

sumedh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6070 OF 2022

Dr. Barkha Tharani (Nee Barkha Chawla)	.. Petitioner
Versus	
Mr. Avinash Suresh Tharani	.. Respondent

-
- Ms. Kavita Karnad i/b Leon Samuel, Advocate of the Petitioner
 - Mr. Akash Vijay, Advocate for the Respondent
-

CORAM : MILIND N. JADHAV, J.

Reserved on : MAY 18, 2022
Pronounced on : MAY 23, 2022
(Vacation Court)

P.C.:

- 1.** Heard learned counsel appearing for the respective parties.
- 2.** By the present Petition, Petitioner (wife) has prayed for the following reliefs:

"(a) This Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction, calling for the Record and Proceedings in the Petition No. a-157 of 2019, pending in the Ld. Family Court, and after going through the legality ad propriety of the impugned Order, be pleased to quash/modify or set aside the impugned order dated 20th April, 2022 below Exhibit 38;

(b) This Hon'ble Court be pleased to pass an order for day access to son Ved in the Children's room of the Ld. Family Court at Bandra, for the Respondent, during the remaining summer vacation days. She seeks to modify and/or quash the order dated 20th April, 2022 impugned in the petition."

- 3.** The impugned order is passed below Exhibit-38. Original Application was filed by the Respondent (husband) before the Family Court seeking access to his minor son-Ved on the occasion of his

birthday and during the ensuing summer vacation between 30th April 2022 to 5th June 2022. The birthday of Ved was on 21st April.

4. This petition was mentioned before me on 13th May 2022 during the vacation. Both learned counsel appeared and made their respective submissions. A joint request was made by both the parties to interview / have an altercation with the child in chamber. After hearing the learned counsel for the parties I passed the following order:

"1. Heard.

2. After hearing the learned counsel for some time and perusing the impugned order, it is directed that the Petitioner along with Advocate shall remain present along with her child in chamber at 10:00 a.m. on 18.05.2022. Respondent along with Advocate shall also remain present at the same time.

3. Stand over to 18th May, 2022 at 10:00 a.m. in Chamber."

5. On 18th May 2022 the matter was fixed for hearing and interaction with the child in chamber at 10:00am. The Petitioner was present along with the child Ved, so also the Respondent was present. The advocates for both sides were also present. I had an interaction with Ved initially only in the presence of the Petitioner and her Advocate and later in the presence of the Petitioner, the Respondent as well as their respective Advocates who were all present in the adjoining chamber. Though, all of 7 years of age, Ved appeared to be a highly reciprocative boy and got engaged in a conversation with me immediately. From his body language, demeanor, replies and answers given to a gamut of general questions put to him, he came out to be

more than intelligent for his age. His reflexes were very sharp. After spending about 30 minutes inter-reacting with him, I let alone the Petitioner, Respondent and Ved in the chamber and shifted to my chamber to hear the respective advocates, when further submissions were made. After hearing the Advocates the matter was closed for orders. The petitioner and the respondent along with Ved thereafter left the chamber.

6. Though, the parties have approached this Court in the middle of the summer vacation, I acceded to their joint request and heard the present petition finally lest to render the proceedings infructuous. My task is cut out as only two weeks are now remaining for the summer vacation period which is the subject matter of the original application and the impugned order by the Trial Court. Nevertheless, the matter needs to be decided in the interest of justice and most importantly in the larger interest of the child.

7. Petitioner is aggrieved by paragraph Nos. 4 and 5 of the operative part of the impugned order which read thus:

"4. Petitioner shall also give overnight access of child Ved to father from 17.05.2022 to 30.05.2022. She shall hand over master Ved on 17.05.2022 around 10:00 a.m. to respondent-father, whereas respondent shall return the child around 5.00 p.m. on 30.05.2022 to petitioner-mother.

5. During overnight access, respondent shall take care of child by all means and also allow him to speak with mother daily as per child's wish."

8. The present petition is restricted only to the above issue, i.e.

overnight access of the child to the Respondent during the summer vacation. Petitioner has submitted before the Trial Court that she is ready to give access to the Respondent but resisted to give overnight access. Ms. Karnad in her submission before me has also stressed upon and reiterated the above stand. The Trial Court has however reasoned that the child was now grown up and he could live with his father and spend quality time with him. The Trial Court relied upon photographs to arrive at the conclusion that the child was having a good bonding with his father. I have seen the photographs (rather several of them which are annexed to the Petitioner / Reply) and they do depict what the trial court has observed. The Trial Court was also influenced by the fact that there was no material on record to deny overnight access of the child on the ground of "**safety**" as pleaded by the Petitioner. Hence directions were given in paragraph Nos.4 and 5 for overnight access.

9. At this stage I may not dwell into the family history of the parties save and except if required and refer to such relevant facts that may be necessary to dispose of the present petition.

