X Vs. Z

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SooperKanoon Citation : sooperkanoon.com/52113

Court : Delhi

Decided On : Jun-11-2015

Judge : S. Muralidhar

Appellant : X

Respondent : Z

Judgement :

$~ * 2 IN THE HIGH COURT OF DELHI AT NEW DELHI + MAT.APP.(F.C.) 78/2015 X ..... Appellant Through: Ms. Geeta Luthra, Senior Advocate with Mr. Adhirath Singh, Advocate. versus Z ..... Respondent CORAM: HON'BLE DR. JUSTICE S.MURALIDHAR HON'BLE MR. JUSTICE I.S.MEHTA

ORDER
% 11.06.2015 CM APP No.11009 of 2015 (exemption from filing clear copies) 1. Allowed subject to all just exceptions.

2. The application is disposed of. MAT.APP.(F.C.) 78 of 2015 & CM APP No.11008 of 2015 3. This appeal under Section 19 of the Family Courts Act, 1984 is directed against the order dated 5th June 2015 passed by the Principal Judge, Family Court, Saket.

4. The brief background to this appeal is that there were three applications filed by the Appellant father in the Family court which were decided by the Family Court on 15 th April 2015. The first application sought a direction to the Respondent mother

to apprise the Appellant father of the health, education, daily activities and overall development etc. of the two minor children. While deciding the said application by the said order, the learned Family Judge issued certain directions including those concerning the visitation rights of the father and his presence at parent teacher meetings of the school where the children are studying.

5. The second application was for modification of an earlier order dated 15th April 2014 passed by the Family Court so that

50. of the vacations of the children during summer break may be granted to the applicant and also call the children for interview in order to determine their wishes. As far as this application is concerned, the Family Court in its order dated 15th April 2015 observed that children had interacted with the predecessor court and expressed their desire which was recorded in the order dated 15th April 2014. The Family Court was of the view that interacting with the children again would not be desirable or in their interest. Consequently, the prayer for modification of the earlier order dated 15th April 2014 was declined.

6. The third application was for appointment of a psychologist/counsellor to determine the psychological situation of the children. The Family Court was of the view that the children should be allowed to grow naturally with time and should not be allowed to face rigmaroles of facing one psychologist or the other. The said prayer was also, therefore, declined.

7. Aggrieved by the above order dated 15th April 2015, the Appellant filed MAT APP (FC) No.66 of 2015 which was decided by the Division Bench of this Court [of which one of us (I.S. Mehta, J.) was part]. on 25th May 2015. The said order reads as under:

By this appeal filed under Section 19 of the Family Courts Act, 1984, the appellant seeks to challenge the impugned order dated 15.04.2015 passed by the learned Principal Judge, Family Courts, Saket, New Delhi. After some arguments, both the learned counsel for the parties, on instructions from their receptive clients present in Court, have agreed for the production of children before the learned Family Court on 01.06.2015 so that the learned Family Court can have a fresh interaction

with the children so as to ascertain their views. We accordingly direct the respondent to produce the children before the learned Family Court on 01.06.2015 and on that date the learned Family Court shall interact with the children to ascertain their views. We also direct that if after interacting with the children, the Court finds that any modification or variation in the impugned order is required, then the Court will pass a fresh order to vary or modify the order dated 15.04.2015 and if the Court is satisfied that no modification or variation in the order is required, then it is left to the discretion of the learned Family Court. With the above observation, the present appeal is disposed of. Dasti.

8. Pursuant to the above order, the learned Family Judge interacted with the children in order to ascertain their views. In the impugned order dated 5th June 2015, the learned Family Judge inter alia noted:

During interaction, the children have expressed their desire to spend 50% of the vacations with their father. They were absolutely clear in their thinking and choice taken by them.

9. Consequently, the Principal Judge, Family Court, declined to make any further modification or variation to the earlier order passed by him on 15th April 2015. He clarified that the Appellant would have custody for half the summer vacations beginning on 1st June 2015 and shall hand over their custody to the mother at the end of 50% of the vacation period. Pursuant thereto, the Appellant as of date has the custody of the two children.

