Marriage & Divorce Act, 1936.

(c) Till the hearing and final disposal of this suit, this Hon'ble Court may be pleased to restrain the Defendant from taking forcible physical custody of the minor son Marc.

(d) This Hon'ble Court may be pleased to grant an amount of Rs.50,000/- per month, with 10% annual escalation, as and by way of maintenance to the Plaintiff and minor son Marc.

(e) *This Hon'ble Court may be pleased to direct the Defendant to pay for the education related expenses of minor son Marc till such time that he is able to stand on his own feet.*

(f) *This Hon'ble Court may be pleased to direct the Defendant to reimburse the amount of Rs.1,50,000/- (lumpsum) paid by the Plaintiff's father towards the predelivery, delivery and post delivery expenses incurred by him on the Defendant's behalf.*

(g) *This Hon'ble Court may be pleased to grant an amount of Rs.7.50 crores as and by way of one time lumpsum alimony to the Plaintiff.*

(h) *This Hon'ble Court may be pleased to direct the Defendant to purchase a house for the Plaintiff and their son, to reside in Bombay comprising of 3 BHK in Santacruz where the minor son is now residing with the Plaintiff at the Plaintiff Father residents of the minimum value of Rs.5.00 crores.*

(i) *This Hon'ble Court may be pleased to permit the Plaintiff to visit her matrimonial home so as to collect her personal furniture paid for by her, as also her and her son's clothes and personal belongings, Toys, Books, Study material and the like. The Court may be pleased to grant the Plaintiff unhindered access to the premises, and permission to remove any and all of her belongings.*

(j) *This Hon'ble Court may be pleased to permit the Plaintiff to remove all her personal jewelry and valuables from the Bank Locker and Locker in the home.*

(k) *Interim and ad-interim reliefs in terms of prayer clause (b), (c), (d) & (e), (I) and (j).*

(l) *For Costs of the suit."*

3 The learned counsel for the Applicant submits that being subsequent suit filed by the Respondent wife, it is required to be transferred to Pune Court for hearing and final disposal on merits. He submits that the reliefs claimed by the parties in their respective suits are similar in the nature i.e. for divorce and other consequential reliefs including custody of the child.

4 The learned counsel for the Applicant submits that initially the Respondent wife had filed an application u/s.24 of the Code of Civil Procedure, 1908 for transfer of the suit filed by the Applicant before the Pune Court to Mumbai for hearing and final disposal on merits. He submits that the said application bearing Misc. Civil Application (ST) No.11133/2017 was on board before this court (Coram : S. J. Kathawalla, J.) on 09.06.2017.

5 After hearing both sides, this court dismissed the said application with direction to the Applicant to pay sum of Rs.1500/- to Respondent wife on each date of hearing. Said order reads thus:

“1. The above Application is filed by the Applicant Wife seeking transfer of Civil Suit No. 10 of 2017 filed by the Respondent Husband before the learned District Court, Pune to the Parsi Chief Matrimonial Court, Bombay.

2. Since the Applicant is at present not busy with a job, the matter is not transferred to Mumbai. In view thereof, the Applicant has agreed to attend the proceedings before the Pune Court, provided she is paid expenses towards travelling etc. The Respondent undertakes to pay to the Applicant an amount of

Rs.1,500/- on each date of hearing. The undertaking is accepted. The amount of Rs. 1,500/- shall be paid to the Applicant in cash on each day of the hearing and the Applicant will issue a receipt for the same. The Misc. Civil Application is accordingly disposed off.”

6 The learned counsel for the Applicant submits that the Respondent is staying at Pune only. Not only that the minor child is also taking education at Pune. He submits that without informing the Applicant, the Respondent wife shifted to Mumbai along with minor child. He submits that the Respondent wife in her application for temporary injunction dated 24.04.2017 filed before the District Court Pune in Suit No.10/2017 has specifically made a statement that she is going to make a counter claim u/s.37 of the said Act in due course. First para of the said application reads thus:

“At the outset it is contended that the Defendant is going to make a counter claim u/s.37 of the Act, in due course. Hence, the Defendant has right to move this interim application.”

7 The learned counsel for the Applicant submits that in spite of that the Respondent wife shifted to Mumbai and filed Parsi Suit No.8/2017 at Mumbai.