10. Parties got married in 2012, child was born in April 2015 and parties have been staying separately since September 2016. Petitioner is seeking divorce under the Special Marriage Act as also other reliefs regarding custody and maintenance. The reason for filing the divorce petition is stated in paragraph No.4 of the present petition. It is the

Petitioner's grievance that pursuant to her separation the Respondent has not offered a farthing towards maintenance as also even after the birth of the child the Respondent has never offered/shared or paid towards his maintenance. This is seriously disputed by the other side. Petitioner submits that, post filing of the divorce petition, the Respondent has inundated her with multiple applications to harass her. I have perused the interim orders dated 5th April, 2021 and 29th October, 2021 passed by the Trial Court. In the petition in para Nos. 9 to 14 the Petitioner has narrated certain incidents attributable to the nuisance caused by the Respondent.

11. One of the principle reason of opposition to overnight access as argued by the Petitioner is that after the demise of the Petitioner's mother in June 2000, there is no woman staying in his house who can take care of the child. The Petitioner has argued that since there is no elder person in the house to monitor the needs of the child overnight access should be denied.

12. In the petition in para No. 18 the petitioner has made certain submissions which ought to be avoided; the Petitioner should refrain from making comments about Judges and commented only on the facts of the case. Merely narrating superfluous english words in pleadings cannot enhance the strength and quality of the case. The Petitioner should remember this. As far as the grounds are concerned,

it is understandable that the welfare of the child is paramount and that should be the focus of every parent. The Petitioner has levelled serious charges against the Respondent about threatening to disappear with the child but they seem to be merely on paper; if the Petitioner was indeed threatened in such a manner the Petitioner ought to have reported the same to the law enforcement agencies. No such report or complaint is placed on record.

13. Per contra, the Respondent has filed his affidavit-in-reply to oppose the petition. According to the Respondent, Petitioner is guilty of not complying with the orders passed by the Family Court. Respondent submits that the parties entered into consent terms on 07-11-2020 wherein the Petitioner agreed to grant overnight access of the child to the respondent. On 29-10-2021 the Family Court granted access of the child to the Respondent during Diwali from 10:00am of 1st November, 2021 to 10:00a.m. of 4th November 2021, but the same was flouted by the Petitioner. In the consent terms, Petitioner agreed to grant overnight access of the child to the Respondent for Diwali and alternate weekends, however, access was granted only once till date. On 29.10.2021 for the first time the Family Court granted overnight access but the petitioner did not comply with the same. Respondent submits that in the month of December 2019 the petitioner had allowed access to the child for a period of 7 days

permitting the Respondent and his father (child's grandfather) to take the child for a trip to Dubai when the child was the 4 and half years old. Respondent has pleaded that until March 2020 the Respondent was allowed to meet the child physically almost every day as the Petitioner used to be busy in her clinic and that the Respondent would spend quality time with the child.

14. I have perused the orders dated 20.04.2022, 29.10.2021, 24.12.2020, 05.04.2021 passed by the Family Court.

15. I have heard both the learned counsel Ms. Karnad and Mr. Vijay for the parties. Submissions made by them are on pleaded lines. It is seen that as per the consent terms dated 7.11.2020 between the parties the Petitioner has agreed to provide regular access of the child to the Respondent. In fact the Petitioner does not have any problem with the day access at all. It is seen that vide order 24.12.2020 day access was granted for three days and the same was complied with. Thereafter on 05.04.2021 day access was granted once again for 16 days which was again complied with peacefully. It is further seen that overnight access thereafter was granted between 1st November 2021 and 4th November 2021, but was not complied with by the Petitioner. It is also seen that the child had travelled with the Respondent for 7 days to Dubai for a holiday when he was four and half years old. The material placed on record shows that the bond between the child and

respondent father is strong. This finding by me is fortified and strengthened because of the interaction that I have had with the child. I have very carefully watched the demeanor, body language and the replies given by the child during the interaction process. Bonding between the Respondent and the child is also very strong in view of the fact that the child virtually has no inhibition in interacting with the Respondent and reminiscing the good old memories of time spent together by both of them in the past. Every interaction of the Respondent-father with the child in my presence was responded very quickly and eagerly by the child. I found that the auditory senses of the child were drawn towards what the father (Respondent) was speaking. For every question asked, the child's reply was prompt and infact it came with an improvised answer reminding the Respondent of many further missed details. What I could also observe was that though the child was attentive to what the father spoke and replied to him, there was no trust deficit between the two or any fear shown by the child. Their interaction seemed like a normal father and son together. After I left the adjoining chamber to continue with the hearing of the case both the Respondent and the child enjoyed playing with each other which all of us could overhear as we were sitting in the next chamber.

