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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 10.07.2023

+ **CM(M) 301/2023 & CM APPL. 9175/2023**

DEBARATI BHUNIA CHAKRABORTY

..... Petitioner

Through: Ms.Ruchi Kohli, Ms.Shrishti
Mishra, Ms.Chitrangda
Rastravra, Ms.Aishwary Mishra
& Mr.Dhananjai Shekhawat,
Advs.

versus

SUMAN SANKAR BHUNIA

..... Respondent

Through: Mr.Prosenjeet Banerjee,
Ms.Akriti Anand, Mr.Sarthak
Bhardawaj & Ms.Anshika,
Advs. with respondent in
person.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed challenging the order dated 01.02.2023, passed by the learned Family Court, Patiala House Courts, New Delhi, in G.P. No.22/2021, whereby the application of the petitioner *inter alia* seeking permission to obtain Passport and Visa of the minor children to take them abroad and for a direction to the Passport Seva Programme, Ministry of External Affairs, to issue their passports to be

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granted in favour of the petitioner herein, was rejected by the learned Family Court.

2. This Court by its order dated 17.03.2023, without prejudice to the rights and contentions of the respondent, passed the following directions: -

“2. In the meanwhile taking into account that the petitioner has approached this Court seeking permission for her to relocate abroad with the minor children who are presently in her custody, the petitioner is granted permission to apply for passports of the two minor children as their sole custodian without the signatures of the respondent. The passport authorities will therefore process the applications for issuance of passports to the minor children namely Ms. Deyasini Wriddhi and Mst. Sushrik Sankar Bhunia without insisting for signatures of the respondent/father.

3. It is, however, made clear that this interim direction would not be treated as the petitioner having being declared as the sole custodian of the minor children for any other purpose. The petitioner would, however, not take the children outside the country without the leave of this Court or of any other competent Court as the case may be.”

3. By a subsequent order dated 09.05.2023, this Court allowed the petitioner to even obtain the requisite Visas for the children to relocate abroad. The relevant extract from the order are as under: -

“5. However, taking into account the petitioner's grievance that, even if, she succeeds before this Court, it would become extremely difficult for her to obtain the requisite Visas to relocate abroad with the minor children, the petitioner is permitted to apply for the necessary Visas for herself as also for the minor children by approaching the



High Commission/Embassy. The said applications of the petitioner and the minor children for Visas will be processed without insisting on the consent or signatures of the respondent/father. However, the respondent will ensure that the original birth certificate and the vaccination certificate of the son of the parties, if available with him, are handed over to the petitioner without any further delay so as to enable her to submit the Visa applications in time.

6. It is, however, made clear that the grant of these Visas to the petitioner and the minor children will neither create any special equities in their favour nor will they be entitled to relocate abroad without the specific permission of this Court."

4. The order dated 09.05.2023 of this Court was challenged by the respondent before the Supreme Court by way of a Special Leave Petition, and the Supreme Court by way of its order dated 12.06.2023, passed in the Civil Appeal No. 4041/2023, directed as under: -

"4. This Court is of the view that the permission to apply for grant of visas cannot be faulted with. However, the condition that only relocation abroad would be with the specific permission of the Court is not an appropriate condition. Appropriately it should be that the children would not be travelling abroad without prior permission of the Court and that too after hearing the appellant/father.

5. Accordingly, we dispose of this appeal with the above observations that grant of visas would not entitle the respondent/mother to travel with the minor children abroad but the same would be permitted only after taking leave of the Delhi High Court after hearing the appellant/father. However, the respondent/mother would be free to travel alone if she desires to which the appellant/father apparently has no objection.



6. The impugned order will stand modified to the above extent.”

5. Therefore, essentially the prayers which were made by the petitioner before the learned Family Court stand satisfied, however, without prejudice to the rights and contentions of the respondent. What is now to be determined by this Court is as to whether the petitioner can be granted permission to relocate abroad along with the children.

6. The learned counsel for the respondent, at the outset, points out that as far as the application filed by the petitioner, on which the Impugned Order dated 01.02.2023 was passed, there was no such disclosure made before the learned Family Court as to where the petitioner seeks to relocate with the children and what job offer she has received, for the learned Family Court to apply its mind on this issue. He submits that in exercise of the powers under Article 227 of the Constitution of India, this Court would not act as a Court of First Instance.

7. On the other hand, the learned counsel for the petitioner submits that the petitioner had made such prayer before this Court and on the said prayer being considered, this Court had already allowed the petitioner to apply for fresh Passports for the children and even obtain Visas for them. She submits that certain observations have been made by the learned Family Court in the Impugned Order which would prejudicially effect any application that the petitioner may file before the learned Family Court seeking permission to relocate abroad.



