

IN THE HIGH COURT OF BOMBAY AT GOA**MISC. CIVIL APPLICATION NO.195 OF 2019****IN****SECOND APPEAL NO.75 of 2018**

Roxann Sharma

51 years, CD Patanga Bldg.,

A Wing, 1st Floor,

Aquem, Margao, Goa.

... Applicant

Versus

Mr. Arun Sharma, 55 years,

Presently R/o.H.N No.80,

Magnolia, Ground Floor, Bin Waddo,

Betalbatim, Salcete, Goa.

...Respondent

Ms. Caroline Collasso, Advocate for the Applicant.

Respondent in person.

Coram:- DAMA SESHADRI NAIDU, J.**Reserved on: 15th March 2021.****Pronounced on: 24th March 2021.****ORDER:**

The respondent, a Hindu by religion, married the applicant, a Jamaican-born American of Indian origin. She is a Christian by faith and an American by citizenship. They met, fell in love, and married in the USA. It was in 2009. When they were living there, on 18th April 2012 they had a son—Master Thalbir Sharma.

2. When in the USA, the mother was employed: She was a ‘tenured’ professor in English Literature. After the child’s birth, the couple moved over to India. They first began to reside in Pune. There, a few months later, the grandmother (father’s mother) joined them. The mother-in-law’s addition seems to have provided the proverbial setting to the family’s problems. The mother and the grandmother could not get along well; the mother felt, as the Appellate Court puts it, that

her mother-in-law usurped her role and responsibility as the child's mother.

3. So the couple shifted over to Goa. The record reveals that the house in Goa along with the adjoining flat belonged to the respondent's family. Soon the grandmother, too, came to Goa. She occupied the neighbouring flat. The problems resumed.

4. In January 2013, the mother went to the USA, leaving the child with the father. She came back in April 2013 and filed proceedings under the Domestic Violence Act. It was in the Court at Mapusa. In those proceedings, she applied for an interim relief: the child's custody. In fact, the trial Court granted that relief. But the couple seemed to have settled their differences, for the mother withdrew the Domestic Violence proceedings and re-joined the respondent. In May 2015, the mother once again went to the USA, leaving the child with the father.

5. This time, it was the father's turn to seek judicial redressal. When the mother was in the USA, the father filed Marriage Petition No. 59/2013, under Section 6 of the Hindu Minority and Guardianship Act 1956. It was before the Civil Judge, Senior Division, Margao. He alleged that the mother had abandoned the child, so he wanted to retain the child's custody. There the mother filed a counterclaim for the child's custody.

Procedural History:

6. To begin with, the trial Court, in January 2014, granted the child's interim custody to the mother, with visitation rights to the father. Aggrieved, the father moved this Court in Writ Petition No. 79 of 2014. In fact, this Court allowed the father to have custody, with visitation rights to the mother. Then, the mother moved the Apex Court in Civil Appeal No. 1966 of 2015. Through a reported

judgment, 17.02.2015, the Supreme Court restored the trial Court's order: interim custody to the mother and visitation to the appellant.

Trial Court:

7. Eventually, by the judgment dated 06.03.2018, the trial Court dismissed the father's petition and allowed the mother's counterclaim. The trial Court declared that the child should be with the mother; of course, the father could have visitation rights from 3.00 pm. to 6.30 pm every Tuesday and Thursday, and from 3.00 pm to 8.30 pm on Saturdays. The trial Court also required the mother to reside with the child within the Court's jurisdiction. If she wanted to leave Goa or the country, she should secure the Court's leave. She should also inform the respondent if she changed her place of residence.

First Appellate Court:

8. Aggrieved, the father filed the First Appeal No.20/2018 before the District & Sessions Judge, South Goa, Margao. Through its judgment dated 29th June 2018, the First Appellate Court refused to overturn the trial Court's verdict. That is, the First Appeal was dismissed.

Second Appeal:

9. So, the father filed Second Appeal No.75 of 2018 before this Court. On 18th September 2020, this Court, too, dismissed the second appeal. Now, I am told that the judgment in the second appeal has not been appealed against. It has become final.

The Miscellaneous Application:

10. When the Second Appeal was pending, both the father and the mother filed a host of miscellaneous applications. And of those, the father filed the most. Some, of course, allege that the mother be punished for contempt because on occasions she violated the trial

Court's arrangement of visitation. As the contempt proceedings are independent, this Court is yet to take them up for consideration.