10. At the beginning of the hearing today the Court enquired from Ms. Geeta Luthra, learned senior counsel appearing for the Appellant, whether the Appellant had brought with him to the Court the two children. When she answered in the affirmative the Court observed that the children need not have been brought to the Court when there was no order requiring their presence. Unless absolutely necessary for the purposes of interaction with the Judges, parties should not be required to bring children to the Court. The adversarial nature of child custody proceedings, and the environment in which they are conducted, have the potential of traumatising children. Accordingly as far as the present appeal is concerned, the children were requested to remain outside the court room. Further, the Court

requested counsel and other persons not associated with the present appeal to withdraw so that the appeal could be heard in camera.

11. Ms. Luthra first submitted that the Family Court in the impugned order erroneously declined to decide the issue of grant of permanent custody of the children to the father, despite a plea in that regard being urged before it. The ground cited by the Family Court was that the concerned questions of the fact are yet to be churned in the mill of trial. According to her the said issue ought to have been examined and decided in favour of the father particularly since both the children have, according to the father, expressed in clear terms to the learned Family Judge during interaction their desire to be with him permanently.

12. Secondly, Ms. Luthra urged that the impugned order failed to record completely what transpired during the interaction of the children with the learned Family Judge. She insisted that while she was not for a moment suggesting that what was recorded was incorrect, it was according to her incomplete. She drew attention of the Court to the averments in the memorandum of appeal and in particular paras 19 and 20 which purport to set out what according to the Appellant the children told the Family Judge during the interaction. When the Court posed a query to Ms. Luthra as to the source of the above knowledge of the Appellant, she stated on instructions that during the Appellants interaction with the children subsequent to the impugned order, they informed the Appellant that they had stated to the Family Judge what has now been set out in paras 19 and 20 of the memorandum of appeal. In response to the query as to how the Court is expected to test the veracity of the above averments, Ms. Luthra submitted that it would be sufficient if the Judges spoke to the children in the Chamber, and on that basis decide whether what was recorded in the impugned order by the learned Family Judge was a complete account of his interaction with them.

13. For dealing with the first contention of Ms. Luthra it is necessary to examine the scope of the Appellants application for modification of the order dated 15th April 2014 which was decided by the Family Judge by the order dated 15th April 2015. A copy of the said application has been placed before this Court. The prayer clause in the said application reads as under:

aa. Call the children to interview them and determine their wishes. a. Modify the order dated 15.04.2014 with regard to the permanent custody and the vacations of the children. b. Grant 50% of the vacations of the children for the coming holi and spring term breaks and further the summer break vacations of 2015 with the Petitioner. c. Pass any other order or orders as this Honble Court may deem fit and proper in the facts and circumstances of the case.

14. It requires to be noticed that the entire prayer (aa) and the words the permanent custody and in prayer (a) have been added by hand by the counsel who filed the aforementioned application. The Court finds that there barring the above words in prayer (a) added by counsel by hand, there is no averment in the said application concerning the issue of grant of permanent custody of the children to the father. The application only makes a reference to the fact that there is a guardianship petition which is pending adjudication before the Family Court.

15. It is perhaps for the above reason that in the impugned order the learned Family Judge, after noting the submission of the counsel appearing for the Appellant father that the permanent custody should be granted to him and the opposition to the said submission by the Respondent mother that not even single averment has been made in the application with regard to the permanent custody, declined to decide the said issue. In relation to the said issue it was observed by the learned Family Judge that:

The complex facts are yet to be analysed, scrutinized and thrashed during the course of trial which is not yet over.

16. Indeed, if there are no averments in the application as regards the issue of permanent custody, then the mere addition by hand of words to that effect in the prayer clause would not expand the scope of the application to include the issue. It would therefore not be justified to expect the learned Family Judge to decide that issue. Consequently, this Court is satisfied that by declining to decide the issue of grant of permanent custody, the learned Family Judge has not committed any legal error which requires interference by this Court.

