

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8429 OF 2022

Pallavi Keshav Bhoir

...Petitioner

Vs.

Amit Harischandra Patil

...Respondent

Mr.Sanjeev Kadam a/w Mr.Rajesh Kachare, Mr.Kishor Patil,
Mr.Samir Mhatre, Mr.Ajay Patil for the Petitioner.

Mr.Ganesh Gole a/w Mr.Shivkumar Mishra, Ms.Vridhhi Maria
and Mr.Vijendra Jabra for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 5 SEPTEMBER 2022

P.C.

. By this Petition, the Petitioner is challenging the order dated 26 May 2022 below Exhibit-13 in Petition No.B-06/2019. By the impugned order Application Exhibit-13 filed by the Petitioner (Original Respondent) before the Family Court, seeking rejection of the custody Petition, filed by the Respondent, as not maintainable, has been kept with the main Petition. In other words, the learned Family Court has refused to decide the Application challenging the maintainability of the Petition at the threshold.

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2. The parties had earlier filed Petition No.F-302 of 2013 before the Family Court at Thane for dissolution of marriage by mutual consent, under Section 13B of the Hindu Marriage Act, 1955. The parties had produced consent terms on the basis of which the Petition No.F-302 of 2013 came to be disposed of by order dated 3 May 2014. It can be seen that by virtue of the said consent decree the permanent custody of the minor son of the parties was to remain with the Petitioner-mother and the Respondent-father was entitled to the visitation rights as agreed. As per Clause (3) of the Consent Terms it was agreed that the Respondent will not at any point of time file another Petition for custody.

3. The Respondent has filed Petition No.B-06/2019 before the Family Court under Section 26 of the 1955 Act claiming “Additional Custody” of at least 10 to 15 days in the month of May as well as the Diwali and December vacations till the minor attains majority.

4. The Petitioner filed Application Exhibit-13 for rejection of the Petition as being not maintainable in the light of the earlier Consent Terms, which application, the Trial Court has directed to be “kept” with the main Petition.

5. I have heard the learned counsel for the parties. Perused record.

6. It is submitted by the learned counsel for the Petitioner that in view of the earlier Consent Terms by which the Petitioner had expressly agreed not to file any Petition for custody, the Petition seeking “Additional Custody” during May, Diwali and December vacation is *ex facie* not maintainable. It is submitted that the learned Family Court, ought to have decided the Application at the threshold and was not justified in postponing to consider the Application along with main Petition which is in the submission of the learned counsel would frustrate the very object of filing of the Application.

7. On behalf of the Appellant reliance is placed on the decision of this Court in *State of Goa V/s. Placido Bragonz*¹, *Latabai Narcinha Telang V/s. Suresh Narcinha Telang*², *Krishna Kumar Birla V/s. Rajendra Singh Lodha & Ors.*³, *Mausami Moitram Ganguli V/s. Jayant Ganguli*⁴, *Krishna Kumar Birla V/s. Rajendra Singh Lodha & Ors.*⁵, *Vikram Vir Vohra V/s. Shalini Bhalla*⁶, *Mohan Kumar Rayana V/s. Komal Mohan Rayana*⁷ and the decision of the Madras High Court in *S. Rohini*

1 2002 (1) M.L.J. 370

2 2005 (6) Bombay Case Reporter 389.

3 (2008) 4 Supreme Court Cases 300

4 (2008) 7 SCC 673

5 (2008) 4 Supreme Court Cases 300

6 2010 (4) SCC 409

7 (2010) 5 Supreme Court Cases 657

V/s. M. Rajavel Mohan⁸. He submitted that the Petition be allowed and the Family Court be directed to decide the Application at the threshold by way of a preliminary issue.

8. The learned counsel for the Respondent submitted that all that the Family Court has done, is to keep the Application with the main Application and there is no adverse order as such passed against the Petitioner. It is submitted that the Respondent is only claiming additional custody during the period of vacation in May, December as well as at the time of Diwali, in order to spend quality time with the minor and to develop emotional bond with him and in order to ensure that the child is not emotionally alienated from the father.

9. On behalf of the Respondent reliance is placed on the decision of the Supreme Court in ***Rosy Jacob V/s. Jacob A. Chakramakka***⁹, in order to submit that the orders of the Court relating to the custody of the minor are always of a temporary nature and no estoppel applies.

10. I have considered the submissions made. At the outset it is necessary to note that I am only concerned with the question whether the Application raising a preliminary objection to the maintainability of the Petition was required to be decided

8 2018 () High Court of (Madras) 2472

9 (1973) 1 Supreme Court Cases 480

at the threshold and/or whether the family Court was justified in postponing the consideration of the same along with the main Petition.