8 The learned counsel for the Applicant submits that, the Respondent wife has intentionally filed Notice of Motion No.6/2017 in Parsi Suit No.8/2017 for various reliefs including restraint order against Applicant from taking forcible physical possession of the minor son Marc. He submits that the said Notice of Motion was heard by this court (Coram : R. G. Ketkar,J., as he then was) and observed

that the Respondent has intentionally shifted from Pune to Mumbai. In support of this contention, he relies on para 35 to 37 and 55 of the said order, which read thus:

“35. As far as aforesaid paragraph-6 of the reply filed by Rishad is concerned, no reply/rejoinder is filed by Nahida controverting said contentions. During the course of hearing Ms.Irani undoubtedly contended that Nahida did not give oral undertaking to the learned Principal District Judge. It is not possible to accept this submission for more than one reason. In the first place, no counter/rejoinder is filed denying the assertions made in paragraph-6. Secondly, from the perusal of reply at Exhibit-13 filed by Nahida to application Exhibit-5 filed by Rishad in Civil Suit No.10/2017 and more particularly paragraphs 3, 4, 5, 8 and 10(h), dealt with hereinabove in detail, there is reason to believe that Nahida had in fact given undertaking, albeit oral, before the learned Principal District Judge. Thus, despite giving an oral undertaking before the learned Principal District Judge as also making representations in paragraphs 3, 4, 5, 8 and 10(h) of reply at Exhibit 3 to Exhibit-5 application Nahida has surreptitiously removed Marc and shifted to Mumbai. She also attempted for transferring the proceedings of Pune Court to Mumbai Court by filing application under Section 24 of C.P.C., which was rejected by this Court on 8.6.2017. Without obtaining School Leaving Certificate or Transfer Certificate from the Bishop's School, Pune, Nahida got Marc enrolled in the Maneckji Cooper Education Trust School on 12.6.2017 and said fact was also not disclosed to Rishad, father of minor child. The name of the school was also not disclosed in the composite reply dated 21.7.2017 filed by Nahida to application dated 9.6.2017 at Exhibit-20 and application dated 13.6.2017 at Exhibit-25 filed by Rishad in Civil Suit No.10/2017. Prima facie Nahida has misled not only Rishad, but, also the learned Principal District Judge, Pune by committing breach of the oral undertaking. Nahida brought Marc to Mumbai and enrolled him in the Maneckji Cooper Education Trust School without

obtaining School Leaving Certificate or Transfer Certificate from the Bishop's School, Pune.”

“36. I have already dealt with in detail the contents of reply dated 21.4.2017 at Exhibit-13 filed by Nahida to application Exhibit-5 filed by Rishad in Civil Suit No.10/2017. She made representations at several places that she does not intend to leave Pune along with Marc and that Marc will not be admitted in a school outside Pune. Prima facie Nahida has also made misrepresentation in her reply at Exhibit-13.”

“37. The present suit is instituted on 28.6.2017. A perusal of the plaint prima facie shows that Nahida has not disclosed pendency of applications Exhibits-5, 20 and 25 filed by Rishad in Civil Suit No.10/2017 as also application Exhibit-15 filed by her in that suit. The plaint also does not disclose the stage of those proceedings as also does not disclose rejection of the Misc. Civil Application filed for transfer of proceedings from Pune Court to this Court. That apart, in fact Nahida represented in her application at Exhibit-15 filed in Civil Suit No.10/2017 that she is going to make a counter claim under Section 37 of the Act in due course. Instead of filing counter claim in the suit instituted by Rishad, she chose to file present suit on 28.6.2017. It is no doubt true that as the marriage between the parties was solemnized at Mumbai on 24.5.2008, in view of Section 29 of the Act this Court will undoubtedly have the jurisdiction to entertain and try the suit.”

“55. Applying the tests laid down in aforesaid decisions to the facts of the present case, in my opinion, it is necessary that Marc is sent back to Pune so as to attend Bishop's School, Pune. Ms. Irani submitted that by prayer clause (a) of the Motion, Nahida has prayed for injunction restraining Rishad from taking forcible physical custody of minor son Marc. As noted earlier, Rishad has already adopted due process of law for taking custody of minor son Marc. In view thereof, I do not find any merit in the submission of Ms. Irani that Rishad is trying to take

forcible physical possession of minor son Marc. Nahida can exercise all the options referred hereinabove, namely, staying at 'Raj Nest', Lulla Nagar, Pune along with Marc or staying on the first floor of D-38, Clover Pinnacle Ridge, Pune by partly allowing application Exhibit-15 filed by her in Pune Court or any of her premises, as mentioned in email dated 19.4.2017 referred hereinabove. Nahida can contest the applications instituted by Rishad for temporary custody of Marc. In the present case, the evidence is yet to be adduced. In my opinion, the summary order is in the best interests of Marc. I am satisfied that if Marc is sent back to Pune, it will involve no risk or harm to him. This course of action also involves no danger to the moral or physical health of Marc."