17. As regards the second submission about the impugned order not recording completely as to what transpired during the interaction of the children with the learned Family Judge, the averments in the memorandum of appeal by the Appellant can at best stated to be hearsay. Even Ms. Luthra does not dispute that the Appellant himself was not personally present when the learned Family Judge interacted with the children. A reading of paras 19 and 20 of the memorandum of appeal reveals that the Appellant has paraphrased in his own words what the children purportedly told him. That is obviously not the very words spoken by the children to the learned Family Judge.

18. The more difficult issue is how to test the veracity of these averments?. Normally a judicial order which records what transpired in the presence of the Court should be taken to be correct. The Supreme Court has been categorical on this issue. It repelled a contention in State of Maharashtra v. Ramdas Shrinivas (1982) 2 SCC466that a concession recorded in the order of the High Court under challenge was never made by counsel. It observed thus:

4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation".[Per Lord Atkinson in Somasundaran v. Subramanian A.I.R. 1926 P.C. 136].. We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in

the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is' incumbent, upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. [Per Lord Buckmaster in Madhusudan v. Chanderwati A.I.R. 1917 P.C. 30]. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In Rev. Mellor 7 Cox. C.C. 454 Martin B was reported to have said "we must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity".

6. In King Emperor v. Barendra Kumar Ghose 28 C.W.N. 170 Page, J.

said: ...these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animadversion.

7. In Sarat Chandra v. Bibhabati Debi 34 C.L.J.

302, Sir Asutosh Mookerjee explained what had to be done: It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment.

8. So the judges record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.

(emphasis supplied) 19. In view of the above legal position the Court is not inclined to meet the children in the Chamber to ascertain if what was recorded by the learned Family Judge as to what transpired during his interaction with them was incomplete. That course is not open to this Court.

20. Ms. Luthra then urged that the Judges comprising this Bench should nevertheless meet the children in the Chambers to ascertain if they wished to return to the mother at the end of 50% of the vacation period. The Court is of the view that the whole purpose of remanding the matter to the learned Family Judge on the previous occasion was for him to have a fresh interaction with the children. That has been done, and only recently. In the circumstances, the Court is of the view that repeated interaction with the children in the Chambers will not be in their best interests.

21. Consequently, the Court is not persuaded to interfere with the impugned order dated 5th June 2015 of the Family Court. It is hereby affirmed.

22. As a last attempt, Ms. Luthra sought to suggest that there might be difficulties in the children being returned to the mother at the end of 50% of the vacation period. The Court would like to remind the Appellant that he must obey the rule of law and abide by the orders of the Family Court, which have merged with this order of this Court. As a responsible parent, he should explain to the children the importance and the imperative of compliance with the Court's orders. We also have no doubt that Ms. Luthra and her instructing counsel will explain to the Appellant the need to respect the orders of the Court and the consequences of his failure to do so.

23. Before parting with the case, the Court would like delve into another issue of serious concern that has emanated from the present appeal in the form in which it has been presented. Enclosed with the appeal as Annexure P-18 is the copy of a purported personal diary stated to have been maintained by one of the children. The Court at the outset would like to clarify that it should not be construed as

having accepted either the genuineness of the said 'personal diary' or that it was indeed authored by the child as claimed by the Appellant. Without commenting on either of the said issues, and leaving their determination to the trial Court after recording evidence, the Court notes that contents of the document reflect inter alia the very private and personal feelings and opinions of a young child about his parents, sibling, friends and relatives. It is not something which should be casually placed in the public domain as it is bound to violate the right to privacy of not only the author of the 'personal diary' but others whose names and conduct find mention therein and is likely to affect the authors relationships with them.