16. Be that as it may, what is important to address is the fear of the

Petitioner as a mother. The apprehension of the Petitioner is not well founded for several reasons. On the one hand the Petitioner does not have an issue with giving day access but is having reservation about overnight access. What is required to be noticed is that if the Petitioner has a genuine apprehension then such an apprehension has to be backed by cogent material, evidence and prelude. There is not a singular incident that I have come across while reading the entire record to compel me to believe that the apprehension of the Petitioner is well founded. Just as the Petitioner is the mother of the child it should not be forgotten that the Respondent is his father and from the record it is clearly gathered that he is a doting father. The photographs do convey a certain degree of bonding. The interaction which I had with the child and after my interaction the bonding between the child and the father while playing with each other does not leave any doubt in my mind that the apprehension of the Petitioner can be true. Since the child is 7 years old I did not think it fit to ask all parties to step out of the chamber and interview him with direct questions. I chose to have an informal personal interaction with the child and discussed with him a wide array of topics of his interest, hobbies, studies, friends, school, sports etc. which interested him a lot and also had one on one conversation with the child. After interacting with the child I have come to the definite conclusion that if I would have asked him a direct question he would have definitely answered it directly since

from his entire demeanor it appeared that he was prepared and looking forward to answer the difficult question of custody. As a 7 year old, the child's diction and spoken english was with a sense of proportion. From the conversation that I had and what I observed, I do not think that the child should be kept away from the Respondent-father. The child also did not have any hesitation in accepting the fruit drink and chocolates brought by the father or even listening to his small commands. The Petitioner has already taken the child for a holiday to Nainital during these summer vacations. The parties in this case should not forget that both parents have common responsibilities, most importantly been together would be an ideal case but even if they are separated they still have to helm the primary responsibility of upbringing and development of the child. For this, the child requires the love, affection and quality time to be spent with both the parents. Leaving apart the acrimony between the parties before me, at this stage the most important focus should be aimed at the development of the child in his these formative years, which is extremely important for his age as he possesses a good intelligent quotient (IQ). It is easily understood that, if Ved the child was intimidated or having any reservation of going near the Respondent, he would have shown it during the interaction. However such is not the case herein.

17. In the present case, both the parties are financially sound and

educated. Learned counsel appearing for the Respondent has stated that after the demise of the Respondent's mother a full time maid is employed for 16 hours by the Petitioner to take care of the daily chores. Respondent's father lives with the Respondent. He submits that denial of access to the father may be detrimental to the child.

18. What is important to be seen is whether the child has love and affection towards the parents rather than the other way round. In the present case undoubtedly the child is living with the Petitioner-mother but the love, affection and bonding with the Respondent-father is there to be seen and I have found that there is no trust deficit between the Respondent and the child. It is also not the case of the Petitioner that there is any ill treatment attributable/given to the child by the Respondent. Thus, the child therefore needs love, understanding and company of both the parents. Though the impugned order does not dwell into details, I have perused the various orders passed by the Family Court, inter alia, pertaining to access and more importantly overnight access. There is one complaint of the Petitioner that the Respondent is an overzealous father and if he misses one phone call to speak to the child he keeps on calling up again and again. Respondent should also therefore conduct himself with maturity. Court's order is not a license given to any one of the parent to behave in a manner which will be detrimental to the other side. In cases like these Court

orders have to be worked upon by both the parents.

19. In the present case for the purpose of interim access consent terms dated 7.11.2020 were executed between the parties wherein both parties have undertaken to co-operate with each other for peaceful and smooth access including overnight access. From the record of the case I find that there is no reason for the Petitioner to contend that the child will not be safe with the Respondent. The Petitioner's opposition to giving access is in-fact in the present case is overlapped with her acrimonious past and hatred towards the Respondent. This is an area where there is a very thin line of demarcation to be drawn which warring parents need to draw in the interest of their child.

20. The primary proceeding for divorce is pending before the Family Court. It may take its own course. What is before me is the challenge to the impugned order dated 20.04.2022.

21. For all the above reasons and findings, I do not have the slightest hesitation to conclude that the order dated 20.04.2022 passed by the learned trial / family court should call for any interference. The order dated 20.04.2022 stands upheld with modification of the access period as stated in the order. Since 7 days are already over in respect of the period of overnight access as stated in paragraph 4 of the order, the said period of overnight access shall now read as to be given from

24.05.2022 to 05.06.2022. Hence it is directed that the petitioner shall hand over the custody of the child-Ved to the Respondent on 24th May, 2022 at 03.00 p.m. at the Respondent's house i.e. below the building of the Respondent's house along with his clothes and necessities required for 13 days stay and the child shall remain with the Respondent upto 05.06.2022. The respondent shall return the child to the Petitioner at 3:00 pm on 05.06.2022. Considering some of the reservations expressed by the Petitioner, it is directed that during the aforesaid period of overnight access the Respondent shall not travel outside India or attempt to take the child outside India for any trip or holiday outside the county. Respondent is directed to take proper care of the child and allow the child to speak with the Petitioner at least two times in a day i.e. once in the morning / afternoon time and once at night before going to bed or as per the child's wish. If any of the condition given in this order is flouted by the Respondent, liberty is given to the Petitioner to take out appropriate proceedings.

22. With the above directions, Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

RAVINDRA
MOHAN
AMBERKAR
Digitally
signed by
RAVINDRA
MOHAN
AMBERKAR
Date:
2022.05.23
14:44:50
+0530