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Court : Mumbai Goa

Decided On : Sep-18-2014

Judge : U.V. Bakre

Appeal No. : Writ Petition No. 576 of 2014

Appellant : Arun Sharma

Respondent : Roxann Sharma

Judgement :

1. Heard learned Counsel for the respective parties.
2. Rule. Rule made returnable forthwith. Ms. Collasso, learned Counsel waives service on behalf of the respondent. By consent and at the request of the learned Counsel for the parties, heard forthwith.
3. By this petition, the petitioner has challenged the order dated 06/09/2014 passed by the learned 2nd Additional Adhoc Civil Judge, Senior Division, Margao (trial Court, for short) in Matrimonial Petition No. 59/2013/II.
4. The petitioner has filed the said Matrimonial Petition No. 59/2013/II in the Court of the trial Judge, under Section 6 of Hindu Minority and Guardianship Act, 1956 (the Act, for short), for permanent custody of the minor child and also for temporary injunction to restrain the respondent from taking forcible custody of the child. The petitioner is the husband of the respondent. He claimed that he is a

native of Mumbai and citizen of India whereas the respondent is American citizen. They were married in the year 2009, in U.S.A. and out of wedlock, the respondent delivered a boy on 18/04/2012 in U.S.A., who is named Thalbir Sharma. The petitioner and the respondent thereafter returned to India and were residing in Mumbai, in the company of the mother of the petitioner. Thereafter, there arose differences between the two and they started leaving separately. The child is in the custody of the petitioner. In the said Matrimonial Petition, the respondent filed an application dated 31/10/2013 for interim custody of the minor child. The petitioner filed reply. Upon hearing the parties, the trial Court passed the order dated 31/01/2014 by which, pending final disposal of the petition under Section 6 of the Act on merits, the respondent was granted interim custody of the minor child Thalbir Sharma and the petitioner was assured with visiting rights to the child. The said order was challenged by the petitioner in this High Court by way of Writ Petition No. 79 of 2014. By Judgment dated 02/08/2014, the said Writ Petition was disposed of. The impugned order dated 31/01/2014 was quashed and set aside. It was ordered that the custody of the child shall continue with the petitioner subject to the respondent getting visitation rights in the manner referred to in the order. The trial Court was directed to proceed to dispose of the Petition filed by the petitioner as well as the Counter Claim as expeditiously as possible in the light of the observations made in the said order after hearing the parties in accordance with law. It was observed that the trial Court shall not be influenced by any observations made by this Court while deciding the petition filed by the petitioner and the respondent on its own merits.

In paragraph 16 and 17 of the said order this Court observed as under:

16. Be that as it may, it cannot be disputed that for upbringing the child, love of the petitioner as well as the respondent who is the mother is very much essential for the healthy growth of such child. In such circumstances, though the custody would continue with the petitioner nevertheless, the respondent being the mother would definitely have frequent visitation rights of the minor child. Such visitation rights shall tentatively be for at least 3 days in a week. The parties are at liberty to fix such days before the learned Judge at a mutual agreeable place preferably within the jurisdiction of the Court.

17. Another aspect which the learned Judge would have to examine is about the jurisdiction of the Court. Section 9 of the said Act of 1890 provides that jurisdiction to grant custody is by the Court where the child ordinarily resides. In the present case, on perusal of the petition filed by the petitioner, I find no averments with that regard therein. Merely residing temporary in Goa by itself cannot suggest that the child ordinarily resides within the jurisdiction of the Court. Apart from that, the interim order passed by this Court, by consent, some visitation rights of the child were mutually agreed in Mumbai. Apart from that neither the Act of 1956 nor the Act of 1890 are extended to the State of Goa. In such circumstances, the learned Judge would have to direct the petitioner to make an appropriate averment with regard to the place where the child ordinarily resides.

5. Thereafter the respondent filed an application dated 20/08/2014 for visitation rights before the trial Court. The respondent prayed that the minor son Thalbir Sharma be allowed to be alone with the mother from Monday to Friday, at Dona Paula, Goa with the condition that the child be produced by the respondent on Monday morning at 10.00 a.m. in the trial Court and will be returned back on Friday at 5.00 p.m. in the trial Court by the respondent. The petitioner filed reply resisting the application. However, the petitioner had no objection for the respondent to visit the child in three continuous days in each week between 4.00 p.m. and 5.00 p.m. as as per the guidelines fixed by the High Court in Writ Petition No. 79 of 2014 in its orders dated 02/05/2014 and 07/05/2014, which provided for supervised visitation. The petitioner further demanded that the place of visitation should be Mumbai. According to him, since the month of June 2013, the petitioner along with the child went to his parents' residence situated at Flat No. 2, Ashirvad Building Siddi Sadan Colony, opposite Bhagwati Hospital, Borivali (West), Mumbai where the mother of the petitioner was living. He further stated that the said building has been taken for repairs and therefore, since about two months back, they have shifted their residence to Flat No. 2, Shriram Kutir, Khandewal Layout, Evershine Nagar, Malad (West), Mumbai-400 065.