24. The Court enquired of Ms. Luthra as to how the father came into possession of the document. She then stated on instructions from the father who was present in Court that the child himself gave the diary to the father. It is not clear that the child was made aware by the father that he would be producing it before the Family Court and whether he explained to the child the implications it would have for him if a copy of his personal diary were to be given to the mother. Even if the father believed that by doing so he was acting in the best interests of the child, there is no doubting that by making a copy of the said personal diary available to the mother, the right to privacy of the child would be compromised.

25. It is also not known if the father apprised the child that he would be enclosing a copy of the child's personal diary with this appeal. Also, whether he explained to the child the implications it would have for him if a copy of his personal diary were to be placed in the public domain. It does not appear that his lawyers cautioned him in that behalf, and not realising that by placing a document of this nature with the appeal, he was in effect making public something that is extremely private.

26. Further, a petition (or any pleading in the form of an application, reply, appeal, affidavit etc.) along with the accompanying documents filed in a Court passes through several hands before it is registered and/or placed before and considered by the Court. Apart from the lawyers who prepare the petition/pleadings, their staff including clerks who handle the papers, get them photocopied, collect them from the Registry for curing defects etc., the Court staff which checks the petition/pleading at various stages, carries it to various branches where it is further

processed and finally to the Court all of whom can view the contents of a petition/pleading. This process does not ensure confidentiality as to its contents. There is an added dimension of accessibility of the documents through inspections of the Court file and grant of certified copies of the records (sometimes to even third parties where it is a disposed of case). All these factors underscore the need to respect the right to privacy of the author, and where it is a child, the best interests of the child.

27. Where litigants themselves do not realise the implications that this has for the right to privacy and dignity of the parties involved in a litigation, the Court expects the lawyers handling the litigation to display that understanding of the legal position. The law of evidence of this country, for instance, recognises that communication between spouses or between a lawyer and the client are 'privileged'. The Supreme Court has in several decisions explained that the right to privacy of individuals flows from Article 21 of the Constitution. Lawyers are expected to act with professional responsibility in cases that involve disclosure of private and personal information.

28. The Court enquired of Ms. Luthra whether the said document formed part of the record of the case before the Family Court. Ms. Luthra volunteered that an application had indeed been filed before the Family Court (which was unnumbered) seeking the permission of the Family Court to produce the said personal diary before it. According to Ms. Luthra although no specific order was passed by the Family Court on the said application, the Family Court saw no difficulty in asking counsel for the father to hand over a copy of the said personal diary' to the mother during the course of hearing. Although the said personal diary was not formally made part of the record of the case in the Family Court, since the mother had already been given a copy of the personal diary, the counsel for the father felt that there was no problem in enclosing a copy thereof with the present appeal. She submitted that when the previous appeal of the father MAT APP (FC) No.66 of 2015 was argued, the personal diary was produced before this Court. However, one of us (I.S. Mehta, J.) who was part of the Bench that heard the appeal recalls that it was not placed on record and returned to the appellant's lawyers.

29. Merely because copy of a childs personal diary was handed over to the Respondent mother during the hearing before the Family Court, and was not made formally part of the record, the counsel for the father could not have presumed that it was alright to enclose that document as an annexure to the appeal without first seeking leave of this Court. The nature of the document is such that its casual disclosure by placing it in the public domain would irreparably compromise the right to privacy of the author of the document, not to speak of the right of privacy of others whose names and conduct may find mention therein.

30. Having now come across a number of cases of matrimonial and custody disputes, in the civil and criminal jurisdictions, the Court notes with concern that there a growing trend among parties and their lawyers to readily disclose in the petitions, in the form of pleadings and documents, the most private and personal details of their clients and of the opposite parties, without a thought for the privacy implications, or even embarrassment potential, that it has. All too often no attempt is made to first seek the leave of the Court to tender the documents, be it in the form of private letters, notings, photographs, electronic evidence including video clips, text messages, chat details, emails, CCTV footage etc. the contents of which are of a private and personal nature. The Court has to consider if such documents are relevant to the case and how they should be presented, preserved and provided to the parties.

