IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 28TH OF OCTOBER 2022

MISC. PETITION No. 3546 of 2022

BETWEEN:-

SMT. DIVYA MALPANI W/O SHRI SAURABH MALPANI, AGED ABOUT 35 YEARS, CHRISTA 1, APT 1403 APPOLLO DB CITY, NIPANIA (MADHYA PRADESH)

.....PETITIONER

(BY SHRI A. S. GARG, SENIOR COUNSEL WITH SHRI V. K. CHOUKSE, ADVOCATE)

AND

SHRI SAURABH MALPANI S/O SHRI SHYAM MALPANI 701, NAVKARANPLOT 117, LOKHANDWALA COMPLEX, ANDHERI WEST MUMBAI AND ALSO RES. 238 DORIS AVENUE APT. 1808 IN NORTH YORK ON CANADA (MAHARASHTRA)

.....RESPONDENT

(BY SHRI VIVEK DALAL, ADVOCATE)

....

Reserved on	27.09.2022
Passed on	28.10.2022

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This petition coming on for orders this day, the court passed

the following:

ORDER

Heard.

1] This petition has been filed under Article 227 of the Constitution of India by the petitioner/plaintiff/wife against the order dated 04.08.2022 passed in HMA Case No.1335 of 2022 by First Additional Principal Judge, Family Court, Indore whereby the application filed by the petitioner under Order 39 Rule 1 & 3 read with Section 151 of C.P.C. and Section 7 of the Family Courts Act, 1984 has been dismissed.

2] Shorn of details, the brief facts of the case are that the petitioner-wife and the respondent-husband got married as per Hindu rites at Lonavala, Maharashtra on 18.01.2014. Out of this wedlock their daughter Miraya was born in Chicago U.S.A., and as such is a U.S. citizen and also holds permanent residency card of Canada and O.C.I. card of India as in the year 2018, the petitioner and her daughter Miraya and respondent became permanent residents of Canada. As as it transpired, a matrimonial discord took place between the parties from 25.10.2021 to January, 2022 and subsequently on 27.01.2022, the petitioner and her daughter Miraya left Canada for India, and since then they are living with petitioner's parents in Indore. The parents of the petitioner and the respondent also tried patch up their differences in their presence at Indore, however, the parents of the respondent suggested that they should

take divorce and as the things did not turn out as expected, on 06.04.2022, the respondent returned back to Toronto, Canada. On 18.04.2022, the petitioner enrolled her daughter Miraya in Delhi Public School, Indore on which date she also sent an email to the respondent husband asking for separation. On 27.04.2022 a response was made by the respondent and on **20.05.2022**, the respondent commenced proceedings for divorce in Canada and also sought **interim/permanent custody** of Miraya, the notice of which was also served on the petitioner.

3] On **20.06.2022**, the petitioner filed a divorce petition under Section 13(ia) and Section (iii) of the Hindu Marriage Act, 1955 and also filed custody application and maintenance application in the Family Court, Indore. On 21.06.2022 the petitioner was also served with a notice from Canadian Court informing that the hearing was fixed on 23.06.2022 at 10:00 AM relating to Miraya's habitual residency in Canada. Soon thereafter, the respondent also filed a Writ Petition in the nature of *habeas corpus* i.e. W.P. No.14089 of 2022 before this Court alleging illegal detention of Miraya by her mother at Indore. On **28.06.2022** the petitioner also preferred an Anti-Suit Injunction application to restrain the respondent from continuing to prosecute the Canadian proceedings and to commence any fresh proceedings in Canadian Court against the petitioner or Miraya.

4] In the aforesaid proceedings in the Canadian Court, the mediation exercise was also carried out, but the same failed and on

13.07.2022, the court of Ontario, the Canadian Court allowed the urgent motion and directed that Miraya be returned back to Canada within 30 days, whereas the **Anti-Suit Injunction application** filed by the petitioner before the Family Court at Indore was decided on **04.08.2022,** after the respondent filed its reply to the application. Hence, this petition against the aforesaid order.

5] Shri A. S. Garg, learned senior counsel appearing for the petitioner assisted by Shri Upendra Kumar Choukse, Advocate has submitted that the learned Judge of the family Court has erred in dismissing the application despite holding that such an application is maintainable but holding that no further proceedings is pending at Court in Canada hence no injunction can be granted. Shri Garg has submitted that such finding is erroneous for the reason that in the Canadian Court also the order is of interim nature only directing Miraya to return back to Canada within 30 days. It is further submitted that the respondent husband has no respect for the Indian Court which is also reflected in his pleadings in the Canadian Court where disparaging remarks have been made about the courts in India. It is also submitted that the daughter of the petitioner is already admitted to Delhi Public School, Indore and she is quite happy in the company of her maternal grand parents which is also apparent from various photographs filed with the petition. Shri Garg has also relied upon various decisions rendered by the Supreme Court in support of his submissions viz. **Modi Entertainment Network & Anr. Vs. W.S.G. Cricket Pte. Ltd. reported as (2003)**

