

ORDER BELOW Exh. 76 IN
SPECIAL MARRIAGE PETITION No. 2/2017

[1] The petitioner - husband has filed the petition against the respondent - wife under Section 32(d) of the Parsi Marriage and Divorce Act, 1936, (for short, the 'Parsi Act') and during the pendency, the present application Exh. 76 is preferred by the petitioner - husband seeking permanent and primary custody of their two daughters namely Feroza Boyce (date of birth: 13.01.2004) and Arnavaz Boyce (date of birth: 11.03.2006).

[2] The fact emerges from the present application can be summarised to the effect that the petitioner - husband and respondent - wife have solemnized their marriage on 04.12.2001 at Ahmedabad as per the rites of their Parsi Community; out of their wedlock, they have two daughters namely Feroza Boyce, whose birth date is 13.01.2004 and Arnavaz Boyce, whose birth date is 11.03.2006; there is no dispute regarding their legitimacy; and, they all were living in the United States of America (USA). It is stated by the petitioner - husband that over the course of time, irreparable differences arose between the parties and despite several

attempts at reproachment, the differences could not be resolved. Thereafter, the respondent - wife filed a suit for divorce before the Superior Court at Vermont, USA, along with interim applications, wherein the present petitioner - husband filed a motion before the said Court at Vermont, USA, for dismissal of the suit on the ground of jurisdiction, claiming that the parties were governed by the provisions of the Parsi Act and the Courts in India are competent to exercise the jurisdiction. The said motion filed by the petitioner - husband was dismissed vide order dated 13.03.2018 by the Court at Vermont, USA.

[2.1] Further, the petitioner - husband has filed present petition being Special Marriage Petition No. 2/2017 on 06.11.2017 seeking decree of divorce; permanent and primary custody of the minor daughters; order of interim injunction restraining the respondent - wife from filing or pursuing any proceedings in any Court situate anywhere outside India against the petitioner - husband; directing to the respondent - wife to disclose all her assets and appoint receiver in respect of the said assets; and, other relevant prayers.

[2.2] Along with the present petition, the petitioner - husband filed interim application at Exh. 11 with the prayer of seeking an order in the nature of permanent anti-suit injunction, restraining the respondent - wife from pursuing the proceedings filed by her before the Hon'ble Superior Court, Washington Unit, in the State of Vermont, USA, till the final disposal of the present petition. The said application Exh. 11 of the petitioner - husband was allowed vide order dated 17.04.2018; the permanent anti-suit injunction was passed against the respondent - wife; and, she was also directed to place the copy of the said order 17.04.2018 before the Court at Vermont, USA. However, the respondent - wife continued to press the proceedings before the Court at Vermont, USA and therefore, the petitioner - husband filed an application for initiation of contempt proceedings against the respondent - wife before this Court, which is pending. Meanwhile, the respondent - wife filed an appeal against the order dated 17.04.2018 passed below Exh. 11 before the Hon'ble High Court of Gujarat, which was dismissed with the liberty to the respondent - wife to file appropriate proceedings and thereafter, the respondent - wife filed Special Civil Application before the Hon'ble High Court of

Gujarat. In the backdrop, on 04.10.2018, the respondent - wife filed Writ Petition (Civil) No. 1335 of 2018 before the Supreme Court of India challenging the vires of certain Sections of the Act of 1936. Meanwhile, on 14.11.2018, the Court at Vermont USA passed an order granting shared parental rights and responsibilities with the consent of the parties stating the manner in which the parties would have such shared custody of the daughters. Further, on 10.07.2019, the Hon'ble Supreme Court has ordered that the parties would attempt to settle their disputes through mediation, however, they have failed to settle the dispute through the mediation.