8. I have considered the submissions made by the learned counsels for the parties.

9. I shall first deal with the submission of the learned counsel for the petitioner that certain observations have been made by the learned Family Court which were unwarranted while considering the prayer of the petitioner for grant of permission to apply for separate Passports and Visas for the children. I find merit in the said submission.

10. The learned Family Court in the Impugned Order has laid emphasis on the fact that the petitioner had challenged the income disclosed by the respondent and, therefore, cannot plead that as the respondent is not paying adequate maintenance, the petitioner should not be prohibited from accepting better job offers from abroad and settle abroad with the children. The relevant observation of the learned Family Court in the Impugned Order in this regard is as under:-

*“24. The contention that since petitioner has shown his inability to give more money than Rs 10,000/- a month for the maintenance of the children and therefore, respondent cannot be prohibited from accepting better job offers from abroad and settle abroad with children as that would increase her income which in turn would help her provide for well being of the children, has got to be rejected because respondent has not accepted the alleged pitiable financial condition of the petitioner. She has been contesting the claim of the petitioner about his financial claim and has been throughout claiming that he is a man of means and is liable to pay maintenance as claimed by her in her maintenance petition.
25. If at all she had accepted the financial position of the petitioner she would have withdrawn her maintenance petition or would*



not have claimed the amount as claimed by her in the maintenance petition. Respondent cannot have the cake and eat it too. Contested claim cannot be made basis for laying claim as has been sought by the respondent in the present application. Of course one can lay claim on the accepted position. Had it been pleaded by her that petitioner was poorly earning person and his income was not sufficient to maintain her and her children, therefore, she may be permitted to accept the job offers coming her way, probably her plea could have carried weight.”

11. In my view, the above observation of the learned Family Court was totally unwarranted. The fact which remains undisputed is that the respondent was paying a meagre maintenance of Rs.10,000/- per month since 18.10.2022 for the children. It was the case of the petitioner that the said maintenance is not sufficient to maintain the children and for this reason, she wishes to explore possibility of settling abroad by finding a job. The only question to be determined, therefore, for the Court was as to whether there is merit in this submission of the learned counsel for the petitioner, and as to whether grant of permission to the petitioner to settle abroad along with the children will be in the interest of the children or not. The petitioner was not expected to give up her claim for further maintenance only because she wishes to contend that with the maintenance that has been granted, she finds it difficult to sustain a good lifestyle for herself and for the children in India and has better prospects of the same abroad. It cannot be a condition for the petitioner to obtain such permission that she



maintenance for the children or be satisfied with the maintenance that has been granted or mutely accept the income that has been disclosed by the respondent. In my view, this was a totally irrelevant and extraneous factor which has wrongly weighed with the learned Family Court.

12. The learned Family Court has in the Impugned Order further observed as under:-

27. Further, there is contradiction in the assertion of the respondent. Respondent on the one hand had alleged the petitioner to be abusive, aggressive and had subjected the child Sushrik several mental, physical and sexual abuses and on the other hand she had been alleging that petitioner had never taken any responsibility of the children economical, financial and emotional and respondent has been ignorant towards the needs of the children. If petitioner had been an abusive father and had subjected the child to mental, physical and sexual abuses, then it is not good on the part of the respondent to expect any responsibility to be shared by the petitioner. If petitioner had been such a father then the first priority of any caring mother would be to keep away such abusive father from the child and not to expect of him discharging any responsibility (particularly an emotional one) as that would bring the child near to abusive father. Once respondent accuses petitioner of being completely ignorant towards the responsibility of the child, then respondent accusation about abusive nature of the petitioner towards the child becomes doubtful and it appears that such an allegation has been leveled only to keep the child away from the petitioner.

28. Be that as it may admittedly in the present petition, petitioner claiming custody and guardianship of the children of the parties and said claim is strongly being contested by the respondent. Before taking a decision, based on



materials and evidence, as to who is more competent to be the guardian of the children, and with whom the custody of the children shall be more safe, taking into account the welfare and well-being of the children, respondent cannot be permitted to take the children abroad. If respondent is permitted to move out of the country with the children even before the issue of guardianship and custody is decided, it will certainly non-suit the petitioner even without affording him an opportunity to prove his entitlement.