11. The only ground on which the Petitioner claims that the Petition filed by the Respondent is not maintainable is based on the Consent Terms entered into between the parties in the year 2014, in which by Clause (3) the Respondent had agreed that he will not file another Petition for custody. The relevant Clause (3) reads as under:-

“3. The Petitioner doth hereby unconditionally and irrevocably agree, declare and confirm that the Respondent being the mother of Swayam is natural guardian and the custody of Swayam shall always and permanently be with the Respondent and the Petitioner shall not at any point of time file another Petition for custody.”

12. The question is whether in the face of such a term which was agreed to by the Respondent, the Petition now filed under Section 26 of the Act by the Respondent can be dismissed at the threshold.

13. It is now well settled that in the matter of the custody of the minors the paramount consideration is welfare of the

minor which takes precedence and primacy over the respective rights of the parents claiming custody and or visitation rights and in a given case even over statutory provisions as held by the Supreme Court in case of *Vikram Vir Vohra*. The Supreme Court while holding so has placed reliance on its dealier decision in *Mausami Moitram Ganguli V/s. Jayant Ganguli*.

14. The Supreme Court in case of *Vikram Vir Vohra* on which reliance is placed by the learned counsel for the Petitioner has held that the custody orders are always considered to be interlocutory orders capable of being modified, keeping in mind the needs of the child. The Supreme Court has held that such orders even when passed on consent can be varied if welfare of the child so demands.

15. It is true that by virtue of the Consent Terms executed in 2014 the Respondent had agreed not to file any custody petition in future. The Respondent has now filed the Petition for Additional Custody during vacations. It is neither necessary nor appropriate to dwell on the merits of the Petition filed by the Respondent at this stage. It is necessary to emphasise that the Family Court has not even considered the preliminary objection and all that has been done is to postpone the consideration of the Application at the time of hearing of the main Petition.

16. In my considered view, no exception can be taken to the course adopted by the Family Court having regard to the sensitive nature of the issue of the custody of the minor involved and the rights of the parties as parents. The Supreme Court in Rosy Jacob has reiterated that the orders of the Court relating the custody of the minors are temporary in nature and has also considered whether estoppel may be applicable in such cases.

17. In my considered view the Petition filed by the Respondent can be better decided in the larger interest and the welfare of the minor after the parties get an opportunity to lead evidence. This may even afford the Family Court opportunity to interact with the minor, if necessary, ascertaining the wishes of the minor. These are not matters which can normally be disposed at the threshold one way or the other.

18. It is for the Family Court to decide the effect of the Consent Terms entered into by the parties in the context of the welfare of the minor taking primacy and also the issue of estoppel if it arises. I have only delineated the issues in order to find that a consideration of these larger issues at the preliminary stage may not be possible and they can be more appropriately dealt with at the time of hearing of the Petition.

19. In *Placido Bragonz* the question was whether the State was precluded from maintaining an Application for relief which travels beyond the compromise decree before the Lok Adalat.

20. In *Latabai Telang* there was a consent decree in which a correction of typographical error was sought for. This Court found that it was not a fit case for exercise of the jurisdiction under Article 227 of the Constitution of India.

21. In *S. Rohini* before the Madras High Court the Appellant wife had sought modification of the consent terms/decreed by which the marriage was dissolved and the custody of the minor son was entrusted to her. She sought modification on the ground that in the consent decree no modalities with regard to the manner in which the payment agreed by the Respondent-husband was to be made and the period of the visitation rights given to the Respondent were set out. The case in my view turned on its own facts. At the cost of the repetition I may state that the Family Court has not yet dwelt on the merits of the objection to the maintainability of the Petition.

22. In *Dhanvanti Joshi* the Supreme Court has held that the orders regarding custody are interlocutory in nature and

subject to modification depending upon the change of the circumstances and the paramount interest of the child.

23. In *Krishna Kumar Birla* the Supreme Court has held in paragraph 116 that a Court is entitled to dismiss a lis at the threshold if it is found not maintainable, in order to save the valuable time and wasteful expenditure. There can not be any manner of dispute with the proposition and infact I am bound by the same. However, the question whether a particular issue is to be decided as a preliminary issue would depend upon the facts and circumstances of each case.

24. The case of *Mohan Kumar Rayana* also, in my humble opinion turned on its own facts.

25. Considering the overall circumstances, I do not find that a case for interference is made out. The Petition is without any merit and it is accordingly dismissed, with no order as to costs.

26. The parties are at liberty to file/complete pleadings, in the Petition and the Application (Exh.3) within a period of four weeks if not done. Needless to mention that the learned Family Court would frame appropriate issues on the rival

pleadings, which can be decided at the hearing of the main Petition.

Rival contentions of the parties are left open.

C.V. BHADANG, J.