[2.3] Thereafter, the petitioner - husband has come from Boston to Mumbai on 05.08.2019 along with his two daughters and they have continued to reside in India till date. The petitioner - husband filed a motion before the Court at Vermont USA, seeking modification of the order of shared custody passed by the said Court on 14.11.2018 and along with the said motion, the handwritten letters, allegedly written by the daughters, were placed before the said Court, wherein they stated that they desired to relocate to India

with their father i.e. the present petitioner - husband, however the said motion was rejected by the Court at Vermont, USA. Thereafter, the respondent - wife filed petition seeking a writ of habeas corpus for a direction to the petitioner - husband to produce their daughters before the Hon'ble High Court of Bombay, with a further direction to handover the custody of the daughters to her. The said writ petition was dismissed by the Hon'ble High Court of Bombay with the direction that the respondent - wife shall have visitation rights to meet and associate with her daughters. Thereafter, against the said Judgment of the Hon'ble High Court of Bombay passed in Writ Petition No. 681/2020 dated 24.03.2021, the respondent - wife approached the Hon'ble Supreme Court by filing Petition for Special Leave to Appeal (Cri.) No. 5079/2021, wherein the Hon'ble Supreme Court has passed order dated 27.01.2022 declining to interfere with the Judgment of the Hon'ble High Court of Bombay and granted liberty to the parties to avail the remedies from an appropriate Court.

[3] In response to the present application (Exh. 76), the respondent - wife has filed her written statements at Exh. 78,

85 and Exh. 87. The respondent - wife has mainly contended that the petitioner - husband has made false allegations and certain illegal contentions in his petition as well as the present application. It is further contended by the respondent - wife that the parties herein had entered into a mutually agreed and negotiated custody agreement with respect to the minor children which was approved by the Vermont Court and as per the said agreement, both the parties have equal access and equal role in the upbringing of their children. It is contended that in contravention of the said agreement, the petitioner - husband has taken the children away from their home in Vermont and brought them to India. It is stated that pursuant to the requests of the respondent - wife, the Court at Vermont granted permanent and sole custody of the children to her. The respondent - wife has further contended that initially, the petitioner - husband had appeared before the Vermont Court and filed a motion dated 13.09.2017, thereby submitting himself to the jurisdiction of the Court at Vermont and sought dismissal of the motion for temporary reliefs and he accepted the jurisdiction of the Court at Vermont. It is further contended that even after approaching this Court, the petitioner - husband has filed several

applications in the Court at Vermont and also filed appeals against its orders before the Supreme Court in Vermont. The respondent - wife has denied all the statements, averments, submission and allegations made in the present application and stated that the petitioner - husband may not be provided with the relief claimed for in the present application and prayed to dismiss the same.

[4] I have heard the Ld. Advocate Mr. Anoshak Daver for the petitioner - husband, who has reiterated the averments made in the present application and has further submitted that it is true that the present petitioner - husband has filed motion and various applications before the Court at Vermont, however, first the petitioner - husband had pleaded for the dismissal of the suit preferred by the respondent - wife before the Court at Vermont on the ground of jurisdiction of the said Court. He has submitted that both the parties are abide by the Parsi Act and only this Court has the jurisdiction to decide the merits of the case. He has submitted that the anti-suit injunction was passed by this Court vide order dated 17.04.2018 in favour of the petitioner - husband and restraining the respondent - wife from

pursuing the proceeding filed by her in the Court of Vermont, USA, although, the respondent - wife has not obeyed the said Order of this Court and continued to press the proceeding in the Court at Vermont, USA. He has submitted that the daughters have clearly stated during their interaction with the Hon'ble High Court of Bombay as well as with the Hon'ble Supreme Court that they want to stay with their father only and they have specifically denied to stay with their mother. He has submitted that, for the welfare of the daughters, the petitioner - husband may be granted custody of the daughters. He has relied on certain authorities, which are considered by this Court.

[5] *Per contra*, Ld. Advocate Ms. Aishwarya Reddy for the respondent - wife has submitted that the Court at Vermont is the Court of the closest concern as the parties, along with their children, have resided in USA till the August - 2019 and thereafter, the petitioner - husband fled from USA along with his daughters violating the order of shared parental rights and responsibilities passed by the Vermont Court, USA. She has submitted that the Court at Vermont, USA, has, thereafter, ordered that the respondent - wife is to

be awarded the sole legal and physical parental rights and responsibilities of both the minor daughters and the husband is directed to return the minor daughters to the custody of the respondent - wife in Vermont. Thus, she has submitted that the present application may be rejected with the direction to the present petitioner - husband to return the custody of both the daughters to the respondent - wife at Vermont. She has relied on certain citations, which are considered by this Court.