11. Through this Miscellaneous Application, the mother wants the Court's permission to leave the Country. This Court, initially, was not inclined to consider it when the Second Appeal was pending. It was for two reasons: (a) The mother, then, had the child's custody through an interim arrangement. So pending the final adjudication of the Second Appeal on the same issue, the Court felt it premature to consider the mother's plea to leave the country. (b) When the Court disposed of the Second Appeal, both parties had agreed to invite an order in this Miscellaneous Application separately. The reason for this was that the father himself told the Court that they had been lately meeting each other often. There was thawing in their frozen relationship. And it might result in some reunion or rapprochement. To this day, the fact remains that the parents have not been divorced; their matrimonial bond persists.

12. So this Court has kept aside the technicalities and allowed the parents time and space for them to talk and, if possible, to patch up their differences for the child's sake. It does not seem to have happened. So the mother has mentioned the matter before the Court on more than one occasion.

13. Before ruling on the mother's application for leaving the country with the child, who is an American citizen by birth, the Court wanted to ascertain the parental position or viewpoint on the issue. So, a couple of weeks ago, I required them to see me in the Chamber. Due to the pandemic and because of the father's pursuing the case *pro se*, there was no proper communication. Eventually, last week, they met me in the Chamber. The father, as always, has had no counsel; the mother came along with her counsel, though.

14. In the Judgment, dt.18.09.2020, in SA No.75 of 2018, this Court has given detailed reasons why the child must remain with the mother. That said, it has not disturbed the visitation arrangement. Now, through this Miscellaneous Application, only the visitation rights need to be reworked. In the Chamber, I have asked the father about his view on the matter: how he would like to have the visitation rights. I have suggested that he opt for an annual physical association, besides video chatting with the child as often as the child's education and other activities permit.

15. In the judgment in the Second Appeal, this Court has particularly observed the father's exemplary conduct. It was in praise of him, and it still is. But in the Chamber, the father unusually turned aggressive. He said, "in India, the Courts always lean in woman's favour. Though that is not the case in many states in the USA". He has further pointed out that the issue about the mother's leaving the country must be left to the trial Court. Then, I wanted to know whether that was on the grounds that the second appeal had already been disposed of. He said, 'yes'. Of course, I reminded him this is the arrangement they both had agreed to: to wait, to try to sink differences, and, if possible, to settle the issue. Then, the father did not pursue that point.

16. As to any arrangement about visitation should the Court choose to permit the mother and the child leave the Country, the father expressed no opinion. He has remained dismissive of the Court's whole effort. He said, "let this Court do whatever it wants". To be fair, I have seen more anguish and less anger on his face, but the Court is ordained to do many an unpleasant task, so to say. Parental quarrels always pain the Court, too. Here, the law's role is limited; it is the parental wisdom that is needed. But a judge is no superhuman,

much less divine, not to err. So whichever way the decision goes, it is fraught with its own limitations.

17. On the mother's part, she has told me that the father may speak to the child every weekend through video calls; such an arrangement will affect his education during the weekdays, though. Then, I have asked her about her visit to India once a year and leave the child to the father's complete care for, say, a month or so. In reply, the mother has told me that it is difficult for her to come to India annually; she, instead, undertakes to come to India once in two years—biennially. She has also suggested that the father may visit the USA as often as he pleases. Then, on all occasions, she will allow his access to and interaction with the child. That apart, the mother has assured if the father comes once in a year and wants to spend time with the child, she will help him with accommodation, too, so the child need not be taken away to far off places in the USA.

18. Even in the wake of the mother's proposal, the father remained unimpressed and refused to suggest any alternatives. As I have already noted, the judgment, dt.18.09.2020, in the Second Appeal has given sufficient reasons why the child, now nine years old, should be with the mother. So I need not dwell on it.

19. In the end, the mother has pointed out the procedural problems she faces to leave the country for the USA. Those problems relate to the conversion of the child's Person of Indian Origin (PIO) card into an Overseas Citizen of India (OCI) card. It needs the father's consent and co-operation.

Before Pronouncement:

20. Today is the day of the week reserved for virtual hearing. Before pronouncing the judgment, as I had spotted Shri Sharma on screen, I asked him whether he would physically attend the Court. He

agreed and came down to Court, so did the applicant's counsel, Ms. Collasso.