9. The learned counsel for the Applicant submits that, being aggrieved by the said order dated 22.09.2017 the Respondent wife preferred an appeal bearing No.374/2017 before this court. He submits that Division Bench of this court also observed that the Respondent wife has shifted from Pune to Mumbai to defeat the right of the Applicant. In support of this contention, the learned counsel for the Applicant relies on para 22, 26 and 27 of the order dated 06.12.2017, which read thus:

"22. A learned Single Judge of this Court, vide his order dated 09/06/2017 (actual date is 08/06/2017 passed in MCA ST No.1113 of 2017) had already rejected Nahida's prayer for transfer of Civil Suit No.10 of 2017 from Pune to Parsi Chief Matrimonial Court, Mumbai. The said order mentions that Nahida had agreed to attend the proceeding before the Pune Court if she was paid expenses towards travelling etc. and Rishad had undertaken to make such payment and therefore, there was no reason for her not to have proceeded with all the interim applications filed by the parties in Civil Suit No.10 of 2017 before the learned Principal District Judge at Pune."

“26. We find that instead of contesting the question of custody of Marc in Pune Court wherein the suit was filed earlier in point of time, Nahida filed the present suit before this Court in which one of the prayers is also in respect of the custody of Marc. We find some force in the submission of Mr. Bhojwani that this amounts to abuse of the process of law. He has also invited our attention to the fact that Nahida has now filed a complaint under the Domestic Violence Act before the Metropolitan Magistrate, 21st Court, Bandra, Mumbai, wherein, again, the question of Marc's custody has been raised. We are not going into the propriety or the right of Nahida to file such proceeding. In our view, filing of the said proceedings in a way reflects upon the conduct of Nahida. In our view, the said situation could have been surely avoided. Mr. Bhojwani has stated that Mark's admission is still intact in Bishop's School at Pune and that Rishad has paid the term fees. 27. Since the Exh.5, Exh.15, Exh.20 and Exh.25, as mentioned earlier, are pending in Civil Suit No.10 of 2017 before the learned Principal District Judge at Pune, both the parties can contest those proceedings and question regarding the custody of Marc pending the suit can be decided there. The learned Single Judge of this Court, by the impugned order, has committed no error in issuing the directions in this regard and also in directing that the learned trial Judge at Pune to decide the pending applications on their own merits in accordance with law. The learned Single Judge has clarified that his observations in the said order were prima facie and tentative and were made only for the purpose of considering prayer clause (a) of the Notice of Motion before him. In this view of the matter, it is not necessary to go into the details of allegations, counter allegations, emails exchanged by or on behalf of the parties. All these can be considered by the competent Court i.e. the learned Principal District Judge at Pune while deciding all the applications pending before him by conducting elaborate inquiry in that regard. The impugned Judgment and Order, in our view, does not call for any interference.”

10 The learned counsel for the Applicant submits that being aggrieved by the said order of the Division Bench of this court, the Respondent wife moved the Supreme Court by way of SLP (Civil) Diary No.11202/2018, wherein the apex court has granted liberty to the Respondent wife to file an appropriate application before the Pune Court in case of exigency as required to shift to Mumbai and disposed of the said SLP. He submits that pursuant to the said liberty the Respondent wife has recently filed an application before the Pune Court. He submits that the entire cause of action arose at Pune. Apart from that the Petitioner has filed the suit on 22.02.2017 whereas the Respondent has filed the suit on subsequent date i.e. 28.06.2017. In view of these facts, the learned counsel for the Applicant submits that the suit filed by the Respondent at Mumbai is required to be transferred to Pune for hearing and final disposal on merits along with suit filed by the Applicant for the same cause of action. He submits that if the application is not allowed, irreparable loss will be caused to the Applicant.

11 On the other hand, the learned counsel for the Respondent wife has vehemently opposed the Misc. Civil Application. She submits that it is not necessary that the subsequent suit is required to be transferred for hearing and final disposal on merits along with the suit filed prior in time. She submits that in the present proceedings because of illtreatment from the Applicant, the Respondent constrained to shifting from Pune to Mumbai and she started residing with her parents at Mumbai. Therefore, the Respondent has filed the said suit No.8/2017 at Mumbai

for divorce and other reliefs. She submits that, considering the convenience of the wife, there is no question of transferring the said suit from Mumbai to Pune.