4 SCC 341; Damini Manchanda Vs. Avinash Bhambhani reported as CS(OS) 13/2022 (MANU/DE/2370/2022); Madhavendra L. Bhatnagar Vs. Bhavna Lall reported as (2021) 2 SCC 775; George Koshy Vs. Sarah Koshy reported as 2021 SCC OnLine Ker 1970; Arunima Naveen Takiar Vs. Naveen Takiar reported as 2019 (3) Mh.L.J. 885; Vivek Rai Gupta Vs. Niyati Gupta reported as (2018) 17 SCC 21; Ravindra Harshad Parmar Vs. Dimple Ravindra Parmar reported as 2015(2) Mh.L.J. 821; Y. Narasimha Rao and others Vs. Y. Venkata Lakshmi and another reported as (1991) 3 SCC 451; Jasmeet Kaur Vs. Navtej Singh reported as MANU/SC/0551/2018 passed in Civil Appeal No.2291 of 2018; Harmeeta Singh Vs. Rajat Taneja reported as 2003 (67) DRJ 58; and Padmini Hindupur Vs. Abhijit S. Bellur reported as 2015 SCC OnLine Del 7484.

6] On the other hand, Shri Vivek Dalal, learned counsel appearing for the respondent, has vehemently opposed the prayer and it is submitted that no illegality has been committed by the Family Court in passing the impugned order. He has also relied upon certain decisions in the case of **Smt. Satya Vs. Shri Teja Singh reported as (1975) 1 SCC 120; Modi Entertainment Network & Anr. Vs. W.S.G. Cricket Pte. Ltd. reported as (2003) 4 SCC 341; Dinesh Singh Thakur Vs. Sonal Thakur reported as (2018) 17 SCC 12; Yashita Sahu Vs. State of Rajasthan reported as AIR 2020 SC 577; and Milind Ashok Kalamkar Vs. Sheetal Milind Kalamkar reported as AIR Online 2021 Bom 3108** to

buttress his submissions.

7] Heard the learned counsel for the parties and perused the record.

8] In the considered opinion of this Court, the decisions relied upon are not relevant to decide the issue i.e., whether the order dated 13.07.2022 passed by the Court at Ontario in Canada is merely an interim order or it has attained the finality, and for this purpose, it would be apt to go through the order passed by the Canadian Court on 13.07.2022, Para 8 of which reads as under:-

> "[8] For the reason that follow, I am satisfied that the child is habitually resident of Ontario and that this Court has jurisdiction under the CLRA. I am not satisfied that there is a sufficient basis for this Court to decline jurisdiction in favour of a Court in India. I order that the child be returned to Ontario within 30 days, and fix an interim parenting schedule, subject to variation where the best interest of the child can be assessed in making final parenting orders."
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> (emphasis supplied)

9] Pursuant thereto, another order was also made by the said Court on 13th July, 2022 itself, copy of which is filed as Annexure /J by the respondent. Paras 10 to 16 of the same read as under:-

> "10. Upon the Child's return to Ontario, and until varied by further court order or the parties' agreement, the Respondent, Divya Malpani (the "Respondent"), or whomsoever escorts the Child to Toronto, Ontario shall forfeit the Child's passport and all other government issued identity documents to the Applicant.
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> 11. On an interim basis and subject to variation at a further motion or the parties' agreement, the Child shall reside primarily with the Respondent upon the Child's return to Toronto, with the Child spending time

with the Applicant:

a. Every Monday and Wednesday from 3:30 p.m. until 7:30 p.m.; and

b. Alternating weekends from Friday at 3:30 p.m. until Sunday at 6:00 p.m.

12. If the Respondent does not return to Ontario with the Child, the Child shall reside exclusively with the Applicant.

13. On a temporary basis subject to further variation, the Applicant shall have sole decision-making with respect to the Child's education and extra-curricular activities. The Respondent shall have interim sole decision-making with respect to medical decisions. However, at all times, she shall follow the medical advice of the treating physician.

14. The parties shall consult and keep the other party advised prior to making any major decisions in the Child's life, except in cases where urgent medical decisions must be made.

15. The parties shall communicate by email, or in the case of emergency, by telephone.

16. Should an Order of an Indian Court be made, leave is granted to the Applicant to argue whether those Orders should be enforced in Ontario."

(emphasis supplied)

10] On perusal of the aforesaid orders passed by the Ontario Court on 13.07.2022, it is apparent that it is a final order so far as it relates to return of child Miraya is concerned, but in the separate order, certain directions have made to the parties to the *lis* which are of interim nature. In other words, the Court at Ontario has directed the daughter of the petitioner to return to Canada within 30 days time and after her arrival at Canada, certain other directions have also been issued by the said Court, which are interim in nature, only to ensure that the child should not be inconvenienced either

mentally or physically in adjusting in the new environment there.