21. In the Chamber, I have suggested to Shri Sharma and the respondent's counsel that both parties may cooperate, so that child custody does not become a matter of ego and that the child's future does not suffer. In that context, Ms. Collasso pointed out that as the father, Shri Sharma has to cooperate with his wife to facilitate her travel, as well as the child's, from India to the USA. She wanted him to handover (i) the child's old passport, (ii) the child's new passport, and (iii) the child's PIO card.

22. Shri Sharma wanted the child's exclusive custody for 12 days before the mother and the child leave the country. He wanted the child because his sister, brother-in-law, and other relatives are home. This arrangement is without prejudice to Shri Sharma's rights to challenge the order being pronounced. Based on the submissions advanced by the applicant's counsel, the Court suggested to Shri Sharma that to have the exclusive custody of the child, he should cooperate with the applicant to enable her to secure an OCI card for the child, Master Talbir Sharma. As a part of it, he will have to hand over the documents mentioned above.

23. In response, Shri Sharma has submitted that he does not possess the PIO card. According to him, it is with the applicant-mother. He has then undertaken to place the old and new passports of Master Talbir Sharma before the Court. When the Court informed Shri Sharma that once he complied with that, he would have the child's exclusive custody for twelve days as he had requested; he flew into a rage. He submitted he could accept no pre-conditions. Once he gets his child's exclusive custody for twelve days, then he will 'think' of handing over the documents. Then, he said he wants no bargain; he will first test the order before the Supreme Court.

24. Therefore, I am constrained to conclude that Shri Arun Sharma is unwilling to agree to any arrangement that smoothens and expedites the child's travel. Nevertheless, I have given the copy of the judgment-to-be pronounced to both Shri Sharma and Ms. Collossa to suggest any changes in the custody and visitation arrangements on either side as it is a cross-continental custody matter. Shri Sharma has refused to look into the judgment; Ms. Collasso has read the conditions and said that the applicant is agreeable to all conditions.

25. As a result, I dispose of this Miscellaneous Application with these directions:

(A) The applicant may leave India for the USA along with Master Thalbir, the child, subject to these conditions:

(i) The applicant must allow the respondent to talk and interact with Master Thalbir twice every weekend: Saturday and Sunday. For that, she has to provide video-call access to the child at her end in the USA. The calls may be via skype, WhatsApp, or any other convenient electronic mode as the respondent chooses.

(ii) The applicant must visit India and stay here at least for two weeks. During that period, the applicant must hand over Master Thalbir to the father, who can have the child's exclusive custody. Of course, the applicant may speak to the child twice a week (audio or video calls).

(iii) If the respondent chooses to live in the USA, the same visitation rights as provided by the trial Court, and confirmed by the Apex Court, will continue to bind both the mother and the father.

(iv) Instead, if the respondent wants to visit the USA annually, the applicant must give the respondent two week's exclusive

access to the child. It is subject to the respondent's providing all the details of his place of stay in the USA. This sole custody must be only during the child's vacation, lest it should disturb his education.

(v) In the alternative, if the respondent chooses to visit the USA more than once a year, he may have exclusive access to the child, in all, fifteen days, spread across his visits. Those days of sole custody must be either weekends or vacations.

(vi) If the applicant violates any of the above conditions, such violation shall be treated as an act of contempt. And if the respondent brings to the Court's notice any instance of violation, the Court may recall its judgment, dt.18.09.2020, besides continuing the contempt proceedings against the applicant.

(vii) Once the applicant secures the travel documents for the child, she must file an undertaking before this Court that she would not abuse the arrangement now the Court has allowed and would always abide by them.

(B) On the Respondent's part:

(a) The respondent must provide all assistance to the applicant to secure an OCI card or any other travel documents to enable the applicant to take Master Thalbir to the USA.

(b) In four weeks from today, the respondent must hand over Master Thalbir's documents in his possession to the applicant to enable her to process the child's travel application.

With the above observations and directions, the Court disposes of this Miscellaneous Civil Application.

DAMA SESHADRI NAIDU, J.

NH

26. After the pronouncement of the order, Shri Arun Sharma wanted the Court to suspend the operation of the judgment for twelve weeks. The applicant's counsel has insisted that eight weeks would suffice. She has again wanted the Court to direct Shri Sharma, in the meanwhile, to enable the applicant to process their travel documents. But Shri Sharma would have none of it. Without testing the judgment, he does not want to commit himself to any agreement or arrangement.

So, the operation of this judgment stands suspended for twelve weeks from the day it is uploaded, as the respondent has sought.

DAMA SESHADRI NAIDU, J.

NH