[6] It is pertinent to note that by way of the present application Exh. 76, the petitioner - husband has sought for the permanent and primary custody of the daughters. Admittedly, no evidence is led till the date and therefore, the permanent custody of the daughters cannot be decided at this juncture in absence of any evidence. Moreover, with the consent of both the sides, at present, the issue of the primary custody of the daughters is considered. Further, the record reveals that the petitioner - husband has prayed for the custody of two daughters, namely, Feroza Boyce (date of Birth: 13.01.2004), who is now aged about 18 years, 6 months and 1 day on the date of this order i.e. 14.07.2022.

She has already attained the age of majority and therefore, there is no need to decide her primary or permanent custody. Being adult, she can very well form her own intelligent opinions about her good and evil. So far as the younger daughter Arnavaz Boyce is concerned, her date of birth is 11.03.2006, she is aged about 16 years, 4 months and 3 days on the date of this Order i.e. 14.07.2022, hence she is also at the verge of attaining the age of majority. Consequently, the issue remains before this Court to decide in relation to the primary custody of the younger daughter Arnavaz Boyce till she attains the age of majority.

[7] Before parting with the merits of the case, it would be quite apposite here to note that the Hon'ble Apex Court has laid down in catena of decisions that in the matter of custody of minor, paramount consideration would be the welfare of minor and not the rights of parents or relatives.

[8] Keeping forefront the above settled principle, looking to the facts on record, it transpires that admittedly, the petitioner - husband has been residing in India along with his daughters since August - 2019 i.e. for almost three years. The younger daughter - Arnavaz Boyce is undergoing

schooling in India since the time of her arrival. Moreover, the record reveals that the respondent - wife had preferred writ of habeas corpus before the Hon'ble High Court of Bombay being Writ Petition No. 681/2020, which was rejected vide Judgment dated 24.03.2021, wherein the Hon'ble High Court of Bombay has observed in paragraph - 22 that the children i.e. the daughters are of such young age that they can have the capacity to form their own opinions and the risk of tutoring would abate with the age of children nearing the age of majority. After interacting with both the daughters, the Hon'ble Bombay High Court has observed that both the daughters were emphatic that they desired to live with their father i.e. the present petitioner in India. The Hon'ble High Court of Bombay has relied upon the observation made by the Hon'ble Supreme Court in the case of *Nithya Anand Raghvan vs. State (NCT of Delhi)* reported in (2017) 8 SCC 454 that the Courts in India are free to decline the relief of return of child brought within its jurisdiction, if the child is quite mature and objects to its return. In paragraph - 23, the Hon'ble High Court of Bombay has further observed that the daughters are also hinted at the nature of relationship that they had with their mother and how they are apprehensive

about living in her company and this is in tune with what they stated in the letters addressed to the Court at Vermont, U.S.A. as also affidavit filed before the Hon'ble Supreme Court of India. It is further observed that the contents of such affidavits being sworn by children, who have not attained the age of majority may not be considered relevant in law, nonetheless the daughters did express their apprehensions when interacted with them. The Hon'ble High Court of Bombay has laid down in paragraph - 28 that the Court cannot ignore as to what would be in the best interest of the children even if the objection of the husband was rejected and orders were passed by the Court at Vermont, USA. In the same way, this Court is also in the agreement of the aforementioned view taken by the Hon'ble Supreme Court of India in the case of Nithya Anand Raghvan (*supra*) that the Court cannot ignore as to what would be in the best interest of the daughters.

[9] While dismissing the writ of habeas corpus, the Hon'ble High Court of Bombay has formed opinion that even though the petitioner - i.e. present respondent - wife is the mother of the children, that alone cannot be a factor for

passing an order in her favour. The daughters have been in India now for better part of three years and one of the daughters would soon be attaining the age of majority (who at present has attained the age of majority). The Hon'ble High Court of Bombay has concluded that the daughters are not in improper or illegal custody of the father and directed that the wife shall have visitation rights to meet and associate with her daughters.