11] In such circumstances, in the considered opinion of this court, the interim directions as aforesaid regarding custody and welfare of the child would not encapsulate the earlier order passed by the same court which is final in nature so far as the return of the child to Canada is concerned. Thus, Family court's refusal of the petitioner's application for grant of anti suit injunction cannot be faulted with.

12] This finding is also substantiated by the decision rendered by the Supreme Court in the case of **Vivek Rai Gupta Vs. Niyati Gupta** reported as **(2018) 17 SCC 21** in which case also, the Supreme Court, in categorical term has held as under:-

> "6. The position which emerges from the aforesaid factual background is that as of today the divorce petition in which the respondent-wife had also claimed other reliefs, is not pending as all the proceedings have already been culminated into judgment dated 18.09.2012 passed by the Court of Common Pleas, Cuyahog County, Ohio, USA as mentioned above. *Therefore, there is no occasion to grant any anti suit injunction and, thus, the prayer made in this appeal is rendered infructuous*."
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> (emphasis supplied)

13] However, having said so, in the same judgment of **Vivek Rai Gupta (supra)**, the Supreme Court has also held as under:-

> "14. If the execution proceedings are filed by the respondent-wife for executing the aforesaid decree dated 18.09.2012 passed by the Court of Common Pleas, Cuyahoga Country, Ohio, USA against any other movable/immovable property in India it would be open to the appellant-husband to resist the said execution petition on any grounds available to him in

> law taking the position that such a decree is not executable. At that stage, it shall also be permissible for the appellant-husband to take a plea that the decree in question was passed by US Court even after the injunction orders passed by this Court and, therefore, should not be executed. We make it clear that it will also be permissible for the respondent-wife to plead that the decree passed is not in violation of any orders and it would be for the Court where the execution petition is filed to decide such an issue in accordance with law."
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> (emphasis supplied)

14] Testing the facts and circumstances of the case in hand, on the anvil of the decision of the Supreme Court in the case of **Vivek Rai Gupta (supra)**, this Court has no hesitation to hold that so far as the return of the daughter of the petitioner is concerned, when the proceedings in the Canadian Court have already come to an end, the anti suit injunction cannot be granted. **Resultantly, the petition fails and is hereby dismissed.** However, with liberty reserved to the petitioner wife that if the execution proceedings are initiated by the respondent/husband in the Court in India, she shall be entitled to resist the said execution proceedings that the decree is not executable in India, and the concerned court shall decide the same in accordance with law.

15] As a parting note, this court would be failing in its duties if it does not take note of the respondent's pleadings in the Canadian court about the working of the Indian courts and the law applicable. It is apparent that the respondent husband is trying to make the most of his situation in Canada, and has left no stone unturned even if it

comes to making disparaging remarks against the Indian law as also the courts, which is strongly deprecated.

16] The relevant para of the affidavit of the respondent submitted in the Ontario Court reads as under:-

> "48. The law in India will not support Miraya's return to Canada if her Mother wants to stay in India. It may or may not be known here, but in India, the Courts favour the Wife/Mother where there are children and issues of primary and secondary residency. And I have done some "google" research and have learned that India does not recognize "kidnapping" as between parents in situations like these.
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> I know also that the courts are generally very slow in India, such that by the time any case I could bring before a judge, Miraya and I could lose precious time, even up to years. At that point, Miraya would have been there for so long, the Indian court may deem it best to keep her there simply due to the passage of time."

17] Despite respondent-husband's misgivings about the working of the Indian courts, two orders have been passed in his favour only, first by the trial court vide the impugned order and the second, by this court in this petition. But taking a clue from the same, it is also found that the petitioner had filed the anti suit injunction application in Indore on 28.06.2022, whereas the order was passed by the court at Ontario on 13.07.2022, thus, there were around 15 days available to the Family court in Indore to pass the order, but only on account of the delay in deciding the said application, it has led to this situation. In such circumstances, **it is directed to all the courts in**

Madhya Pradesh, that whenever such anti suit injunction applications are filed by any of the parties to the suit or proceedings, the efforts should be made to pass the *ad interim order* on the same, *if prayed for*, as expeditiously as possible, preferably within a period of three days time, in accordance with law. This is for the reasons that any delay by the trial court would increase the chances of the said application being rendered infructous many fold which is always the intention of the opposite party, as the courts must keep in mind that the judges in the Indian courts are already overburdened as compared to their counterparts in U.S. Or Europe or any other developed nations where the chances of fast disposal of a case are for more greater then in India.

18] With the aforesaid observations, the petition stands **disposed of.**

(SUBODH ABHYANKAR)
JUDGE

Pankaj