6. By order dated 06/09/2014, the learned Trial Court fixed Saturdays, Sundays and Mondays of every week as the days for visitation of the child by the respondent and directed that the visitation shall be within jurisdiction of his Court.

It has been ordered that the child shall be brought in the Court on every Saturday at 9.30 a.m. and handed over to the respondent and the respondent shall return the child in the Court on every Monday at 5.00 p.m. to the applicant. It is this order which is challenged in the present petition.

7. Mr. Usgaonkar, learned Counsel appearing on behalf of the petitioner submitted that the trial Court by order dated 31/01/2014 had given interim custody to the respondent and visitation rights to the petitioner and that by judgment dated 02/08/2014 this Court had set aside the said order thereby directing that the custody of the child shall continue with the petitioner subject to the respondent getting visitation rights. He submitted that in violation of the said order of this Court, the trial Court has now granted shared custody of the child to both the parties in as much as three days custody has been granted to the respondent and four days custody has been retained with the petitioner. He submitted that the impugned order is absurd and illegal. He further submitted that the welfare of the child was of prime consideration. He submitted that the respondent has sickness of bipolar disorder and there is on record a report of a Psychiatric, Dr. Hegde which has been prima facie believed. He pointed out that earlier the respondent has tried to run away with the child. He therefore submitted that handing over the child in the hands of the applicant alone for three days would never be in the welfare of the child. He submitted that from June, 2014 the petitioner and his child have shifted to Mumbai and the child is going to play school and the timings are from 11.00 a.m. to 1.30 p.m. from Monday to Friday. He invited my attention to earlier visitation orders dated 13/02/2014, 30/04/2014, etc. passed in the said Writ Petition No. 79/2014 which were all for visiting the child at Mumbai. He therefore submitted that fixing visitation rights in Goa would not be in the interest of the child. He urged that the impugned order is liable to be quashed and set aside.

8. On the other hand, Ms. Collasso, learned Counsel appearing on behalf of the respondent, submitted that the impugned order granting visitation rights continuously for three days cannot be construed as grant of shared custody. She submitted that visitation rights can be granted in the manner as has been done by the trial Court. She further submitted that the Judgment dated 02/08/2014 of this Court in Writ Petition No. 79 of 2014 clearly shows that the parties shall be at

liberty to fix the days of visitation before the learned Judge at a mutual agreeable place preferably within the jurisdiction of the Court which means the jurisdiction of the trial Court which is Margao-Goa. She therefore submitted that the impugned order is in accordance with law. She relied upon the following judgments:

(i) Judgment dated 29/01/2004 of the Supreme Court in Special Leave Petition (Civil) 4230-4231 of 2003 (Kumar V. Jahgirdar Vs. Chethana Ramatheertha)

(ii) Mohan Kumar Rayana v/s. Komal Mohan Rayana [2010 STPL (web) 554 SC]: AIR 2010 SC 1659

(iii) Renuka Nair V/s. G. Satish [CDJ 2005 APHC 2144]

9. I have gone through the material on record and considered the submissions made by the learned Counsel for the parties.

10. By Judgment dated 02/08/2014, passed by this Court (Coram F. M. Reis, J.), in Writ Petition No. 79 of 2014, it was ordered that custody of the child would continue with the petitioner therein i.e. the petitioner herein, but the respondent being the mother would definitely have frequent visitation rights of minor child, which shall tentatively be for at least three days in a week. Frequent means occurring often or in close succession. Frequent cannot mean continuous.

