IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 1 OF 2020
IN
WRIT PETITION NO. 2928 OF 2019

Dharmesh Vasantrai Shah ...Petitioner
vs.
Renuka Prakash Tiwari ...Respondent

Mr.Aditya Pratap for Petitioner.
Mr.Abhishek Pungliya for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 9 JUNE 2020

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2 This writ petition challenges an order passed by the Family Court at Pune on an interim application made by the Petitioner herein (original Petitioner before the Family Court in a custody petition). The interim application had sought interim custody of Master Omiraj Shah, who is the minor son of the parties. It had also sought an interim injunction restraining the Respondent from taking the minor out of India, besides other related or consequential reliefs. By the impugned order, the Family Court rejected the interim application.

3 The short facts of the case, borne out by the narration in the petition, may be stated as follows :-

According to the Petitioner, Master Omiraj Dharmesh Shah, who is

six years old as of the date of the petition (currently seven years) was born to the parties out of a romantic relationship. The Petitioner claims to have met the Respondent sometime in or about 2008 and been in a romantic relationship with her from 2011 onwards and until June 2012. Master Omiraj was born to the Respondent on 11 December 2012. It is not in dispute that ever since his birth, the child has stayed with the Respondent, though in a flat which is jointly owned by the parties. The Petitioner claims to be living separately with his parents and son from his first marriage at another place in Pune. He, however, claims to have visited Master Omiraj three to four times a week and sometimes overnight whilst the child continued to reside with the Respondent. It is his case that from about June 2018, the Respondent has cut-off the Petitioner's access to Master Omiraj. It is the Petitioner's case that the Respondent is of a quarrelsome and violent nature; going by the fact that she has changed the schools attended by Master Omiraj on a couple of occasions, on one particular occasion after levying sexual harassment allegations against a member of the school staff and filing a complaint with the police in that behalf, and also by reason of the fact that there have been complaints as between the Respondent and some of her neighbours, which have resulted into FIRs, she is mentally and emotionally unfit to have the custody of Master Omiraj. It is submitted that the Respondent has made conscious efforts to minimise the social interaction of Master Omiraj with others. It is the Petitioner's case that the Respondent has applied to FRRO for an exist visa for Master Omiraj in order to go to New Zealand. On these facts, the Petitioner has claimed permanent custody of the minor son as final relief in the pending petition. His interim application, as noted above, has been for interim custody and a temporary injunction against the Respondent for taking the child out of India.

4 The application has been opposed by the Respondent on

several grounds. It is submitted, firstly, that the Petitioner has not till date accepted the marriage between the parties, which is claimed to have taken place at Mulshi in Pune on 28 November 2009 as per Hindu rites and rituals. It is submitted that the Petitioner abandoned the Respondent during the pregnancy itself. It is submitted that before abandoning her, the Petitioner even put immense pressure on her to undergo an abortion, with physical assaults and violent intercourse so that she would suffer a miscarriage. It is submitted that the fetus, however, survived the misfortune and Master Omiraj was born on 11 December 2012. It is submitted that since his birth and till date, i.e. for the last seven years, it is the Respondent alone who has brought up the child. It is denied that the Petitioner has any affection or association with the child. The Respondent submits that her minor son has been suffering from autism spectrum disorder and has always been in her exclusive care and maintenance. It is submitted that the Respondent and her minor son are both citizens of New Zealand. It is submitted that the Respondent has made arrangements for admitting the child to a reputed school in New Zealand and is now awaiting permission from FRRO for an exit visa. It is submitted that considering the fact that there is currently a raging Covid-19 pandemic in India, the area of Pune having been particularly identified as a red zone for the pandemic, and, on the other hand, New Zealand being a country virtually free of the pandemic as of date, it is imperative and in the interest of the child to allow the Respondent to take him to New Zealand so that he could be admitted to a good school there and properly nurtured.