[10] Against the said Judgment passed by the Hon'ble High Court of Bombay in Writ Petition No. 681/2020 dated 24.03.2021, the wife approached the Hon'ble Supreme Court of India by preferring Petition for Special Leave to Appeal (Cri.) No. 5079/2021. The Hon'ble Supreme Court has also interacted with the daughters and passed order dated 27.01.2022 observing that:

"Taking into consideration the fact that the scope in a writ petition seeking writ of habeas corpus is very limited and taking note of the consideration made by the High Court, we are not inclined to interfere with the impugned order passed by the High Court dismissing the writ petition filed by the petitioner herein...."

Further, taking into consideration the facts and circumstances of the instant case, we grant liberty to the parties to avail the remedies available to them in accordance with law before an appropriate court.”

[11] It is amply evident from the above observation that the Hon'ble Apex Court has also not found the custody of the daughters with their father improper and illegal and granted liberty to the parties to avail the remedies available to them in accordance with law before an appropriate court, which in the humble opinion of this Court is the present Court. However, admittedly no application is preferred before this Court on behalf of the respondent - wife seeking custody of the daughters. It is the contention on the part of the respondent - wife that initially the petitioner - husband had submitted to the jurisdiction of the Court at Vermont, USA, by filing his motion. The said contention cannot be sustained as the record reveals that the petitioner - husband had filed motion before the Court at Vermont for the dismissal of the suit at the outset and as the said motion was rejected, he proceeded further. As observed above, in the present case, the paramount consideration for this Court is the welfare of daughter - Arnavaz. Considering the age of daughter -

Arnavaz at the verge of majority, this Court, with the consent of both the sides, thought it fit to interact with her. Accordingly, Arnavaz Boyce remained present before the Court on 21.02.2022 and the undersigned interacted with her. During the said interaction, she has taken the same stand as was taken by her before the Hon'ble High Court of Bombay, the Hon'ble Supreme Court and in the letters, allegedly written by her to the Court at Vermont, USA, that she wants to reside with his father and has shown her unwillingness to stay with her mother. During the interaction with daughter - Arnavaz Boyce with the undersigned, she has not complained of any illtreatment towards her on the part of her father. In fact, she has clearly shown her unwillingness to stay with her mother. As observed by the Hon'ble High Court of Bombay that even though the respondent - wife is the mother of the children, that alone cannot be a factor for passing an order in her favour, when the daughter has clearly expressed her apprehension in staying with her mother. The Hon'ble Supreme Court has also not found the custody of the father improper and illegal. Hence, considering the entire scenario of the present case; paramount factor for consideration i.e. the welfare of the daughter and also

keeping in view the fact that considerable period is passed since the daughter has been staying with her father in India and more particularly, considering the fact that daughter Arnavaz Boyce has clearly stated that she does not want to stay with her mother, I am inclined to exercise the discretion in favour of the father granting primary custody of Arnavaz Boyce with him. In view of the above, following order is passed.

:: ORDER ::

- [1] The present application (Exh. 76) is hereby partly allowed.
- [2] The petitioner - husband i.e. Rustum Sam Boyce is hereby granted the primary custody of minor daughter Arnavaz Boyce (date of birth : 11.03.2006) till she attains the age of majority or till the final outcome of the present petition i.e. SMP No. 2/2017, whichever is earlier.
- [3] It is made hereby clear that after the daughter - Arnavaz Boyce attains the age of majority, she would be at liberty to decide in relation to her stay

with either of the parties or according to her own intelligent opinion.

[4] During the primary custody of Arnavaz Boyce with her father i.e. the present petitioner - husband, the respondent - wife, being mother, shall have visitation rights to meet and associate with her daughter and to facilitate this, the petitioner - husband is directed to ensure that when the respondent - wife desires to visit India to meet the daughter, he shall extend full co-operation for the same.

[5] The present order is subject to the final outcome of the Special Marriage Petition No. 2/2017.

Pronounced in the open Court today on this 14th day of July, 2022.

Place : Surat
Date : 14.07.2022

(Vimal Kanaiyalal Vyas)
Principal District Judge,
Parsi Matrimonial Court,
Surat.
Code No. GJ00912.

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