29. Further, if children are taken away abroad that will certainly affect the visitation right of the petitioner about which petitioner has repeatedly complained that respondent has not been not allowing successful video calls chat with the children, though said allegation has been categorically denied by the respondent. If at all there is some substance in the complaint of the petitioner regarding the visitation through video calls and in this circumstance if respondent is allowed to move the children out of the jurisdiction of Indian court, petitioner's right would be seriously defeated.

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31. While the right to earn or move to any place of choice with her children is essentially a personal fundamental right, the right to justice through court of law is also personal fundamental right but has wider ramifications and impacts public justice, which is a larger cause. The cause of public justice would suffer if petitioner is practically non-suited by permitting the respondent to move out of the country with children and therefore, respondent's personal right to development with her children to her side has got to yield to cause for public justice."

13. In my view, in the above discussion, the learned Family Court has not considered the primary factor which had to be kept in view while considering the application in question.

While it cannot be disputed that right of the parents is to be kept



in consideration while deciding such application, it is the welfare of the children which is paramount. The learned Family Court was, therefore, to consider whether the permission can be granted to the petitioner to relocate abroad along with the children by finding a job there as it would be in the best interest of the children or not. The learned Family Court appears to be influenced by the fact that it would be against the interest of the respondent/father herein. It is reiterated that while this would be an important circumstance, the interest of the children is paramount and should have been weighed with the learned Family Court.

14. Having said the above, I find merit in the submission of the learned counsel for the respondent that this Court in exercise of its power under Article 227 of the Constitution of India should not act as a Court of First Instance. The learned Family Court has the experience and expertise to deal with an application filed by the petitioner seeking permission to settle abroad along with the children. The learned Family Court while passing the Impugned Order had no occasion to deal with this request of the petitioner as the petitioner had not completely disclosed the job offer she had received and the country that she wishes to settle in. The application was rather vague on these vital particulars.

15. In my view, therefore, the petitioner must first move such an application with full disclosure to the learned Family Court on the job offer that she has received, the place where she is



intending to stay, and other details that may be found relevant for the consideration of such an application.

16. The learned counsel for the petitioner expresses an apprehension that in case these disclosures are made, the respondent, as in the past, may address communication to the employer raising various issues and queries which may scare the employer away from offering or retaining the petitioner in the job. The learned counsel for the respondent denies that any such attempt has been made earlier by the respondent and, in any case, on instructions from the respondent, who is present in person before this Court, undertakes that no direct communication shall be addressed by the respondent to the disclosed employer of the petitioner; if there is any grievance on any issue, the learned Family Court will be moved without any direct or indirect communication to the employer in question of the petitioner. The respondent is held bound by this undertaking.

17. The learned counsel for the petitioner further expresses an urgency in consideration of the application that is proposed to be filed before the learned Family Court, stating that the petitioner is in receipt of a job offer which will lapse in case the petitioner is not in a position to give her consent and join her job expeditiously in a short time and, in fact, by 17.07.2023.

18. In view of the peculiar circumstances of the case, on the petitioner moving an appropriate application before the learned Family Court seeking permission to settle abroad along with the children, such application shall be considered by the learned



Family Court expeditiously and within a period of one week. Notice of this application may be served on the counsel for the respondent before filing, along with the date of its listing, and no other/further notice needs to be given to the respondent for the same. In case the respondent wishes to file any reply to such application, he shall do so within a period of two days of the receipt of the application.

19. It is made clear that the said application shall be considered by the learned Family Court remaining uninfluenced by any observation made by the learned Family Court in the Impugned Order dated 01.02.2023. It is also made clear that this Court has not expressed any opinion on the merits of the application that may be moved by the petitioner in this regard.

20. Needless to state, this order will not preclude the petitioner from travelling abroad alone, without the children, if she so desires. It is further reiterated that the petitioner shall remain bound by the direction of the Supreme Court as contained in the order dated 12.06.2023, passed in Civil Appeal No.4041/2023, and shall not be entitled to travel with the minor children abroad without obtaining the leave of the learned Family Court.

21. The learned counsel for the petitioner submits that in spite of the order dated 09.05.2023, the respondent has not handed over the original Birth Certificate and the Vaccination Certificate of the son of the parties, to the petitioner.

22. Though the respondent submits that the original Birth Certificate and the Vaccination Certificate of the son of the



parties is not available with him, he assures the Court that he will again search for them and if found, would hand them over to the petitioner. The petitioner shall, at the same time, be at liberty to apply for fresh/duplicate copies of such certificate(s) from the concerned authorities.

23. The petition, along with the pending application, is disposed of in the above terms.

24. Copy of this order be given *dasti* under the signatures of the Court Master.

JULY 10, 2023/rv/rp

NAVIN CHAWLA, J



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