5 In its impugned order, the Family Court *inter alia* observed that since the birth of the child, it was the Respondent mother who alone had taken care of the child. It was particularly noted that the Petitioner's own complaint to the Police Commissioner, Pune City (made on 21 May 2016) disclosed that since 2012, the Petitioner was not staying with the

Respondent and had not kept any relations with her. The court noted that this itself indicated that ever since the birth of the child, it was the Respondent mother who had single handedly made efforts for the child's upbringing. So far as the Petitioner's allegations concerning mental disorder and incapacity of the Respondent to take care of her son are concerned, the court noted that at the interim stage, without any concrete evidence, the submission of the Petitioner could not be accepted. The court noted that it was in the interest of the child and commensurate with its welfare that its custody continued with the Respondent exclusively. The court noted that the Respondent mother was the child's primary caretaker; she had taken care of his schooling; since birth the child, who was suffering from autism, was staying with the Respondent mother; and now suddenly his custody could not be shifted to the Petitioner. The court noted that the Respondent and her son Omiraj were both citizens of New Zealand and had every right to visit New Zealand; the Respondent had even started the process of securing admission for her son Omiraj to a school there; the son was a special child and needed special care and attention; and that at this stage, it was the Respondent mother alone, who was able to take his care. The court held the *prima facie* case to be clearly in favour of the Respondent. Even from the point of view of balance of convenience, the court held that the Petitioner had no case to seek any interim injunction. The court, in the premises, did not find any substance in the interim application and dismissed the same.

6 At the very outset, it must be noted that the Petitioner himself has come before the court with a case that the minor child was born not out of a wedlock but out of a romantic relationship between the Petitioner and the Respondent. In other words, it is the Petitioner's own case that the child is an illegitimate child. If that is so, it is difficult to see how the Petitioner, who claims to be its putative biological father, can claim the

custody of the child over the Respondent, who is admittedly its biological mother. Under Section 6 of the Hindu Minority and Guardianship Act, by which both parties are admittedly governed, in the case of an illegitimate boy or an illegitimate unmarried girl, it is the mother who is the natural guardian, and the father's claim of such guardianship comes only after hers. There are only two exceptions to this rule. The first is that no natural guardianship can be claimed under Section 6 if the person claiming guardianship has ceased to be a Hindu. The second exception is where such person has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). It is not the Petitioner's case that the Respondent either has ceased to be a Hindu or has renounced the world either by becoming a hermit or an ascetic. The Respondent, thus, has an indefeasible claim to natural guardianship of her child Omiraj. There is no case in law for the Petitioner to claim guardianship or custody of the child over her.

7 The Petitioner, however, falls back on his submission that the Respondent is mentally unfit to take care of the child or retain its custody. The only case urged in that behalf is averred in para 8 of the petition that "*due to the fact that the Respondent is mentally and emotionally unstable and makes a conscious efforts to minimise Master Omiraj's social interaction with any person other than herself, she is unfit to raise him and interim custody of Master Omiraj ought to be granted to the Petitioner. The Respondent's suspicious and quarrelsome attitude has resulted in Master Omiraj being deprived of proper schooling and if she continues to have custody of Master Omiraj, it could adversely affect the mental growth and development of Master Omiraj."* What is cited in the petition in support of this case are (i) two communications from two NGOs which appear to cast a doubt on the veracity of the Petitioner's complaint of sexual molestation of Master Omiraj by the staff of Sanskriti School and

(ii) a couple of complaints as between the Respondent, on the one hand, and a couple of neighbours on the other, which have resulted into cross FIRs before the jurisdictional police station.

8 What is apparent from the Respondent's own narration in the petition is that there is not even a formal stated case of "unsoundness of mind" against the Petitioner. What is claimed is that the Petitioner is mentally and emotionally unstable, being of a quarrelsome nature, having filed a false sexual molestation complaint and made efforts to minimise Master Omiraj's social interaction. Any mental or emotional instability, by itself, is no ground to deny custody to a natural guardian except insofar as it bears on the physical or mental security and welfare of the child. The so called observations made by the two NGOs concerning the Respondent's conduct in the matter of her sexual harassment complaint do not even *prima facie* suggest any "mental unsoundness" or even, for that matter, a case of "mental or emotional instability" as alleged by the Petitioner. In its assessment of the Respondent (referred to as "Deva"), the NGO, We empower HER, has made following observations:

> "As per my judgment of her behaviour, I find it **unusual**. She has approached several NGOs. She wants us to handle her case according to her wish and **does not listen to us**. I am a gynecologist. Yet, I will definitely say that **she needs psychiatric evaluation to make sure she is stable emotionally**. **Without knowing her mental stability**, I am concerned that **the true nature of her allegations cannot be determined with accuracy**. If Deva passes her psychiatric evaluation, it is important that we continue the investigation to protect other kids in school. I hope as well that Deva will get her son evaluated medically.
>
> We Empower HER is not handling the case at this time due to concern of **possible false accusations against the school**. We stand for Truth and we will not work in any case where there is a concern of dishonesty."
>
> (Emphasis supplied)

As is obvious, there is no finding of any mental instability in this assessment. There is, at best, a suggestion for an evaluation of mental stability. As for the sexual harassment complaint itself, it is not even ruled out but said to contain "possible false accusations".