11. The learned trial Court, however, by impugned order has fixed Saturday, Sunday and Monday of every week as the days for visitation of child by respondent but has further directed that the child shall be brought in the Court on every Saturday at 9.30 a.m. and handed over to the respondent, to remain with her till Monday and that she shall return the child in the Court every Monday at 5.00 p.m. to the petitioner. The above means that the respondent is not allowed to visit the child as per the order of this Court but the child has been ordered to be handed over to the respondent to remain exclusively with her for three days between 9.30 a.m. of every Saturday to 5.00. p.m. of every Monday. Thus, though this Court by order dated 02/08/2014 ordered that the custody of child shall continue with the petitioner, however, on account of the impugned order, the custody of the child would remain with the petitioner only from 5.00 p.m. of every

Monday till 4.00 p.m. of every Saturday, i.e. for four days.

12. In other words, contrary to the order dated 02/08/2014 passed by this Court in Writ Petition No. 79 of 2014, and overreaching the said order, the impugned order has been made by the trial Court for sharing custody of child between respondent and petitioner i.e. three days custody to the respondent and four days custody to the petitioner. This is clearly illegal and hence impugned order dated 06/09/2014, warrants interference.

13. In terms of Black's Law Dictionary, Tenth Edition, visitation means a non-custodial parent's period of access to a child. Visitation right means a non-custodial parent's or grandparent's Court ordered privilege of spending time with a child or grand child who is living with another person, usually the custodial parent. A visitation order means an order establishing the visiting times for a non-custodial parent with his or her children. Although the non-custodial parent is responsible for the care of the child during visits, visitation differs from custody because non-custodial parent and child do not live together as a family unit.

14. Admittedly, the respondent has no permanent residence in India. She has not disclosed any fixed address to reside in Goa. Prima facie, she is found to be suffering from bipolar disorder, regarding which there is certificate issued by a psychiatrist. The Child was in the custody of the petitioner. Considering all the aspects, this Court held that it was incumbent upon the learned Judge to examine whether the change of environment and custody would be benefited for the welfare of the minor child, which aspect was not considered by the trial Court while passing the order dated 31/01/2014. It was never intended that custody of the child was to be shared by the respondent. The trial Judge had to fix the three days, timings, and place of visitation.

15. The Judgment of the Hon'ble Supreme Court in the case of Kumar V. Jahgirdar (supra) is on final custody of child and not on interim order of visitation rights. In the case of Renuka Nair (supra), the Court had granted the visitation rights by directing the custody of the child to be given to his father at the weekends i.e. at 6 p.m. on the evening of Friday till 6 p.m. on the evening of the Sunday. Even other wise, in the cases supra, the facts and circumstances in which the

word 'visitation' was used are different and cannot be compared with the facts of the present case. In the present case before this Court, the custody of the child was ordered to continue with the petitioner subject to the respondent getting frequent visitation rights tentatively for at least 3 days in a week. The background mentioned in the Judgment dated 02/08/2014 would make it clear that it was never intended to hand over continuous exclusive custody of the child to the respondent, for three days.

16. Though it was observed by this Court, in paragraph 16 of the order dated 02/08/2014, that the parties are at liberty to fix such three days before the learned Judge at a mutual agreeable place preferably within the jurisdiction of the Court, however, in paragraph 17 thereof, this Court further observed that the learned Judge would have to examine about the jurisdiction of the Court. This Court observed that Section 9 of the Act provides that jurisdiction to grant custody is by the Court where the child ordinarily resides. It was found that in the present case there was no averment with regard to the fact as to where the child ordinarily resides. It was clearly observed that merely residing temporarily in Goa by itself cannot suggest that the child ordinarily resides within the jurisdiction of the Court. It was further clearly observed that by way of interim order passed by this Court, by consent, some visitation rights of the child were mutually agreed in Mumbai. It was observed that neither the Act of 1956 nor the Act of 1890 are extended to the State of Goa. In the circumstances above, the trial Court was required to direct the petitioner to make an appropriate averment with regard to the place where the child ordinarily resides. It was therefore incumbent upon the trial Court to have acted in accordance with the above directions of this Court and prima facie arrived at a decision as to the jurisdiction of the Court, which has, unfortunately, not been done.

17. The impugned order is erroneous and not in accordance with the observations made by this Court in the Judgment dated 02/08/2014 in Writ Petition No. 79 of 2014 and therefore the same is bound to be quashed and set aside.

18. Accordingly, the impugned order dated 06/09/2014 is quashed and set aside. The trial Court shall decide the application dated 20/08/2014 (Exhibit 42-D) filed by

the respondent, afresh, in the light of the above observations and in accordance with the observations made in the order dated 02/08/2014 passed by this Court in Writ petition No. 79/2014.

19. Rule made absolute in the aforesaid terms, with no order as to costs.

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