

Prashant Prakash Sahni vs Devika Mehra on 12 November, 2020

Author: Hima Kohli

Bench: Hima Kohli, Subramonium Prasad

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ MAT. APP. (FC) 141/2020 and C.M. No.29248/2020
PRASHANT PRAKASH SAHNI Appellant
Through: Mr. Prosenjeet Banerjee and
Mr. Krishna Dutta, Advocates with appellant in
person.

versus

DEVIKA MEHRA Respondent
Through: Mr. Prabhjit Jauhar, Advocate.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
ORDER

% 12.11.2020 HEARD THROUGH VIDEO CONFERENCING

1. The present appeal has been listed before us past 6.00 p.m. on urgent mentioning being allowed.
2. The instant appeal challenges an order dated 11.11.2020, passed by the Principal Judge, Family Court, Patiala House, New Delhi in GP No. 92/2018 whereby the learned Family Court has allowed the application filed by the respondent/mother to travel to the United Kingdom (U.K.) with her younger child to be with her elder child who is studying in the UK.
3. The brief facts leading to the filing of this appeal are that the appellant/father and the respondent/mother had got married on 07.08.2005 and two sons were born from out of the wedlock namely, Master Pradeep and Master Prithvi, in the year 2006 and 2007 respectively. Master Pradeep is now 14 years of age and is studying in London and Master Prithvi is 13 years of age and is staying with the respondent in Delhi.
4. Differences arose between the parties and they separated in August, 2017. The appellant/father preferred a Guardianship petition under Section 12 of the Guardianship & Wards Act, 1890 before the learned Family Court in the year 2018 seeking sole custody of both the children. He also sought directions for interim visitation arrangement in respect of both the children.
5. At stated earlier, the elder son is studying in a boarding school in the UK. The respondent/mother has stated that she received an email from the school on 25.09.2020 that one of the students in the

school had tested positive for COVID-19 infection and the child is in isolation. Another email was received from the school on 08.10.2020 stating that a student had tested positive for the COVID-19 and is currently at home with his parents.

6. After receiving the two emails, the respondent/mother filed an application before the Family Court for permission to travel to UK with the younger child to meet the elder child. It was stated in the application that the elder son who is in UK, has two weeks of vacation from 16.10.2020 to 01.11.2020 and thereafter, the winter vacation shall start. Due to the current COVID-19 pandemic, the local guardians of the child in UK are reluctant to take the responsibility of the ward and therefore, it is imperative for the respondent/mother to travel with the younger child to meet the elder child at UK. It is also stated that the younger son is taking online classes for four days in a week and it would not be difficult for him to take the online classes from UK and his studies will not be affected.

7. This application was opposed by the appellant/father stating that the respondent/mother is overlooking the safety and well being of the younger child by travelling to UK during the COVID-19 pandemic. It is also stated that due to the five and half hour time difference in UK and India, the child would have to wake up at 4 O' clock in the morning to attend the online classes which is impractical and it would be very difficult for the child to get up and attend his classes that early.

8. The learned Family Court has noted that on earlier occasions also, the respondent/mother was allowed to go out of the country to visit the older son and/or travel along with the children and she had returned as per schedule. It was also observed that as per the schedules to the calendars furnished by the respondent/mother, in the months of November and December, 2020 there are 15 holidays and therefore, the younger child's education will not be adversely affected.

9. The learned Family Court allowed the application moved by the respondent/mother on the following conditions:-

(i) The respondent/mother shall furnish a surety of Rs.5 lakhs in the like amount and a personal bond of the like amount.

(ii) The respondent/mother shall intimate the court as well as petitioner/father about her place of stay in U.K. before leaving India.

(iii) During her stay abroad, the respondent/mother shall be represented before the court by her counsel and no adjournment shall be requested on the ground of her absence.

(iv) The respondent/mother would be responsible for taking care of safety, health and also about the online school classes of the minor son.

(v) The respondent/mother shall return to India on or before 11th January 2021 and shall report to the court.

It is this order which has been challenged in the instant appeal.

10. Mr. Jauhar, learned counsel for the respondent/mother has raised a preliminary objection regarding the maintainability of this appeal. He has stated that the impugned order has been passed on an interim application under Section 151 for interim directions to take the minor child to travel to UK and the order is only an interim arrangement for two months. This order being interlocutory in nature, no appeal is maintainable against it under Section 19 of the Family Courts Act. Section 19 of the Family Courts Act reads as under:

19. Appeal-(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973(2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991].

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

[(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.] [(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court. [(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.

11. A reading of the impugned order clearly shows that it is only an interlocutory order and therefore, the present appeal as filed, is not maintainable. The proper course for the appellant/father would have been to file a writ petition under Article 227 of the Constitution of India, which would have been listed before a Single Judge of this court. However, this court is of the opinion that even though the appeal is not maintainable in law, but since it touches upon the welfare of the child, the same is not being rejected on the technical ground of maintainability. The other reason is that the court is closing from tomorrow for the Diwali break and if the appeal is rejected on the ground of maintainability, then the appellant may not be in a position to seek timely legal recourse by filing a petition before the learned Single Judge.

12. Mr. Banerjee, learned counsel for the appellant/father very seriously contends that it is extremely dangerous to travel to UK in this pandemic and that the respondent/mother is running a huge risk in taking the younger child with her. He states that there is a lockdown in UK because of the spurt in cases, which was imposed on 05.11.2020 and will continue till 02.12.2020. In this period, it would not be advisable for the respondent/mother to travel with the minor child. He has also strenuously urged that permitting the child to travel to the UK will have a disastrous effect on his academics. He states that after separation, the younger child has been performing badly in his studies. It is contended that online classes start at around 8.30 a.m. in Delhi which would be 3.00 a.m. in UK and it would be virtually impossible for the child to take the online classes at 3.00 a.m. in the UK. On the other hand Mr. Jauhar, learned counsel for the respondent/mother supports the order of the Family court.

13. It is not in dispute that the school in which the elder child is studying in UK, has sent mails to the respondent/mother informing that some students have contracted COVID-19 infection. The second email was received on 09.10.2020. It is natural for the respondent/mother to get alarmed and move the Family Court to get permission to go and stay with the elder child who is staying alone in UK. The mother cannot be faulted for this reaction. It is also not in dispute that earlier too, the respondent/mother has been travelling abroad with the children to various countries including UK and that she has returned to India, as per schedule.

14. This court can also take judicial notice of the fact that there is an alarming rise in cases of COVID-19 infection in Delhi and as of yesterday i.e. 11.11.2020, there were 8,593 cases reported in the city. It cannot be said that staying in the UK will put the younger child to a greater risk compared to staying in Delhi. This court also takes judicial notice of the fact that there is no restriction imposed for travelling from India to the UK or back. This court can also take the judicial notice of the fact that adequate testing is done before people go to board flights from India. Even after going to UK, the passengers are kept in self-isolation.

15. We are therefore of the opinion that the respondent is not taking any undue risk in travelling to UK to ensure that the children are together. In such a situation, the request of the respondent/mother to stay with both the children at one place, cannot be said to be illogical or unjustified.

16. The Family court was cognisant of the fact that there are 14 holidays in November and December, 2020 and the younger child who is studying in the 8th Standard, would be able to take the online classes from UK. Even if the child has to face some inconvenience, that alone cannot be a factor to deny the family permission to be together in these COVID-19 times.

17. In view of the above, we are not inclined to entertain this appeal. The order of the Family court does not warrant any interference on merits also. The appeal is dismissed in limine along with the pending application.

HIMA KOHLI, J SUBRAMONIUM PRASAD, J NOVEMBER 12, 2020 hsk/rkb