31. The Court considers it appropriate to issue the following directions to the Family Courts in Delhi, the parties and the lawyers, to be followed hereafter in the cases pending in those Courts: (i) Where a party in a case seeks to rely upon a document which in his or her assessment or the assessment of the party's lawyer is of a sensitive nature, viz., which contains details of a personal or private nature concerning a party or a person or their conduct, which when disclosed is likely to affect the right to privacy, or cause embarrassment, then such party and/or the lawyer of such party will first apply to the Court seeking leave to produce such document in a sealed cover. Till such time that leave is granted the contents of the said document shall not be extracted in the pleadings or a copy of the whole or part thereof enclosed with the petition. For this purpose a document would include any writing, private letters, notings, photographs, and documents in electronic form

including video clips, text messages, chat details, emails, printed copies thereof, CCTV footage etc. (ii) Where upon a party applying under (i) above, or where any other party, or the Family Court on its own, comes across a document on record in the case which is prima facie of a sensitive nature, viz., which contains details of a personal or private nature concerning a party or a person or their conduct, which when disclosed is likely to affect the right to privacy, or cause embarrassment, the Family Court will pass appropriate orders concerning the said document including providing copies thereof to the parties, preserving the originals or copies as the case may be in a sealed cover, de-sealing for being produced during Court proceedings and re-sealing after the purpose for which they are directed to be produced is over. (iii) The Family Court will also bind down by specific directions, the parties and their respective lawyers, and the Court staff regarding the making of copies, use, preservation and dissemination of such document with a view to maintaining its confidentiality. The Family Court can also pass necessary directions to specify the conditions upon which access would be permitted to such document by third parties. (iv) The Family Court will endeavour to decide on the issues at (i) (ii) and (iii) above, without unnecessary delay, in accordance with law. The above directions are in the nature of broad guidelines and can be suitably modified and adapted/applied to a given situation by the Family Court. The Family Court will, however, at all times keep in view the requirements of protecting the rights to privacy and dignity of the parties and persons. (v) The Family Court should as far as possible and practicable invoke the power under Section 11 of the Family Courts Act 1984 and hold the proceedings in camera. Where the circumstances so warrant, the Family Court may in the orders uploaded on the website or made available otherwise, suitably anonymize the names of the parties.

32. Unless there is a specific order of the Family Court, or where the party thinks it to be absolutely essential, or where suitable alternative arrangements are unable to be made, parties should avoid bringing children to the Family Court on a routine basis. Lawyers should also advise their clients in this regard since repeated visits to Courts to witness the legal contests between and among parents and relatives is not desirable or conducive for the healthy development of children.

33. The above directions shall also apply, as far as possible, hereafter to appeals or further proceedings in this Court emanating from the orders of the Family Court.

34. As far as the present appeal is concerned, in light of what has been discussed in the judgment, and in the facts of this case, and with a view to respecting the right to privacy of not only the parties but in the best interests of the child, the Court has decided that the names of the parties as appearing in the cause title should be anonymized. The Registry is directed to remove the entire Annexure P-18 from all the paper books (including those of the judges) and place one copy in a separate sealed cover which will be kept with the Registrar. The other copies shall be weeded out by shredding. The contents of the sealed cover will be allowed to be inspected only upon specific prior permission being sought from the Court. Likewise, the Appellant and his lawyers are directed not to disseminate or publish in any manner or make public the contents of Annexure P-18 to the present appeal hereafter.

35. The appeal and the application are dismissed in the above terms. A copy of this judgment be sent to the Family Court concerned.

36. A copy of this judgment be sent to each of the Judges in Charge of the Family Courts in Delhi, the District Judges of each District, the Bar Council of Delhi and each of the Bar Associations in the District Courts and the High Court for compliance and observance of the directions issued in paras 31 to 33 of the judgment. S.MURALIDHAR (Vacation Judge) I.S.MEHTA (Vacation Judge) JUNE11 2015 mg