12 The learned counsel for the Respondent submits that the apex court has categorically held in the order dated 18.05.2018 in the said SLP not to rely on the orders passed by this court on 22.09.2017 in Notice of Motion No. 6/2017 in Suit No.8/2017 and order dated 06.12.2017 passed by the Division Bench of this court in Appeal (L) No.374/2017. The learned counsel for the Applicant has relied on both these orders before the District Court. Not only that, the District Court relying on both these orders, passed an order on the application filed by the parties which is contrary to the order passed by the Apex Court. She submits that the Respondent has already filed an application before the Pune Court as per the liberty granted by the apex court by order dated 18.05.2018 and same is pending for hearing on merits. She submits that, at Mumbai, as per the said Act, Juries are already appointed as required by the said Act, so that the matter can be decided immediately. She submits that at Pune District Court, Juries are appointed recently. Not only that not a single meeting is held by those Juries. She submits that if the matter is transferred from Mumbai to Pune, same is going to be delayed for want of procedure to be followed as per the said Act. Therefore, there is no substance in the Misc. Civil Application. Same is liable to be dismissed with costs.

13 Heard both sides at length. It is to be noted that in the present proceedings the Applicant husband has filed the suit No.10/2017 under the said Act for divorce and other reliefs before the Principal District Judge Pune (Parsi Matrimonial Court) on 22.02.2017, whereas the Respondent wife has filed the said suit No.8/2017 at Mumbai for divorce under the said Act on 20.06.2017. Apart from that, when the Respondent has filed an application for interim relief before the Pune Court, she has specifically stated in her application for temporary injunction dated 24.04.2017 (Exhibit- 15 in suit No.10/2017) that she is going to make a counter claim u/s.37 of the said Act in due course. Instead of making a counter claim in suit No.10/2017, the Respondent wife has filed the separate suit being Suit No.8/2017 at Mumbai for the same relief. On this count also, the suit filed by the Respondent is required to be transferred to the District Court at Pune for hearing and final disposal on merits along with suit No.10/2017 filed by the Applicant Respondent.

14 Apart from that the Respondent is residing at Pune. Son Marc is also taking education at Pune only. On this count also, the suit filed by the Respondent is required to be transferred to Pune.

15 In view of the apprehension of the learned counsel for the Respondent that if the matter is transferred from Mumbai to Pune, hearing of the said suit will be delayed, it is necessary in the interest of justice to direct the Pune Court to hear the matter as early as possible.

16 At this stage, the learned counsel for the Respondent wife submits that if this court inclined to allow the present Misc. Civil Application, this Hon'ble Court be pleased to stay the operation and implementation of this order for some time.

17 It is to be noted that, both the suits are of 2017 and same are required to be heard as early as possible. Not only that the Respondent wife as well as her son are staying at Pune and also the orders were passed by the Pune Court from time to time. Therefore, there is no question of granting any stay to this order.

18 In view of the above mentioned facts, I am of the opinion that the present application made by the Applicant u/s.24 of the Code of Civil Procedure, 1908 deserved to be allowed.

19 Hence, following order is passed:

a. The Misc. Civil Application is allowed in terms of prayer clause 32(i), which reads thus:

“(i) This Hon'ble Court may be pleased to direct the transfer of the Parsi Suit No.8 of 2017, titled - Nahida Rishad Cooper Vs. Rishad Darayas Cooper, pending on the file of the Hon'ble Parsi Chief Matrimonial Court, this Hon'ble Court, to the Court of the Learned Principal District Judge, Pune, being the Parsi District Matrimonial Court at Pune.”

b. The Principal District Judge Pune (Matrimonial Court) is directed to hear the suit No.10/2017 filed by the Applicant husband for decree of divorce

u/s.32(dd) and 32(g) of the Parsi Marriage and Divorce Act, 1936 with Parsi Suit No.8/2017 filed by the Respondent wife for dissolution of marriage under the said Act, as early as possible.

c. Hearing of both the suits is expedited.

d. Oral request made by the advocate for the Respondent for stay of this order is rejected on the ground that both the suits are of 2017 and same are required to be heard as early as possible.

e. Misc. Civil Application stands disposed of accordingly.

f. No order as to costs.

(K.K.TATED, J.)