9 The other Counsellor, Dr.Yamina Adbe, has observed that "the mother **seemed to have some psychological problem and carries grudges against school**; she has **unstable behavior towards routine matters** as well; she has **insecurities** and so she **treats every one hostile**, the case is **supposed to be the outcome of this underlined cause not the actual abuse of the child."** (Emphasis supplied.) These observations are at best vague and at worst purely speculative. This is underscored by the fact that, according to the Counsellor herself, these observations are based on the following points :

> "1. She never told driver of school bus her exact address rather would call every day on phone and would request him to drop the child at difference places.
>
> 2. She has filed many police complaints and vice versa by the tenants / her paying guests in local police station so she did not give address of her own even in police FIR rather kept on changing her addresses every time for unknown reasons.
>
> 3. The child said mumma told her to act so that no one can harm them.
>
> 4. She stopped formal education of the child after this case and the child is confined at home with some strange concept of home tuitions.
>
> 5. Similar allegations she has been putting on various previous schools also. Imagin at this tiny age the child has been shifted from one school to another with ugly untrue allegations on school administration.

6. The medical report is suggestive of the fact that child was never sexually (sic, assaulted?)."

10 Apart from these observations of NGOs, there are a couple of FIRs as between the Respondent and some of her neighbours. These relate to physical harassment and are really in the nature of cross-complaints. There is nothing in them to indicate any mental unsoundness on the part of the Respondent.

11 The material adverted above does not even *prima facie* imply the Respondent's "unsoundness of mind" or "her incapacity to look after her own child". There is no medical opinion or other authoritative material produced by the Petitioner in support of his case of mental unsoundness or incapacity of the Respondent. The Petitioner cannot be said to have even remotely made out a case of 'unsoundness of mind' within the meaning of Section 3 of the Mental Healthcare Act.

12 Coming now to the Petitioner himself, he is, in the first place, a divorcee, having a son from his previous marriage who is over 26 years of age. On his own showing, the Petitioner does not even claim to have resided with Master Omiraj at any time after his birth. It is the Petitioner's own case that for the last two years he has not even had access to the child. The Petitioner denies any matrimonial relationship as between himself and the Respondent, and thereby, legitimacy to the minor child. The child, who is a special child, ever since its birth, has been taken care of and looked after by the Respondent mother, who anyway has an indefeasible legal right to its natural guardianship over the Petitioner.

13 On these facts, the question to be considered by this court in the present case is, whether the Family Court, in denying interim custody

to the Petitioner, has acted in any way perversely or illegally. There is nothing in the petition or the documents produced with the petition or submissions made across the Bar, as noted above, to indicate that the impugned order offends any of the well-known Wednesbury principles. The Family Court has indeed taken into account all relevant and germane circumstances and materials on record; it has not considered any irrelevant or non-germane circumstance or material for arriving at its decision; and its view is certainly a possible view, which a court of law might well take. The impugned order has fairly and adequately addressed *prima facie* merits of the case as also the question of balance of convenience. The impugned order is in keeping with the law by which the parties are governed. It brooks no interference.

14 Accordingly, there is no merit in the writ petition. The writ petition is dismissed.

15 Learned Counsel for the Petitioner applies for continuation for some time of the temporary status quo order passed by the Family Court and continued by this court during the pendency of this writ petition. Learned Counsel for the Respondent states that the Respondent has booked tickets for herself and her minor child from Mumbai to Aukland on 23 June 2020, and there is no possibility of the child being taken away anytime before that date. The statement is noted and accepted. In view of this statement, no separate order of even a limited status quo is necessary.

16 This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(S.C. GUPTE, J.)